

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI "C" BENCH: NEW DELHI**

**(THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI G.S.PANNU, PRESIDENT &  
SHRI KUL BHARAT, JUDICIAL MEMBER**

**ITA No.5827/Del/2017**

**[Assessment Year : 2011-12]**

DCIT Circle-11(2) New Delhi	vs	Hughes Communication India Ltd. 1, Shivaji Marg, Westend Greens, NH-8, New Delhi AAACH0765L
<b>APPELLANT</b>		<b>RESPONDENT</b>

**ITA No.569/Del/2018**

**[Assessment Year : 2013-14]**

**&**

**ITA No.571/Del/2018**

**[Assessment Year : 2014-15]**

ACIT Circle-11(2) New Delhi	vs	Hughes Communication India Ltd. 1, Shivaji Marg, Westend Greens, NH-8, New Delhi AAACH0765L
<b>APPELLANT</b>		<b>RESPONDENT</b>
<b>Appellant by</b>	Sh. Ajay Vohra, Sr. Adv & Sh. Deepesh Jain, CA	
<b>Respondent by</b>	Sh. Vinay Kumar Karan CIT(DR) & Sh. Kumar Padmapani Bora , SR. DR	
<b>Date of Hearing</b>	25.11.2021	
<b>Date of Pronouncement</b>	31.12.2021	

**ORDER**

**PER KUL BHARAT, JM :**

These three appeals pertaining to the Assessment Years 2011-12, 2013-14 & 2014-15 are directed against the different orders of

the Ld.CIT(A)-39, New Delhi, dated 12/6/2017 and Ld.CIT(A)-22, New Delhi, dated 20/10/2017. In all these appeals identical grounds have been raised. Therefore, all the appeals are taken up together for hearing and are being disposed of by way of consolidated order for the sake of brevity.

2. First we take up the appeal in ITA No. 5827/Del/2017 for the Assessment Year 2011-12.

3. The solitary effective ground in this appeal reads as under:-

*“ Whether on the facts and circumstances of case the Ld.CIT(A) has not erred in deleting disallowance of Rs. 5,01,85,899/- of capitalization of licenses fee which give assessee company long term right to use telecommunication spectrum and the annual extension of the same be considered as capital expenditures.”*

4. The facts giving rise to the present appeal are that in this case, the assessee filed its return of income declaring an income of Rs.15,04,07,710/- on 28/11/2011. The case was selected for scrutiny and the assessment u/ 143(3) of the Income Tax Act, 1961 [“the Act”] was framed vide order dated 28/3/2014. The Assessing

Officer while framing the assessment noticed that the assessee had claimed license fee expenses amounting to Rs. 6,01,14,532/- during the year under consideration. The Assessing Officer was of the view that by paying license fee the assessee got the right to use telecommunication spectrum and the license so acquired should be treated as intangible assets hence, the assessee was entitled to claim the depreciation on the same. But in the instant case, the assessee claimed it as revenue expenditure. Thus, the Assessing Officer vide orders sheet entry dated 30/1/2014 asked the assessee to explain as to why license fee paid to the Department of Telecommunication should not be disallowed being in nature of capital expenditure. In response thereto, the assessee filed its reply, the reply so filed was not accepted by the Assessing Officer and he proceeded to treat this expenditure as capital in nature, however, he allowed the depreciation at the rate of 25% on this amount and rest of the claim was disallowed. Thus, the Assessing Officer made addition of Rs.5,01,85,899/- on account of disallowance of expenditure of license fee as the revenue expenditure and assessed the total income at Rs. 20,05,93,609/-

against the total income of Rs. 15,04,07,710/- declared by the assessee.

5. Aggrieved against this, the assessee preferred appeal before the Ld.CIT (A) who after considering the submissions and following the decision rendered in the Assessment Year 2008-09 by his predecessor allowed the claim of the assessee and deleted the disallowance made by the Assessing Officer.

6. Now, the Revenue is in appeal before this Tribunal.

7. Ld. Departmental Representative supported the assessment order and submitted that the Ld.CIT(A) was not justified in deleting the disallowance. Ld. CIT DR submitted that the license fee paid by the assessee provided the assessee the benefit of enduring nature. Therefore, the expenditure was rightly disallowed by the A.O, being capital in nature.

8. On the contrary, Ld. Senior Counsel for the assessee Sh. Ajay Vohra opposed the submission and submitted that the issue is squarely covered in favour of the assessee by the decision of the Tribunal in earlier years. Therefore, the Ld.CIT (A) has rightly

deleted the addition. He submitted that the issue in question is no more res-integra and has been decided in favour of the assessee by the Hon'ble High Court of Delhi in the case of Bharti Hexacom.

9. We have heard rival submission and perused the material available on record. We find that Ld. CIT(A) has decided the issue by holding as under:-

*5.2a It is observed from the appellant's submissions, both at the assessment stage and at the appellate stage, that the revenue share fee was for the operation and usage of the rights given under the licence and did not result in creation of any capital asset or advantage. It contended that DOT granted it a licence to operate closed user groups domestic 64 KBPS data network via INSAT Satellite System using VSAT. It was argued by the AR of the appellant that by virtue of the impugned payment of the licence fee to DOT, the appellant only obtained a year to year right to provide VSAT services - the license was granted initially for a period of ten years and was extendable beyond the initial period yearly. The appellant contended that in its case (i) no bid price was undertaken to be paid as part of the tender (ii) an annual fee was paid for obtaining the right to provide VSAT services for each year (iii) the annual fee was paid on the basis of number of VSATs installed and was in the nature of royalty and, (iv) it could opt not to pay the annual charge in any year if it decided not to provide the VSAT services in that year.*

*5.2b It is observed from the extract of the relevant agreement mentioned as a part of its written response dated 13/02/2014 at the assessment stage as well as its submission at the appellate stage that the Department of Telecommunications (DOT) vide licence agreement dated 3/08/1994 awarded licence to the appellant to operate Closed User Group Domestic 64 KBPS Data Network via INSAT Satellite System using VSAT. Further, it is observed as under:-*

- ❖ Granted initially for 10 years, license extendible by one year at a time*
- ❖ Intent of license not to grant Iona distance earner rights to appellant*
- ❖ License fees of Rs.50,000/- p a per VSAT subject to a minimum of Rs.1 crore for first two and 1.5crores in third year*
- ❖ Annual license fee does not include license fee / royalty payable to WPC Wing of Ministry of Communication for use of radio frequency*
- ❖ With effect from 1/10/2001, license agreement amended - payment of revenue share on year-to-year basis @ 10%*
- ❖ Revenue Share under Infrastructure Provider Category -II- license fee @6% of revenue to DOT in terms of license dated 23/10/2001*
- ❖ Additionally, appellant to pay WPC charges @ 3.5% of adjusted gross revenue in terms of order of DOT dated 3/06/2003 r w 16/04/2003*

*Thus, from the above, it can be inferred safely that the*

*appellant's contention is borne out from the available records.*

*5.2c It is also observed from its submission that the appellant has relied upon the following court decisions in support of its contention that the aforementioned annual payment made to DOT in connection with the licence is revenue in nature -*

- *Assam Bengal Cement Co. Ltd. vs. CIT (1955) 27ITR 34 (SC)*
- *Bombay Steam Navigation Co. (1953) (P.) Ltd. vs. CIT (1965) 56 ITR 52 (SC)*
- *KS Radhakrishan Kapoor vs. CIT 47 ITR 938 (All)*
- *CIT vs. Menora Hosiery Works P. Ltd. (1977) 109 ITR 714 (Bom)*
- *Empire Jute Co. Ltd. vs. CIT 124 ITR 1 (SC)*
- *Alembic Chemical Co. Ltd. vs. CIT 177 ITR 377 (SC)*
- *Kirloskar Oil Engines Ltd vs. CIT (1994) 206 ITR 13 (Bom)*
- *CIT vs. Assam Oil Co. Ltd. 107 ITR 261 (Cal)*
- *Mahanagar Telephone Nigam Limited vs. Addl. CIT 100 TTJ1 (ITAT Delhi)*
- *ITO vs. Evergrowth Telecom Ltd. in ITA No.5652/Mum/07 (ITAT Mumbai)*
- *CIT vs. Kirloskar Computer Services 221 Taxman 391 (Kar)*
- *Idea Cellular vs. ACIT 65 SOT 15 (ITAT Mumbai)*
- *Hutchison Essar Telecom Ltd. vs. JCIT149 TTJ 673 (ITAT Mumbai)*
- *Bharti Airtel Ltd. vs. ACIT41 SOT 175 (ITAT Mumbai)*
- *Comsat Max vs. DCIT(2009) 29 SOT436 (ITAT Delhi)*

- *CIT vs. Mihir Textiles Ltd (1994) 206 ITR 112 (Guj)*
- *Videsh Sanchar Nigam Limited vs. JCIT81ITD 456 (ITAT Mumbai)*
- *Rajasthan State Mines and Manuals Ltd vs. DCIT 49 ITD 418 (ITAT Jaipur)*
- *CIT vs. Associated Cement Companies Ltd. 172 ITR 257 (SC)*

*In most of the above cases, it has been held that the annual payment made to an authority (Government) for the business operations of the assessee (businessman) is revenue in nature and allowable u/s 37(1) of the Act - the leading case law in regard to the determination of an expenditure as capital or revenue is the decision of the Apex Court in *Empire Jute Co. Ltd. vs. CIT (supra)* wherein the test for determining as to what constitutes capital expenditure was laid down as under :\_*

*"...It is not every advantage of enduring nature acquired by an appellant that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the appellant's trading operations or enabling the management and conduct of the appellant's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future..."*

*The ratio decided in laid down in the aforesaid judgment has been reiterated by the Supreme Court in CIT vs. Associated Cement Companies Ltd (supra) and again in the case of Alembic Chemical Works Co. Ltd. vs. CIT (supra).*

5.2d. *Also, during the course of the appellate proceedings, the AR of the appellant filed copies of the order of the first appellate authority in its own case vide order dated 29/01/2014 for y 2008-09 [Appeal No. 434/10-11/(94/13-14)] and the order u/s 250 r.w 143(3) dated 8/3/2015 giving effect to the appellate order of the CIT(A), respectively, wherein the appellant's claim of deduction u/s 37(1) in respect of its payment to DOT in the relevant PY was allowed."*

5.2e. *Therefore, in due deference to the aforementioned court decisions that are applicable to the facts in the present case and in my opinion, actually support the appellant's contention as well as the fact that under the same set of facts as those in the present case, the appellant's contention that the payment made to DOT annually is revenue in nature and allowable u/s 37(1) of the Act. It was held as such by the CIT (A) for AY 2008- 09 in the appellant's own case. Also, the appellant's contention is borne out from the available records and in sync with the extant law. Accordingly, as I am in agreement with the contention of the appellant with regard to its claim of deduction on payment to DOT (Rs.5,11,80,333/-), the disallowance made in the impugned order is deleted. The grounds at (III) and (IIia) to (Iid) above on this point, are allowed.*

10. From the above, it is evident that the Ld.CIT(A) had followed the decision rendered in the Assessment Year 2008-09. The issue travelled up to the stage of the Tribunal and the Co-ordinate Bench of this Tribunal in ITA No. 2273/Del/2014 [Assessment Year 2008-09] dismissed the appeal of Revenue by holding as under:-

*“25. At the very outset, we have to state that pursuant to the directions of the Id. CIT(A), the Assessing Officer, vide order dated 08.03,.2015 passed u/s 250 r.w.s 143(3) of the Act, deleted the addition made on account of licence fee paid to DOT by following the decision of the Hon'ble Delhi High Court in the case of Bharti Hexacom [supra]. Since the quarrel has now been settled, we do not find any merits in the appeals of the Revenue. The same are accordingly, dismissed.*

11. The Revenue has not brought to our notice that the decision of the Tribunal pertaining to Assessment Year 2008-09 was reversed by the Hon'ble High Court of Delhi. The Ld.CIT (A) has given a finding on fact that the Revenue share fee was for the operation and usage of the right given under the license and had not result into creation of capital asset or advantage. This finding on fact is not rebutted by the Revenue. Moreover, the Revenue has not brought to our notice any other binding precedent on this point. Under these facts, we do not see any infirmity into the order of the

Ld.CIT(A) The same is hereby affirmed. The Grounds raised by the Revenue is dismissed.

12. Now, we take up the appeal for the Assessment Year 2013-14 in ITA No. 569/Del/2018. The solidarity effective ground by the Revenue in this appeal reads as under:-

*“ Whether on the facts and circumstances of case the Ld.CIT(A) has not erred in deleting disallowance of Rs. 7,88,14,281/- of capitalization of licenses fee which give assessee company long term right to use telecommunication spectrum and the annual extension of the same be considered as capital expenditures.”*

13. The Ld. Authorized Representative of the parties have adopted the same argument as were in ITA No. 5827/Del/2017. It is submitted by the Ld. Senior Counsel for the assessee that the facts are identical as were in the Assessment Year 2011-12. Therefore, he adopted the same argument as were in ITA No. 5827/Del/2017.

14. On the contrary, Ld. DR supported the order of the Assessing Officer.

15. The facts are identical as were in the Assessment Year 2011-12. The Revenue has not brought to our notice regarding change of facts and circumstances in this year. Therefore, taking a consistent view and following our decision in the Assessment Year 2011-12 and for the same reasoning the Revenue's appeal in the Assessment Year 2013-14 in ITA No. 569/Del/2018 is hereby dismissed.

16. Now, we take up the appeal for the Assessment Year 2014-15 in ITA No. 571/Del/2018. The solidarity effective ground by the Revenue in this appeal reads as under:-

*“ Whether on the facts and circumstances of case the Ld.CIT(A) has not erred in deleting disallowance of Rs. 11,53,97,729/- of capitalization of licenses fee which give assessee company long term right to use telecommunication spectrum and the annual extension of the same be considered as capital expenditures.”*

17. The Ld. Authorized Representative of the parties have adopted the same argument as were in ITA No. 5827/Del/2017. It is submitted by the Ld. Senior Counsel for the assessee that the facts

are identical as were in the Assessment Year 2011-12. Therefore, he adopted the same argument as were in ITA No. 5827/Del/2017.

18. On the contrary, Ld. DR supported the order of the Assessing Officer. The facts are identical as were in the Assessment Year 2011-12. The Revenue has not brought to our notice regarding change of facts and circumstances in this year. Therefore, taking a consistent view and following our decision in the Assessment Year 2011-12 and for the same reasoning, the Revenue's appeal in the Assessment Year 2013-14 in ITA No. 569/Del/2018 is hereby dismissed

19. In the result, all the appeals being ITA No. 5827/Del/2017, ITA No. 569/Del/2018 & 571/Del/2018 are dismissed.

Above decision was pronounced on conclusion of Virtual Hearing in the presence of both the parties on 31<sup>st</sup> December, 2021.

**Sd/-**

**(G.S.PANNU)**  
**PRESIDENT**

**Sd/-**

**(KUL BHARAT)**  
**JUDICIAL MEMBER**

\*R. N\*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR  
ITAT, NEW DELHI