



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, MUMBAI

माननीय श्री सी. एन. प्रसाद, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI C.N. PRASAD, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपील सं./ I.T.A. No. 2978/Mum/2016
(निर्धारण वर्ष / Assessment Year:2011-12)

ACIT-Circle 7(1)(2) Room No. 130, 1 st Floor Aaykar Bhavan, M.K. Road Mumbai-400 020	बनाम/ Vs.	M/s. Loop Telecom Ltd. 127 Manmala Tank Road Taikalwadi, Mahim Mumbai-400 016
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAGCS-0351-R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

&

आयकरअपील सं./ I.T.A. No. 3188/Mum/2016
(निर्धारण वर्ष / Assessment Year: 2011-12)

M/s. Loop Telecom Ltd. 127 Manmala Tank Road Taikalwadi, Mahim Mumbai-400 016	बनाम/ Vs.	DCIT-6(3) Aaykar Bhavan, M.K. Road Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. AAGCS-0351-R		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

Revenue by	:	Shri S. Michel Jerald- Ld. DR
Assessee by	:	Shri Ganesh Raj Gopalan- Ld. AR

सुनवाईकीतारीख/ Date of Hearing	:	13/11/2019
घोषणाकीतारीख / Date of Pronouncement	:	05/02/2020



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member): -

1. Aforesaid cross appeals for Assessment Year [in short referred to as 'AY'] 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-13, Mumbai [in short referred to as 'CIT(A)'], Appeal No. CIT(A)-13/DCIT-7(1)(2)/387/2015-16 dated 17/02/2016.

The ground raised by the revenue reads as under: -

1. On the facts and in the circumstances of the case and in law, the Id. Commissioner of Income tax (Appeals) erred in deleting the addition made by the Assessing Officer on account of disallowance of deduction u/s. 35ABB(2) of the Act claimed in respect of NLD License to the tune of Rs.2,50,00,000/- without appreciating the fact that neither provisions of section 35ABB(2) of the Act nor the CBDT Circular No. 783 dated 18.02.1998 are applicable to NLD License, as it does not confer right to operate telecommunication services.

The grounds raised by the assessee read as under: -

A. Disallowance of Interest earned Rs.1,51,89,429

1) The learned CIT(A) failed to appreciate that the Appellant was entitled to capitalize the interest earned of Rs.1,51,89,429 on fixed deposit being margin Money for giving bank guarantee towards the license given by Dot for Telecom Project.

2) Without prejudice to the above Ground of appeal for having treated the interest receipt of Rs.1,51,89,429/- on the Fixed Deposits/Margin Money as taxable business receipts, the learned CIT(A) failed to appreciate that he ought to have allowed deduction of interest cost of Rs.55,95,43,450/- being paid in respect of capital borrowed for the purpose of appellant business in terms of section 36(iii) of the Income Tax Act, 1961 though capitalized by the appellant in the books of account and not doing so is wrong and contrary to the provisions of the Act, and the Rules made there under."

2. We have carefully heard the rival submissions, perused relevant material on record and deliberated on judicial pronouncements as cited



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

before us. Our adjudication to the subject matter of cross-appeals would be as per succeeding paragraphs.

3.1 Facts on record would reveal that the assessee being resident corporate assessee stated to be engaged as telecom service provider, was assessed for year under consideration u/s.143(3) on 14/03/2014 wherein the losses were determined at Rs.125.33 Crores after certain additions/disallowances as against returned loss of Rs.143.30 Crores e-filed by the assessee on 29/09/2011 which was subsequently revised on 23/01/2012 at Rs.142.54 Crores.

3.2 The Assessee was incorporated with the object of carrying on the business of telecom services. The assessee was allotted National Long Distance (NLD) license in 2006. Subsequently, the assessee was allotted Unified Access Service License (UASL) during financial year 2008-09 and it paid license fees of Rs.1472.05 Crores. The said license was to operate all across India. The assessee was awarded 21 licenses in the 2G Auction. After the allocation of 2G spectrum license, the assessee surrendered NLD license to Department of Telecommunications (DOT) and accordingly, wrote-off an amount of Rs.2.50 Crores, being license fees paid to DOT for NLD License.

Revenue's Appeal, ITA No. 2978/Mum/2016

4.1 The subject matter of revenue's appeal is addition of Rs.2.50 Crores representing expenses on surrender of National Long Distance (NLD) license. During assessment proceedings, it transpired that this sum was



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

paid to DOT for surrender of NLD license and the same was claimed as deductible expenditure in terms of decision of Mumbai Tribunal in **ACCC-22 V/s Ashwal Investment P. Ltd. (60 SOT 99)** and the decision of Hon'ble Bombay High Court rendered in **CIT V/s Evergrowth Telecom Ltd. (29 taxmann.com 273)**.

4.2 However, Ld. AO opined that NLD License was an intangible asset which was eligible for depreciation. If such intangible asset is extinguished because the assessee surrendered the same before it was put to use, the gain / losses shall be capital gain/losses and therefore, the losses could not be allowed as business expenses. The resultant losses would be long-term capital loss since the license was allotted in 2006. The case laws being relied upon by the assessee were factually distinguished. Finally, the deduction as claimed by the assessee was denied.

4.3 Before Ld. CIT(A), the assessee again placed reliance on the stated decision of Hon'ble Bombay High Court as well as CBDT circular No. 763 dated 18/02/1998 which had explained the provisions of Sec.35ABB of Income Tax Act, 1961. It was submitted that the assessee fulfilled all the conditions laid down in the said circular. The attention was also drawn to the fact that the assessee never claimed depreciation on NLD license u/s 32 of the Act. In the above background, it was pleaded that the deduction of Rs.2.5 Crores would be allowable in entirety u/s 35ABB(2).

4.4 After due consideration, Ld. CIT(A) concurred with assessee's submissions with following observations: -



ITA No.2978/Mum/2016 &
 ITA No.3188/Mum/2016
 M/s. Loop Telecom Ltd.
 A.Y: 2011-12

4.3 Decision- I have carefully considered both the A.O's order and the AR's submissions. The brief undisputed facts of the case are that the appellant had obtained an NLD license, such license being the license required for operating long distance i.e inter-city telephone services. E.g. if a phone has to be placed from Mumbai to New Delhi, the mobile operator would require an NLD license to be able put through the call. In such a case there would be no need for the mobile operator to have any other license. However, later the appellant was successful in obtaining the Unified Access Service License (hereinafter referred to as 'UASL') for 21 telecom circles which virtually covered the entire area of India. In other words, the appellant got 21 licenses which would collectively enable the appellant to offer all sorts of inter-city and intra-city telecom services throughout the length and breadth of the country. In such circumstances, the NLD license would become virtually redundant as all the rights enjoyed by the appellant under the NLD license would be enjoyed by it also under UASL. As the appellant had not put the NLD license to use, any delay in rolling out the NLD would have attracted penal charges from the DOT apart from the mandated yearly license fees. Through the surrender of the NLD license - which was a prudent business decision - the appellant had also avoided payment of both the penalty charges as well as the yearly license fees for NLD. However, it had lost the payment of Rs.2.5 crores made to DOT as license fees for the NLD license on surrender of the said license. The appellant was not compensated by the DOT to the extent of a single rupee. On this background, it would be important to see the provisions of section 35ABB(2) of the Act which would read as follows.

(2) Where the license is transferred and the proceeds of the transfer (so far as they consist of capital sums) are less than the expenditure incurred remaining unallowed, a deduction equal to such expenditure remaining unallowed, as reduced by the proceeds of the transfer, shall be allowed in respect of the previous year in which the license is transferred."

From a plain reading of the above, it would be clear that the positive difference between the expenditure incurred for- acquiring the license and the proceeds accruing from the transfer of the said license shall be allowed as a deduction during the previous year in which the license is transferred. In the instance case, the license had been acquired for Rs.2.5 crores. Due to the peculiar conditions that the appellant was faced with when it sought to surrender the NLD license, it got nothing back by way of refund. As such, by virtue of the special provisions of section 35ABB of the Act for operating telephone services, the appellant would eligible for deduction of the differential amount of Rs. 2.5 crores.

4.3.1 Coming to CBDT Circular no. 763 dated 18th February 1998, it is seen that this circular has explained the scope and effect of the then newly inserted provisions of section 35ABB of the Act inserted with retrospective effect from 1st April 1996. The relevant provisions of the same are as follows.

"Amortisation of telecom license fees

19.1 In order to give a fillip to the telecom sector, a new section 35ABB has been inserted in the Income Tax Act. The section provides that any capital



ITA No.2978/Mum/2016 &
 ITA No.3188/Mum/2016
 M/s. Loop Telecom Ltd.
 A.Y: 2011-12

expenditure, incurred by an assessee on the acquisition of any right to operate telecom services and for which payment has actually been made to obtain a license, will be allowed as a deduction in equal instalments over the period for which the license remains in force. It further provides that where the license is transferred and proceeds of the transfer are less than the expenditure remaining unallowed, a deduction equal to the expenditure remaining unallowed as reduced by the proceeds of transfer, shall be allowed in the previous year in which the license has been transferred. It also provides that where the -license is transferred and the proceeds of the transfer exceed the amount of expenditure remaining unallowed, the excess amount shall be chargeable to tax as profits and gains of business in the previous year in which the license has been transferred. It further provides for amortization of unallowed expenses in a case where a part of the license is transferred and to which the provisions of sub-section (3) do not apply. The provisions of sub-sections (2), (3) and (4) pertaining to transfer shall not apply in relation to a transfer in a scheme of amalgamation whereby the license is transferred by the amalgamating company to the amalgamated company, the latter being an Indian company."

[Emphasis supplied]

From a plain reading of above, it would be clear that the provisions of section 35ABB of the Act stand reiterated in the Circular. Further, as per the Circular, the stated objective of the provisions of section 35ABB of the Act is stated to be the grant of a fillip to the telecom sector. As such, the reliance of the AR on circular no. 763 is seen to be a valid one.

4.3.2 Coming to the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Evergrowth Telecom Limited (supra), the issue for consideration then was whether or not the entire license fees paid by the assessee were an allowable expenditure under section 37(1). In that context, the Hon'ble Jurisdictional High Court had held that the benefit of the provisions of section 35ABB of the Act would have no application in the case of the assessee whereas the deduction under section 35ABB of the Act was held to be available in respect of the license fees paid by M/s J. T. Mobile Limited (hereinafter referred to as 'JTML'). In that case, the license had been obtained originally by JTML and had been later transferred to the assessee. As such, JTML had both acquired and transferred the license. It was hence eligible for a deduction under section 35ABB of the Act. Similarly in the present case, the appellant has acquired the NLD license from DOT for Rs. 2.5 crores. The same has been later transferred by it by way of an outright surrender resulting in a loss of Rs. 2.5 crores. As laid down in the provisions of section 35ABB(2) of the Act, as also those of CBDT Circular no. 763, the said additional amount of Rs. 2.5 crores shall be allowed as a deduction to the appellant under section 35ABB(2) for AY 2011-12 since the said surrender took place during the previous year relevant to AY 2011-12. Ground no. 1 is accordingly allowed.



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

It is evident that Ld. CIT(A) has noted that NLD license was surrendered by the assessee since this license would become virtually redundant in view of the fact that the rights enjoyed under NLD license would be enjoyed under UASL licenses also and it was a prudent business decision to surrender the same to avoid penalty charges as well as yearly license fees for NLD license. In the process, the assessee lost the payment of Rs.2.50 Crores already made by it to DOT and the assessee was not compensated for the same, in any manner. Therefore, the assessee would be eligible to claim the deduction of the same as per specific provisions of Sec.35ABB read with CBDT circular no. 763 dated 18/02/1998.

Aggrieved, the revenue is under further appeal before us.

4.5 Upon due consideration of factual matrix as enumerated by us in the preceding paragraphs, we find that Ld. CIT(A) has clinched the issue in the correct perspective. The undisputed position is that the assessee has surrendered NLD license to DOT during the year and accordingly, wrote-off the amount of Rs.2.50 Crores in its Books of Accounts, being license fees paid to acquire the NLD license. The allegation of Ld. AO was that NLD was an intangible asset which would be eligible for depreciation u/s 32. However, as per assessee's submissions, the assessee has never claimed depreciation against the same and the said fact remain unrebutted before us also. The perusal of financial statements for the year as placed before us also corroborate the said fact which is further fortified by the fact that the assessee has not claimed any depreciation on intangible assets in its



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

Income Tax Return. This being the case, the assessee was clearly eligible to claim the write-off of Rs.2.50 Crores as normal business loss as well as in terms of provisions of Sec.35ABB(2) read with CBDT Circular No. 763 dated 18/02/1998 . It is noteworthy that the assessee was engaged in the business of providing telecom services and the losses incurred on account of surrender of NLD license would be in the normal course of business and therefore, the same would be an allowable deduction to the assessee as normal business losses also. The decision of Hon'ble Bombay High Court rendered in **CIT V/s Evergrowth Telecom Ltd. (29 taxmann.com 273)** also support assessee's case and therefore, no fault could be found in the impugned order, in this regard. Therefore, by confirming the same, we dismiss the revenue's appeal.

Assessee's Appeal, ITA No. 3188/Mum/2016

5.1 During assessment proceedings, it transpired that the assessee received interest of Rs.151.89 Lacs on fixed deposits / margin money which was reduced from work-in-progress (WIP) and not credited to Profit & Loss Account. The assessee explained that the assessee was incorporated with the object of carrying on the business of telecom services. The company was allotted telecom license during financial year 2008-09 and it paid license fees of Rs.1472.05 Crores to operate across India. The process of setting up of telecom business was in progress, which was highly technical and sophisticated and set up cost would be substantial. Accordingly, the assessee obtained loans from banks for Rs.1000 Crores. To avail the



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

same, the assessee was required to maintain deposits and margin money as security with the bank for debt service. Further, the company placed margin money with SBI to obtain bank guarantee in favor of Department of Telecommunication (DOT). The guarantees were required to be issued as per the requirement of licensing condition. The loan money was borrowed and used for setting up telecom infrastructure. Therefore, the receipts of interest on fixed deposits and margin money was inextricably linked with setting up of infrastructure for providing telecom services. Hence, the interest would be inextricably linked with borrowings and deductible from project expenses / borrowed costs. It was also submitted that in case money is borrowed in the course of setting up of project, the interest expenditure would be capitalized and added to the cost of the fixed asset created as a result of such expenditure. By the same reasoning, if assessee receives any amount which are inextricably linked with the process of setting up of project, such receipts will go on to reduce the project costs. Such receipts would, thus be capital in nature. Reliance was placed, *inter-alia*, on the decision of Hon'ble Supreme Court in the case of **CIT v/s. Bokaro Steel Ltd. (1999 236 ITR 315)** & **CIT V/s Karnal Co-operative Sugar Mills Limited (243 ITR 2)** and the decision of Hon'ble Bombay High Court rendered in **CIT v. Maharashtra Electros melt Limited (214 ITR 489)**.

5.2 However, not convinced, Ld. AO opined that business activities were started during the year and substantial opening working-in-progress (WIP)



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

was put to use during the year. Therefore, the said interest was not to be capitalized but brought to tax. Finally, the said amount was added to the income of the assessee.

5.3 Upon further appeal, Ld. CIT(A) confirmed the stand of Ld. AO by observing as under: -

7.3 Decision - I have carefully considered the AO's order as well as the AR's submissions. The AR has contended that the interest income arose directly as a result of fixed deposits which were obliged to be kept with banks as mandated by the conditions of the UASL. In other words, the said deposits were kept with the banks for operationalizing the UASL, which was actually the business of the appellant. There is hence no doubt that the source of such interest income was inextricably linked to the business operations of the appellant. To that extent all such interest income received on a pre-operative basis could not be charged to tax, it constituting a capital receipt. However, the AO in his order has pointed out that the business activity of the appellant had actually commenced during the previous year relevant to the assessment year under consideration. He has noted that the substantial opening CWIP was also put to use during the year. In other words, the AO's case is that the pre-operative stage was formally over during the previous year relevant to the assessment year under consideration. As such, such interest income would no longer be deserving of treatment as a capital receipt. When queried about this, the AR readily agreed that the business operations of the appellant had indeed commenced during the previous year relevant to the assessment year under consideration. However, his point was that such operations had not commenced in all the 21 telecom circles. The operations were at various stages in various circles viz. total completion, partial completion or even the initial stage of preparations. To this effect, the AR pleaded that it would be unfair to charge to tax the entire interest income pertaining to all the 21 telecom circles. On being asked about whether a working to that effect was available and could be produced, he indicated his inability to do so. In these circumstances, it is clear that it would not be possible to extend the benefit of treatment as capital receipt of the interest income received by the appellant on account of the fixed deposits placed with banks as mandated by the conditions laid down in UASL. This is so as it is clear that the business of the appellant has indeed commenced during the previous year relevant to the assessment year under consideration. The AO has clearly brought out this point in paragraph no. 5.3 on page no. 14. Before me the AR has also accepted it, though he was unable to state the details of the telecom circles where no business operations had been then commenced. In these circumstances in the absence of any circle-wise bifurcation, after careful consideration, the entire disallowance of the AO is confirmed. Accordingly interest income of Rs. 1,51,89,429/- shall continue to form part of the assessed income of the appellant. Ground no. 4 is accordingly dismissed. It is however seen that the appellant



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

has taken a small separate ground without prejudice as part of ground no. 4. Before me, I find that no submission whatsoever have been made with regard to this alternative ground which too is accordingly dismissed.

It is evident that Ld. CIT(A) concurred with assessee's submission that source of interest income was inextricably linked to business operations of the assessee and therefore, the interest received during pre-operative period could not be charged to tax. However, it was noted that the assessee had commenced its business activity during the year under consideration as evidenced by the fact the opening WIP was converted into fixed assets and put to use during the year. The pre-operative stage was already over. The assessee also acquiesced to the said facts but submitted that the business operations were not commenced in all 21 telecom circles but was progressing at various stages. Therefore, it was pleaded that it would be unfair to charge tax on entire interest income. However, since the assessee could not place on record requisite details and circle-wise bifurcation, the entire disallowance was confirmed. Aggrieved by the aforesaid adjudication, the assessee is under further appeal before us.

5.4 We find the dispute to be in a narrow compass since it is undisputed fact that the assessee's business had already commenced during the year and therefore, the interest income could not be capitalized by way of reduction from project expenditure. This position has been accepted by the assessee also. Before us, Ld. AR pointed out that Ld. CIT(A) erred in presuming that interest income of Rs.151.89 Lacs was total interest income which was to be further broken into interest pertaining to circles launched



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

and circles yet to be launched. Our attention has been drawn to financial statements to submit that, in fact, the assessee had earned total interest income of Rs.11.48 Crores during the year, out of which proportionate amount of Rs.9.97 Crores was already offered to tax and the balance amount was reduced from project expenditure. The perusal of financial statements corroborates the same. The Note no. 4 of Schedule 17 also mention that the company has started operations in 8 of its 21 circles with effect from 29/07/2010. This being the case, we direct Ld. AO to verify the stated facts and accept assessee's claim after due verification since the learned first appellate authority agreed with assessee's proposition that interest received during pre-operative period could not be charged to tax and the revenue is not in further appeal on this point. If the said interest of Rs.151.89 Lacs pertains to circle which were not operationalized during the year, the impugned addition would stand deleted. Accordingly, the appeal may be treated as allowed for statistical purposes.

Conclusion

6. The revenue's appeal stands dismissed whereas the assessee's appeal stand allowed for statistical purposes.

Order pronounced in the open court on 05th February, 2020.

Sd/-

(C.N.Prasad)

न्यायिक सदस्य / **Judicial Member**

Sd/-

(Manoj Kumar Aggarwal)

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 05/02/2020
Sr.PS:-Jaisy Varghese



ITA No.2978/Mum/2016 &
ITA No.3188/Mum/2016
M/s. Loop Telecom Ltd.
A.Y: 2011-12

आदेश की प्रतिलिपि ँ ग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

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**उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**