आयकरअपीलीयअधिकरण
मंबईपीठ"आई"मंबई
श्रीविकासअवस्थी. न्यायिकसदस्यएवं
श्रीएमबालगणेश, लेखाकारसदस्यकेसमक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आअसं. 5598/मुं/2017 (नि.व. 2005-06)
ITA NO.5598/MUM/2017(A.Y.2005-06)

Dy. Commissioner of Income Tax – 8(3)(2),
Room No.615, 6th Floor,
AaykarBhavan, M.K.Road,
Mumbai – 400 020 ..... अपीलार्थी/Appellant

बनाम Vs.

M/s. Vodafone India Ltd.
(Formerly Vodafone Essar Ltd.)
Peninsula Corporate Park,
Ganpat Rao Kadam Marg,
Lower Parel, Mumbai 400 013.
PAN: AAACH-5332-B ..... प्रतिवादी/Respondent

आअसं. 5078/मुं/2017 (नि.व. 2005-06)
ITA NO.5078/MUM/2017(A.Y.2005-06)

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(Formerly Vodafone Essar Ltd.)
Peninsula Corporate Park,
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Mumbai – 400 020 ..... प्रतिवादी/Respondent

Revenue by	: S/ShriAnand Mohan&Ajay K.R.Kesari
Assessee by	:S/Shri Salil Kapoor, KetanVed and Ms. Soumya Singh

सुनवाई की तिथि/ Date of hearing : 28/10/2022
घोषणा की तिथि/ Date of pronouncement: 28/11/2022

आदेश/ORDER

PER VIKAS AWASTHY, JM:

These cross appeals by the Department and assessee are against the order of Commissioner of Income Tax(Appeals)14, Mumbai [in short 'the CIT(A)'] dated 21/06/2017 for the Assessment Year 2005-06.

2. The Revenue in appeal has assailed the order of CIT(A) by raising following grounds of appeal:

"*1. The Learned CIT(A) erred on facts and in law in holding that the business of the assessee started in financial year relevant to A.Y. 1996-97 without properly appreciating the factual and legal matrix as clearly brought out in the assessment order.*

2. The Learned CIT(A) failed on facts and in law to appreciate that the DRP, Delhi for in assessee's own case for A.Y. 2066-07 has held that the business of the assessee started in F.Y. 1994-95 relevant to A.Y. 1995-96.

3. The Learned CIT(A) erred on facts and in law in allowing assessee's grounds of appeal pertaining to deduction u/s. 80IA without appreciating that the claims of the assessee in this regard were inadmissible in view of the commencement of assessee's business prior to A.Y. 1996-97.

4. Whether on the facts & circumstances of the case and in law, the Learned CIT(A) is justified in holding that losses of earlier years, already set off against other income cannot be set off for determining the quantum of deduction u/s. 801A.

5. Whether on the facts & circumstances of the case and in law the Learned CIT(A) failed to appreciate that quantum of deduction u/s. 80IA is required to be computed as if the eligible business were the only source of income during the every assessment year for which such determination is to be made.

6. Whether on the facts & circumstances of the case and in law, the Learned CIT(A) erred in deciding the eligible years for claiming deduction u/s. 80IA inspite of the

fact that the assessee is not eligible for deduction u/s 80IA at all as it has commenced its business prior to 01/04/1995.

7. The Learned CIT(A) has erred on facts and in law, in not giving effect to section 114(g) of the Indian Evidence Act which clearly lays down that if a fact in knowledge of a party is not explained, adverse inference can be drawn against the party possessing the knowledge of facts/information."

3. Shri Anand Mohan representing the Department narrating the back ground of the case submitted that the main controversy in the appeal by Department is admissibility of assessee's claim of deduction u/s 80IA(4) of the Income Tax Act, 1961 [in short 'the Act'] on telecommunication services. This being the first year of claim of deduction u/s. 80IA of the Act, is of significant import. The admissibility or otherwise of assessee's claim u/s. 80IA of the Act shall have consequential effect in the subsequent assessment years. The ld. Departmental Representative submits that assessee filed its return of income for impugned assessment year on 05/10/2005 claiming deduction u/s 80IA of the Act amounting to Rs.307,93,70,059/-. The assessee returned 'Nil' income for the Assessment Year 2005-06. The assessment was completed u/s 143(3) vide order dated 03/09/2007. The Assessing Officer accepted assessee's claim of deduction u/s. 80IA of the Act in entirety. In immediately succeeding assessment year i.e. A.Y. 2006-07 assessee's claim of deduction was denied by the AO on the ground that the assessee started telecommunication services prior to 1/4/1995. The said assessment order was confirmed by the DRP. Thereafter, the Commissioner of Income Tax, Chandigarh (in short 'the CIT') invoked revisional jurisdiction u/s. 263 of the Act for A.Y.2005-06 and quashed the assessment order. The assessee challenged the order of CIT dated 30/03/2010 passed u/s. 263 of the Act. The Tribunal vide order dated 19/09/2012 in ITA No. 706/Chd/2010 upheld the order of CIT passed u/s. 263

of the Act.In pursuance to order u/s. 263 of the Act, the Assessing Officer completed the assessment vide order dated 30/12/2010 rejecting assessee's claim of deduction u/s. 80IA of the Act in full. The assessee carried the issue in appeal before First Appellate Authority. The CIT(A) vide order dated 13/10/2011 confirmed the assessment order dated 30/12/2010 passed u/s.143(3) r.w.s. 263 of the Act. Thereafter, the assessee carried the issue in second appeal before the Tribunal. The Mumbai Bench of Tribunal vide order dated 03/04/2013 set aside the order of CIT(A) dated 13/10/2011 and directed the Assessing Officer to make fresh assessment. The Assessing Officer in third round passed fresh assessment order u/s. 143(3) r.w.s. 263 r.w.s. 254 of the Act dated 29/11/2013. In the third assessment order, the assessee's claim of deduction u/s. 80IA was again disallowed. The assessee challenged the validity of assessment order dated 29/11/2013 in Writ Petition No. 3359 of 2013before Hon'ble Bombay High Court. The Hon'ble Bombay High Court quashed the assessment order dated 29/11/2013 and directed the Assessing Officer to make fresh assessment after affording opportunity of hearing to the assessee. The Assessing Officer in fourth round passed the assessment order u/s. 143(3) r.w.s. 263 r.w.s 254 of the Act on 05/03/2014 rejecting assessee's claim of deduction u/s. 80IA of the Act. Aggrieved by the said assessment order the assessee filed appeal before the CIT(A). The First Appellate Authority vide order dated 21/06/2017 allowed assessee's claim of deduction u/s.80IA of the Act, hence, the present appeal by the Department.

In the meantime conflicting decisions were given by the Dispute Resolution Penal (DRP) at Delhi & Mumbai qua assessee's claim of deduction us. 80IA of the Act. For A.Ys. 2006-07 to 2008-09 the DRP at Delhi rejected

assessee's claim u/s 80IA of the Act. Whereas, DRP at Mumbai allowed the claim of assessee for A.Ys. 2009-10 to 2012-13.

4. The ld. Departmental Representative (DR) submits that the assessee was providing Radio Paging Services and Cellular Phone Services. Both the above services fall within the meaning of telecommunication services u/s.80IA(4) (ii) of the Act. The ld. Departmental Representative submits that license for paging services was granted to the assessee on 05/08/1994 and license for cellular services was granted to the assessee on 29/11/1994. The assessee was already having customer base in the period relevant to Assessment Year 1995-96. The assessee started selling pagers in FY 1994-95, therefore, the business of assessee had already commenced prior to 01/04/1995.

4.1 Referring to the provisions of section 80IA(4)(ii) of the Act, the ld. DR submitted that to be eligible to claim the benefit of deduction, the primary requirement of section is that the undertaking starts providing telecommunication services on or after 01/04/1995. In other words, benefit of section 80IA of the Act would be allowed, if assessee starts providing telecommunication services on or after 01/04/1995. In the present case, documents on record suggest that the assessee had started services prior to 01/05/1995, hence, the assessee is not eligible to claim benefit of deduction u/s. 80IA(4) of the Act. To support his arguments, the ld. DR referred to Form No.10CCB furnished by the assessee for Assessment Year 2005-06 and 2006-07. The ld. DR referred to Form 10CCB for Assessment Year 2005-06at page 509 of the Assessee's paper book. He pointed that a perusal of Column -8 of the Form would show that the date of commencement of operation is left blank. Thereafter, the ld. Departmental Representative referred to page 515

of the assessee's paper book to point that in Form 10CCB for Assessment Year 2006-07 the date of commencement of operation is mentioned as 29/11/1994. The ld. Departmental Representative pointed that assessee after more than 8 years filed certificate dated 28/11/2013 from its Chartered Accountants clarifying that the date in Form 10CCAB for 2005-06 be read as November, 1995. The subsequent certificate issued by Chartered Accountants (at page 248 of the assessee's paper book) is an after-thought and a self-serving document to avail the benefit of section 80IA of the Act. The Auditors have to verify the facts first hand before certification. In the instant case, the Auditors have issued the certificate on mere asking of the assessee without examining the documents on record. The certificate issued by the Auditors for Assessment Year 2005-06 is contrary to the audit report in Form 10CCB for Assessment Year 2006-07. The subsequent certificate issued by Auditors is not reliable and hence, has to be discarded at the outset.

The ld. Departmental Representative asserted that as per Rule 18BBB of the Income Tax Rules, 1962 (in short 'the Rules'), the assessee eligible to claim deduction u/s. 80IA has to furnish certificate from Auditor in Form 10CCB from assessment year relevant to financial year in which the assessee commences the eligible business. The Rules does not specify that Form 10CCB is required to be filed only in the year of claim of deduction. The assessee never furnished Auditors Report in Form 10CCB up to Assessment Year 2005-06. The assessee furnished said report for the first time in Assessment Year 2005-06 i.e. the year of claim of deduction u/s. 80IA of the Act.

4.2 The ld. Departmental Representative referred to assessee's return of income for the Assessment Year 1995-96 at page 58 of the Department's Paper

Book No.3. He pointed that in the Balance Sheet as on 31/03/1995 annexed to the return of income, the assessee has declared profit on sale of Pagers aggregating to Rs.35.88 lacs. On page No.28 of the said paper book the details of purchase, sale and closing stock of Pagers is given. The trading of Pagers clearly show that radio paging services had started in the Financial Year 1994-95 i.e. prior to 01/04/1995. The ld. Departmental Representative further referred to Schedule -4 to the Balance sheet at page 32 of the said paper book. The ld. Departmental Representative pointed that the assessee had claimed expenditure on advertisement and site acquisition services during the Financial Year 1994-95. No customer would purchase hardware (Pagers) unless the service provider would start telecommunication services. Site acquisition services and the advertisement expenditure would only be incurred after the launch of services. Thus, from the aforesaid expenditure and profit on sale of Pagers it is logical to conclude that the assessee had started telecommunication services during the Financial Year 1994-95.

4.3 The ld. Departmental Representative further referred to assessee's return of income for Assessment Year 1996-97 at page 1 of Department's Paper Book No.4. He pointed that in Assessment Year 1996-97 in Schedule – 4 to Balance Sheet as on 31-3-1996, the assessee has claimed'Service Launch Expenses' which is nothing but the 'Advertisement Expenses'.As the figure of advertisement expenses Rs.4.28 lakhs in Assessment Year 1995-96 corresponds to the figure of Service Launch Expenses in the immediate previous year. This clearly shows that services were launched in the period relevant to the Assessment Year 1995-96. The assessee has changed the nomenclature of expenditure to suit its requirements.

4.4 The ld. Departmental Representative thereafter referred to the information extracted from the web portal of the assessee. He pointed that as per information available on the web page of Max Telecom (as was the name of assessee at time of launch of telecommunication services) the year of commencement of cellular services & paging services is mentioned as 1994. The ld. Departmental Representative pointed that as per the information on the web portal the assessee had launched "Max Torch" cellular services in Mumbai in 1994. He asserted that in the information available in public domain the assessee throughout has claimed itself that business operations commenced in 1994.

4.5 The ld.Departmental Representative next referred to the license agreement dated 29/11/1994 at pages 72 to 111 of the Assessee's Paper Book-I. He pointed that the effective date mentioned in the said agreement is 29/11/1994. The term effective date means the date on which the assessee is ready to start operations. The ld. Departmental Representative in support of his contentions also referred to the report published by Telecom Commission on 06/12/2000 on Radio Paging Services. He pointed that as per the said report, the first radio paging services were started in Chandigarh in March, 1995. The ld. Departmental Representative further referred to information furnished by the assessee during assessment proceedings for Assessment Year 2006-07 regarding various services provided year wise. As per assessment order for the Assessment Year 2006-07, the assessee admitted vide letter dated 26/10/2009 that cellular paging services were started in Mumbai, Navi Mumbai and Kalyan Telephone District during Financial Year 1994-95 and radio paging services were provided by the assessee in Telephone District of

Ahmedabad, Bangalore, Pune, Vadodara, Chandigarh, Hyderabad and Ludhiana in Financial Year 1994-95.

4.6 The ld. Departmental Representative submitted that the assessee discontinued radio paging services on 01/04/2001. The assessee continued to provide cellular telephone services and purportedly claimed deduction u/s. 80IA of the Act first time in Assessment Year 2005-06 in respect of cellular services only. The assessee has not maintained separate books of account for cellular telephone services and radio paging services. Merely for the reason that assessee discontinued radio paging services that were started in Financial Year 1994-95 would not mean that the assessee is eligible to claim deduction u/s. 80IA in respect of the surviving segment i.e. cellular services. Telecommunication services include both radio paging services and cellular services. Non-maintaining of separate books for the two different divisions itself shows that the assessee was treating radio paging services and cellular services as composite business. The starting of even one of the divisions prior to 01/04/1995 would disentitle the assessee to claim deduction u/s 80IA of the Act in respect of the other division, even if the radio paging division was subsequently discontinued. The ld. Departmental Representative submitted that provisions of section 80IA read with Rule 18BBB makes it clear that each eligible undertaking has to be treated as separate undertaking and separate books are required to be maintained for each eligible undertaking. The ld. Departmental Representative placed reliance on the decision of Hon'ble Supreme Court of India in the case of Arisudana Spinning Mills Ltd. vs. CIT, 26 taxmann.com 39 to support his argument on requirement to maintain separate books of account for each eligible activity.

4.7 The ld. Departmental Representative further argued that the expression "start of business" holds the key. The business is said to have started when the license is received or essential activity of that business started or when all steps necessary to obtain business are made. The assessee entered into license agreement, made advertisement expenses, started trading in pagers, acquired equipments& machinery in Financial Year 1994-95, hence all these activities clearly indicate that the business of assessee commenced in period relevant to Assessment Year 1995-96. The ld. Departmental Representative placed reliance on the following decisions to support his argument:

(i) CIT vs. ESPN Software India Pvt. Ltd. 301 ITR 368 (Delhi);

(ii) CIT vs. Saurashtra Cement & Chemical Inds. Ltd., 91 ITR 170 (Guj);

(iii) CIT vs. E Funds International India, 162 Taxaman 1 (Delhi); and

(iv) Jcdecaux Advertising India (P) Ltd. vs. DCIT, 49 taxmann.com 149 (Del-Trib.)

4.8 The ld.Departmental Representative without prejudice to his primary submissions made alternate submission, that the assessee has violated the provisions of section 80IA(2) of the Act. The assessee has claimed deduction u/s. 80IA of the Act in respect of the business that has emerged out of merger/reconstruction of the two divisions i.e. "Max Torch" and "Max Page"i.e. cellular business and paging business, respectively in the year 2000-01. Although the assessee has claimed that it has satisfied all the conditions laid down u/s. 80IA(3) of the Act and there was no merger or reconstruction of the business, however, the facts on record are contrary to the claim of the assessee. The ld.Departmental Representative referred to the information available on web portal of Hutchison Max wherein the assessee in an article

has stated that Hutchison has decided to merge its cellular and paging divisions. The head quarters of "Max Page" has already been shifted from Bangalore to Mumbai.

4.9 The Department filed an application for admission of additional evidences. The ld.Departmental Representative submitted that additional evidences are in the form of order sheets, exchange of letters between the assessee and Principal General Manager, Department of Telecommunications Chandigarh, noting sheets of Department of Telecommunication recorded during the Financial Year 1994-95, copies of invoices cum delivery challans indicating sale of Pagers during March 1995, license agreement for Radio Paging Service between Department of Telecommunications and Hutchison Max Telecom Ltd. These additional evidences are filed to substantiate that the assessee had started telecommunication services during the financial year 1994-95 i.e. prior to 01/04/1995.

The ld.Departmental Representative finally submitted that without prejudice to his primary arguments, even if, it is held that the services were started in the period relevant to the assessment year 1995-96, the assessee would be eligible for deduction @30% only and not 100% as claimed by the assessee.

5. *Au Contraire*, Shri Salil Kapoor appearing on behalf of the assessee vehemently defended the findings of CIT(A) in allowing assessee's claim of deduction u/s. 80IA of the Act. The ld. Counsel for theassessee submits that to be eligible for claiming of deduction u/s. 80IA(4)(ii) of the Act,the undertaking should have started or start providing telecommunication services on or after 01/04/1995, but before 31/03/2005. The ld.Counsel for the assessee submitted that during the course of his

submissions he would be referring to various documents which are already on record to show that the assessee started providing telecommunication services after 01/04/1995. The ld.Counsel for the assessee first referred to the assessment order for assessment year 1995-96 dated 09/03/1998 (at page 226 of Assessee's Paper Book-1). In assessment year 1995-96 the assessee had made a claim that the assessee's business was set up during the Financial Year 1994-95 relevant to assessment year 1995-96. The Assessing Officer rejected the claim of assessee and observed in para 6 of the assessment order that *"the business of the assessee has not been set up till the closure of the accounting year relevant to the assessment year under consideration i.e. 31/03/1995".* Though the assessee had filed appeal against the said assessment order before the CIT(A), however, the same was withdrawn thus, the assessee accepted the assessment order. The assessment order attained finality.

5.1 The ld.Counsel for the assessee stated that admittedly the agreement was executed between Hutchison Max Telecom(predecessor of the assessee) and the Department of Telecommunications on 29/11/1994 (at page 72 of the Assessee's paper book -1),but the assessee started providing services much later. After execution of agreement there were several other compliances to be made, including installation of towers, assigning of radio frequency, inter phase service approval, final clearance from Department of Telecommunication,etc. before start of telecommunication services. The execution of agreement was one of intermediate step towards start of services. The ld.Counsel for the assessee referred to the letter issued by Department of Telecommunication dated 31/05/1995 at page 113 of the Assessee's Paper Book Volume-1, whereby Radio Frequency Channels were assigned for GSM Cellular Network in Mumbai. The ld.Counsel for the assessee further referred to letter from Ministry of Communications, Government of India dated 13/10/1995 at page 116 of the aforesaid paper book, whereby it was communicated

to the assessee that permissions granted earlier for launch of cellular mobile telephone services would be effective as soon as final clearance is received from Director (VAS-1), Department of Telecommunications. He further referred to letter dated 20/10/1995, whereby clearance in respect of interface/service approval for commissioning of Cellular Mobile Service was granted to the assessee by Director (VAS-1) subject to compliance of certain further conditions. Thus, it is evident from the documents on record that the final clearance and approve for starting cellular services were granted to the assessee in the year 1995 i.e. after 01/04/1995.

The ld.Counsel for the assessee pointed that in so far as radio paging services is concerned, the said services commenced in May/June 1995. He submitted that licence agreement for radio paging services may have been executed with Department of Telecommunications in 1994, however, radio frequency and final approval for starting the services were received by the assessee from Department of Telecommunications after 01/04/1995. The ld.Counsel for the assessee referred to Inter-Phase/Service Approval Certificate issued by the Department of Telecommunications for various Telecom Districts are at pages 199 to 205 of the Assessee's Paper Book-1. He pointed that the earliest approval certificate was issued on 31/03/1995 for Chandigarh Telecom Districts. Radio frequency was allotted by Wireless Planning and Co-ordination Wing (WPC) for Chandigarh Telephone District on 24/04/1995. The same is at page 210 of the paper book. Without interface service certificate and assignment of radio frequency, the assessee could not have started paging services.

5.2 The ld.Counsel for the assessee further referred to the observations of the Assessing Officer in assessment order for assessment year 1995-96, wherein the Assessing Officer had held that the assessee's business was not set up by 31/03/1995. The ld. Counsel for the assessee referred to the questionnaire issued by the Assessing Officer in assessment year 1995-96, wherein specific queries were

raised with respect to details of the commencement of paging cellular services by the assessee in each of the territory including the details of starting of pilot services. The Assessing Officer further asked the assessee to file detailed technical note on the machinery equipment and the installation requirement for operating and paging and cellular services and the details of the software required for operating these services. The Assessing Officer after considering reply of the assessee came to the conclusion that the business of the assessee was not set up till 31/03/1995. In support of his submissions the learned counsel also draws our attention to the assessment order dated 29/01/1999 for assessment year 1996-97 (at page 234 of the paper book-1), wherein the Assessing Officer has categorically recorded that *"cellular services had started on 16/11/1995 and paging services in 7 cities were also started in May/June 1995"*.

5.3 The ld.Counsel for the assessee thereafter referred to the decision of Ahmadabad Bench of the Tribunal in assessee's own case titled ACIT vs. Vodafone Essar Gujarat Ltd. reported as 131 TTJ 544(Ahd-ITAT). The ld.Counsel for the assessee submitted that Assessing Officer in assessment year 2006-07 denied deduction u/s. 80IA of the Act to the assessee. The assessee assailed the findings of Assessing Officer before the CIT(A) but remained unsuccessful. Thereafter, the assessee carried the issue in appeal before the Tribunal. The Tribunal allowing the appeal of assessee held that *"whether or not the assessee started providing telecommunication services in any year, has to be decided in the assessment proceedings for that year in the light of the relevant facts and circumstances obtaining in that assessment year alone"*. The Tribunal further observed that in the case of assessee, "*the Assessing Officer has not reopened the assessment proceedings for the assessment year 1996-97.Instead the findings recorded in the assessment year 1996-97 are being reconsidered in the year under consideration. This approach of the Assessing Officer is against settled position in law".* The aforesaid findings of the Tribunal were

assailed by the Department before the Hon'ble Gujarat High Court in Tax Appeal No.1339 of 2010. The Hon'bleHigh Court upheld the findings of the Tribunal. The ld.Counsel for the assessee argued that similar is the position in present case. The findings given by Assessing Officer in assessment year 1995-96 were accepted by Department. No revision proceedings u/s 263 of the Act were initiated. Now, the Department cannot reconsider the findings given by the Assessing Officer in assessment years 1995-96 and1996-97 in assessment proceedings for Assessment Year 2005-06.

5.4 Referring to the advertisement expenditure in Financial Year 1994-95 the ld.Counsel for the assessee submitted that the advertisement expenditure was at the stage of re-launching of service. Similarly, site acquisition services were in the nature of pre-operative expenditure. The Department has failed to appreciate the fact that even in the Balance Sheet as on 31/03/1995, the expenditure in Schedule-4 has been referred to as pre-operative expenses. The ld.Counsel for the assessee further referred to Auditors report for the year ended 31/03/1995 at page 38 of the paper book, wherein the Auditors have mentioned that no profit and loss account has been prepared for the year ended 31/03/1995 as the company has not commenced commercial services.

5.5 The ld.Counsel for the assessee referred to the approval granted under section 10(23G) of the Act by Central Board of Direct Taxes dated 21/04/2006(at page 218 of the assessee's paper book-1). Before granting approval investigations were carried out by the Department. The aforesaid approval was granted for the period starting from 01/08/2000 to 31/03/2006. The approval was in respect of investment made on or after 01/06/1998. The CBDT vide said approval held Cellular Mobile Telephone Services provided by assessee as eligible business under Section 80IA(4)(ii) of the Act.

5.6 On the objections raised by the Department with respect to non-mentioning of date of commencement of business in Form 10CCB for assessment year 2005-06 and mentioning of November, 1994 as the date of commencement in Form 10CCB for assessment year 2006-07, the ld.Counsel for the assessee submits that non-mention of date of commencement in Form 10CCB for assessment year 2005-06 and mentioning of 29/11/1994 for assessment year 2006-07 was a clerical error and the same was rectified by the Auditors by issuing certificate. The ld.Counsel for the assessee submitted that this technical defect cannot supersede the larger issue. The documents on record clearly suggest that the assessee commenced telecommunication services – radio paging services and cellular mobile services after 01/04/1995. The ld.Counsel for the assessee submits that merely for the reason that Pagers were sold during the Financial Year 1994-95 would not mean that the services commenced before 01/04/1995. The assessee by no means could have started radio paging services/cellular telephone services before allocation of interface / service approval and assignment of radio frequency.

5.7 On the objections raised by the ld.Departmental Representative with respect to the observations of Chandigarh Bench of Tribunal in ITA No.706/CHD/2010 while deciding the appeal of the assessee against the order passed u/s. 263 of the Act for assessment year 2005-06, the ld.Counsel for the assessee submits that directions of the Bench were not to place reliance on the findings given in the assessment order passed u/s.143(3) for assessment year 2006-07. The directions of the Tribunal nowhere states that no reference could be made to assessment order for assessment year 1995-96 and 1996-97.

5.8 On the objections raised by the Department in assessee not maintaining separate books of account for radio paging service and cellular telephone service, the ld.Counsel for the assessee submits that the provisions of section 80IA nowhere mandates maintenance of separate books of account for two different divisions. The

ld.Counsel for the assessee in support of his submissions placed reliance on the decision in the case of CIT vs. Micro Instrument Company reported as 388 ITR 46(P&H). The ld.Counsel for the assessee asserted that in any case radio paging services and cellular mobile services commenced only after 01/04/1995, hence, the arguments raised by the ld.Departmental Representative becomes irrelevant. The Department has erred in not considering the fact that deduction u/s. 80IA is available to an undertaking and not to an assessee.

5.9 On argument by the ld. DR that the business of the assessee has been formed by reconstruction/merger of two different undertakings, the ld. Counsel placed reliance on CBDT Circular 5 of 2005 dated 15/7/2005 and the findings of the CIT(A).

5.10 As regards additional evidences filed by the Department, the ld.Counsel for the assessee strongly objected to the admission of additional evidences. The ld.Counsel for the assessee submits that the assessment order for assessment year 2005-06 was made four times. The matter travelled to and fro between Assessing Officer and CIT(A), the Department never thought fit to furnish the additional evidences either during assessment proceedings or during the first appellate stage in four rounds. No reason whatsoever has been given by the Department for not submitting additional documents during the course of assessment proceedings. Now, additional evidences at thisbelated stage should not be admitted. The Revenue cannot seek re-examination of the entire issue by placing reliance on additional documents which were never part of record in earlier four rounds of litigation.

5.11 In respect of alternate claim of the Department that if at all deduction u/s. 80IA is to be allowed to the assessee it should be allowed @ 30%, the ld.Counsel for the assessee placed reliance on CBDT Circular No.1 of 2016 dated 15/02/2016.

6. Rebutting the arguments made on behalf of the assessee, the ld.Departmental Representative submitted that the submissions made on behalf of the assessee were

already considered by Chandigarh Bench of the Tribunal while adjudicating the appeal of assessee in ITA No.706/CHD/2010 (supra). The Tribunal after considering the submissions rejected the same and upheld the validity of order u/s. 263 of the Act. The ld.Departmental Representative further pointed that the decision of Ahmadabad Bench of the Tribunal in the case titled ACIT vs. Vodafone Essar Gujarat Ltd.(supra) was rendered on 29/01/2010. The same was available with the assessee at the time of appeal proceedings arising out of order passed u/s. 263 of the Act. The Chandigarh Bench of the Tribunal passed the order on 18/09/2012. For the reasons best known to the assessee, the assessee did not furnish the decision of Ahmadabad Bench of the Tribunal before the Chandigarh Bench. The ld.Departmental Representative referring to the assessment order for assessment year 1995-96 submitted that the findings of the Assessing Officer in para 4.2 of the said order are based on the reply field by the assessee. The Assessing Officer has not returned the findings on the basis of his own independent enquiry. The ld.Departmental Representative referring to the approval granted by CBDT u/s. 10(23G) of the Act pointed that approval has been granted only with respect to cellular services and not paging services, hence, reliance cannot be placed on the approval granted by CBDT. The ld.Departmental Representative finally submits that the expression “commencement of business” should not be given narrow meaning. The Hon'ble Delhi High Court in the case of CIT vs. ESPN Software (supra) has held that a business is commenced as soon as an essential activity of business is started. A business is commenced with the first purchase of stock- in- trade, the date when first sale is made is not material. In the present case, the assessee purchased Pagers and sold the Pagers prior to 01/04/1995, hence, the sale and purchase of Pagers is inextricably linked to the assessee providing radio paging services. For all intent and purpose the business of assessee commenced prior to 01/04/1995, therefore, the assessee fails to qualify the pre-condition set out in section 80IA(4)(ii) of start of

telecommunication services after 1/4/1995 to claim the benefit under the said section.

FINDINGS:

7. We have heard extensive submissions made by rival sides and examined the orders of authorities below. We have also considered various documents and decisions on which the respective sides have placed reliance in support of their arguments.

8. The assessment for assessment year 2005-06 has a chequered history of a protracted litigation. The assessee claimed deduction u/s. 80IA of the Act in respect of profits and gains derived from telecommunication service in AY 2005-06 for the first time. The claim of the assessee was initially allowed by the Assessing Officer in order dated 03/09/2007 passed u/s. 143(3) of the Act. The CIT invoked revisional jurisdiction u/s. 263 of the Act on the ground that the Assessing Officer without examining the claim has allowed the benefit of deduction u/s. 80IA of the Act to the assessee, hence, the assessment order was set aside. The Assessing Officer in second round passed the assessment order u/s. 143(3) r.w.s. 263 of the Act dated 30/12/2010 disallowing assessee's claim of deduction u/s. 80IA of the Act. In the meantime, the assessee had also challenged the validity of order passed by CIT u/s.263 of the Act before the Tribunal. The Chandigarh Bench of the Tribunal in ITA No.706/CHD/2010 (supra) vide order dated 18/09/2012 upheld the order passed u/s. 263 of the Act. The assessee had also assailed the assessment order passed u/s. 143(3) r.w.s. 263 of the Act dated 30/12/2010 before the CIT(A) but remained unsuccessful. Thereafter, the assessee carried the issue in appeal before the Tribunal in ITA NO.1172/CHD/2011. The Tribunal allowed the appeal of

assessee for statistical purpose and restore the issue back to the file of Assessing Officer for denovo assessment. The Assessing Officer in the third round of assessment vide order passed u/s. 143(3) r.w.s. 263 r.w.s. 254 of the Act dated 29/11/2013 again disallowed the claim of deduction u/s.80IA of the Act. The said order was challenged by the assessee in Writ Petition No.3359 of 2013. The Hon'ble Bombay High Court without commenting on the merits of the issue set aside the assessment order for de-novo assessment. Consequent to the order of Hon'ble High Court, assessment order was passed fourth time for assessment year 2005-06 vide order dated 05/03/2014. In the fourth assessment order, the Assessing Officer again disallowed assessee's claim of deduction u/s. 80IA of the Act. The assessee assailed the findings of Assessing Officer in disallowing claim of deduction u/s. 80IA before the CIT(A). The CIT(A) vide impugned order dated 21/06/2017 allowed assessee's claim of deduction u/s. 80IA of the Act. Hence, the present appeal by the Revenue.

The primary reason for rejecting assessee's claim by the Assessing Officer is that the assessee started providing telecommunication service in the Financial Year 1994-95 i.e. prior to 01/04/1995. As per the provisions of section 80IA the undertaking is eligible for benefit of deduction u/s. 80IA(4)(ii), if the undertaking started or starts providing telecommunication service on or after 1st day of April 1995. According to the Assessing Officer since, the assessee has started providing telecommunication services prior to 01/04/1995 the assessee is not eligible for claiming deduction u/s. 80IA of the Act. The assessee claimed deduction u/s. 80IA of the Act for the first time in AY 2005-06.

9. Two issues have emerged from the submissions and the grounds of appeal raised by the Department:

(i) Whether the assessee started providing telecommunication services before 01/04/1995 or thereafter; and

(ii) Whether the assessee is eligible to claim deduction u/s. 80IA(4)(ii) of the Act .

10. The primary reason for rejecting assesses claim of deduction u/s. 80 IA(4)(ii) of the Act by the Department is that the assessee started providing telecommunication services prior to 01/04/1995. Whereas, the claim of assessee is that the assessee started providing telecommunication services after 01/04/1995.

11. Before proceeding further to decide this issue, it would be imperative to refer to the provisions of section 80 IA(4)(ii) of the Act. The relevant extract of the same are reproduced herein below:

Section 80IA(4)(ii)

"(ii) any undertaking which has ***started or starts providing telecommunication services****, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services* ***on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005****."*

12. The Department in order to prove that the assessee started providing telecommunication services which includes radio paging services and cellular telephone services inter-alia placed reliance on following documents:

(i) Form No.10CCB furnished by the assessee for AYs 2005-06 & 2006-07;
(ii) Return of income of assessee for A.Y. 1995-96 and 1996-97;

(iii)Information extracted from Web portal of Max Telecom (predecessor of the assessee);

(iv)Licence agreement dated 29/11/1994;

(v) Telecom Commission report;

(vi) Additional evidences filed by the Department viz. communication between the assessee and Principal General Manager, Department of Telecommunication (in short ' the DoT'), invoices, etc.

13. On the other hand, the assessee in order to substantiate that the assessee started providing telecommunication services after 01/4/1995 inter-alia placed reliance on following documents:

(i) Assessment order for Assessment Year 1995-96 and 1996-97;

(ii) Letter of approval and letter of clearance issued by DoT Government of India;

(iii) Auditors Certificate clarifying date of commencement of services;

(iv) Interface/Service approval Certificate;

(v) Radio frequency assignment letter;

(vi) Approval from CBDT u/s. 10(23G) of the Act, etc.

14. Hutchison Max Telecom Pvt. Ltd. (predecessor of the assessee) was incorporated on 21/02/1992 with the main object of providing radio paging services and cellular telephone services in India. Initially, the assessee claimed that the business of assessee commenced in Financial Year 1994-95 i.e. the period relevant to the Assessment Year 1995-96. The assessee in the return of income for Assessment Year 1995-96 claimed interest expenditure and depreciation, accordingly. The Assessing Officer issued a questionnaire dated 16/12/1997 making specific enquiries regarding the details of commencement of paging and cellular services and details of machinery, equipment and installation required for operating paging and cellular services. The Assessing

Officer after making detailed enquiries came to conclusion that cellular services were started by the assessee on 16/11/1995. Even pilot services prior to commencement of commercial services were started on 27/07/1995 and radio paging services commenced during the period May 1995 to June 1995. The Assessing Officer in assessment order dated 09/03/1998 for Assessment Year 1995-96 categorically held that the asessee's business was not set up by 31/03/1995. The relevant extracts from the assessment order for 1995-96 are reproduced herein below:

> *"6. After taking into account all the facts relevant to the issues and the submissions made by the assessee, it is held that the assessee's business was not set up in 1992.* ***It is also held that the business of the assessee has not been set up till the closure of the accounting year relevant to the assessment year under consideration i.e. 31/03/1995.*** *The reasons for holding so are discussed below:*
>
> *A. xxxxx*
>
> *B. xxxxx*
>
> *C. xxxxx*
>
> *D. The nature of the business of the assessee is such that it requires a large scale development of highly sophisticated communication equipment. These equipments could be operationalised only after developing the requisite software for that area.* ***There is no evidence provided by the assessee company on record to show that necessary equipments and the required software was installed by the assessee on31/03/1995. It is pertinent to note that even the pilot services for cellular telephone and the paging services were started 2 to 4 months after the closure of the previous year under consideration. This means that the required equipments and software were installed by the assessee only after 2 to 3 months of the closure of the previous year in question."***
>
> *[Emphasized by us]*

The assessee filed appeal against the aforesaid assessment order before theCIT(A), however, the said appeal was withdrawn by the assessee. No revision proceedings were carried out by the Department for the Assessment Year 1995-96. Thus, the aforesaid assessment order attained finality.

In the assessment order for 1996-97 dated 09/01/1999 passed u/s. 143(3) of the Act, the Assessing Officer in para 3 recorded, "***The assessee's business has commenced in the financial year pertaining to current asstt. year. The cellular services had started on 16/11/1995 and paging services in 7 cities were also started in May/June 1995.***" The Assessing Officer in assessment order for Assessment Year 1996-97 in para -3.1 of the order further observed, ***"The issue regarding setting up of business has already been decided in the case of assessee company in Asst.year 1995-96 by passing a detailed order."***The Assessing Officer after recording the above facts allowed assessee's claim of depreciation in Assessment Year 1996-97. The aforesaid findings given in the assessment order for Assessment Year 1996-97 were confirmed by the CIT(A) vide order dated 11/09/2000. No further appeal was filed by either of the sides thereafter, hence, the findings in the assessment order for Assessment Year 1996-97 became final.

15. The assessee in order to substantiate that cellular services commenced after 01/04/1995 referred to the communication dated 31/05/1995 from DoT, Wireless Planning and Co-ordination (WPC) Wing (at page 113 of Assessee's paper book -1), whereby Radio Frequency Channels for GSM Cellular Network in Mumbai was assigned to the assessee. Our attention was also drawn to the letter dated 13/10/1995 at page 116 of the Paper Book-1, whereby Ministry of Communications (WPC Wing) accorded permission for launching cellular mobile telephone services at Mumbai subject to final clearance from Director (VAS-I), DoT. The said clearance was accorded to the assessee by Director (VSA-I) vide letter dated 20/10/1995 (at page 117 of Paper Book-1). Although, the licence agreement was executed between the assessee and DoT in

November, 1994 the assessee could not have started cellular mobile telephone services till the time radio frequency was assigned and all clearances prior to commencement of cellular mobile telephone services are obtained by the assessee. A perusal of the said agreement (Condition -20) clearly mentioned that a separate licence shall be required from the WPC Wing of Ministry of Communication which will permit utilisation of appropriate radio frequency spectrum for establishment and operation of cellular mobile telephone services. Thus, without allocation of radio frequency the assessee could not have commenced cellular mobile telephone services. As is evident from permits/assignment letters from the DoT referred above it is evident that the said permissions/clearances were granted to the assessee after 01/04/1995.

In so far as radio paging services is concerned the assessee received Interface/Service approval Certificate for the seven cities (Telecom District) in the month of April/May 1995. The date-wise details of the same are tabulated herein below:

Date	Telecom District
31/03/1995	Chandigarh
20/04/1995	Ludhiana
28/04/1995	Pune
01/05/1995	Bangalore
09/05/1995	Secunderabad
22/05/1995	Vadodara
24/05/1995	Ahmadabad / Gandhinagar

After Interface/Service approval Certificate, radio frequency for paging services were assigned to the assessee by WPC Wing on 24/04/1995 for Chandigarh Telecom District. Similarly, for other Telecom Districts mentioned above the WPC Wing allotted frequency for radio paging service in the month of

April/May 1995. Radio paging services could be provided only after assignment of radio frequency by the DoT, government of India. From the documents on record it is evident that the assessee started providing radio paging service after 01/04/1995.

16. In the case of ACIT vs Vodafone Essar Gujarat Ltd. (supra), the assessee had entered into agreement on 11-1-1996.In the State of Gujarat, the assessee started telecommunication services on 24-01-1997 i.e. in assessment year 1997-98. The assessee claimed deduction u/s. 80IA (4) of the Act inassessment year 2006-07. The Assessing Officer held that for the purpose of claiming deduction u/s.80IA(4) of the Act, assessment year 1996-97 was the initial year as the agreement was executed in the period relevant to the said assessment year. The mater travelled to the Tribunal. The Tribunal held that the assessee started its commercial operations on 24/01/1997, therefore, initial year for claiming deduction u/s. 80IA(4) was assessment year 1997-98. The Assessing Officer in the assessment for 1997-98 accepted that assessee started providing telecommunication services in AY 1997-98. The Assessing Officer in assessment order dated 29/01/1999 for assessment year 1996-97 had held that no business activities were carried out by the assessee. The dispute in AY 2006-07 was the " initial assessment yea". The assessee claimed AY 1997-98 to be the initial AY, whereas, the Revenue held that the AY 1996-97 was the initial AY. The Tribunal while deciding the controversy in assessment year 2006-07 held that, "whether or not" the assessee started providing telecommunication services in any year has to be decided in the assessment proceedings for that year in the light of the relevant facts and circumstances of that assessment year alone. The Tribunal further held that without reopening the assessment

proceedings for AY 1996-97, the findings recorded in the assessment year 1996-97 cannot be reconsidered in the subsequent assessment years. To support this view the Tribunal placed reliance on the decision of Hon'ble Apex Court in the case of New Jehangir Vakil Mills Co. Ltd. vs. CIT, 49 ITR 137. The aforesaid decision of the Tribunal was upheld by the Hon'ble Gujarat High Court in Tax Appeal No.1339 of 2010(supra).

Similarly, in the instant case the Revenue is trying to reconsider the concluded findings of the assessment order for assessment year 1995-96 and 1996-97 in assessment year 2005-06. This is impermissible in the scheme of Act. The Revenue by placing reliance on defective certifications and information derived from web portal of the assessee is trying to revisit the facts settled in assessment year 1995-96 and in assessment year 1996-97. The Act does not permit to disturb the findings of closed assessment (except within the mechanism provided under the provisions of the Act) in assessment proceedings for later AYs.

17. Non mentioning of date of commencement or mentioning of wrong date in Form No.10CCB by the Auditors of the assessee can be an error of reporting. We find that in Auditor's Report for the Financial Year ending on 31st March , 1995 (relevant to AY 1995-96), the Auditors have reported:

"No Profit and Loss Account has been prepared for the year ending 31st March, 1995 since the Company has not commenced commercial service."

The subsequent certification by the Auditor's dated 28/11/2013 rectifying the date of commencement in Form 10CCB for AY 2006-07 is in consonance with the Auditor's Report for FY 1994-95.

De-hors the fact that the date of commencement in Form 10CCB for assessment year 2005-06 was not mentioned or wrong date of commencement is mentioned in Form 10CCB for in assessment year 2006-07, the Department cannot turn blind eye to the findings given in the assessment order for assessment year 1995-96 and 1996-97, wherein it was held that the assessee had not commenced the business till 31/03/1995 and it was thereafter only that the assessee started or starts providing telecommunication services. The Department after a decade cannot overlook the findings of the Assessing Officer which were not disturbed by invoking the provisions of section 263 or 148 of the Act or any other provisions of the Act that provide remedy to the Department to correct the alleged wrong findings of the Assessing Officer. Now, the Department cannot disown the assessment order for AY 1995-96 and 1996-97 staring at the face of Revenue.

18. Another reason for Revenue to believe that the assessee had commenced business in the Financial Year 1994-95 is the sale of pagers, as has been reflected in the books of the assessee. The contention of Revenue is that as soon as the assessee purchased pagers for resale the assessee commenced its business of telecommunication. We do not concur with the argument put forth on behalf of the Department. The requirements of section 80IA(4)(ii) is,**"any undertaking which started or stars providing telecommunication services ……. on or after the 1st day of April 1995**." The requirement of section is not commencement of business but the start of telecommunication services. It is the commencement of **telecommunication services** which is material for the purpose of section 80IA(4)(ii) of the Act. The business may commence with the purchase of pagers but telecommunication

services would only start after assignment of radio frequency and various other technical/interface approvals from the DoT. The Revenue has placed reliance on the decision in the case of CIT vs. ESPN Software India Pvt. Ltd.(supra) and CIT vs.Saurashtra Cement and Chemical Industries Ltd.(supra) in support of the arguments that the business of the assessee commenced on the date of agreement or the date on which the assessee had traded in Pagers. There is no dispute in so far as the law laid down by the Hon'ble Court in the aforesaid decisions. However, the ratio laid down in the aforesaid decisions would not apply in the facts and circumstances of the present case.

19. One of the objection raised by the Department is that the assessee has not maintained separate books of account. The assessee had ventured into two different telecommunication services i.e. radio paging services and cellular mobile telephone services. The ld.Counsel for the assessee stated at Bar that the assessee has claimed deduction u/s. 80IA of the Act in respect of cellular mobile telephone servicesonly.

It is evident from the documents on record that radio paging services were started in May /June 1995 and the cellular telephone services were started in November 1995. Thus, both telecommunication services started after 01/04/1995. Undisputedly, the assessee was not maintaining separate books of account for two different segment of telecommunication services. Separate books of account for the two segments is not a mandatory condition for claiming deduction u/s. 80IA of the Act. Our aforesaid view is supported by the decision rendered by the Hon'ble Punjab and Haryana High Court in the case of CIT vs. Micro Instruments Co.(supra). Therefore, the claim of the

assessee u/s. 80IA of the Act cannot be declined on the ground that the assessee was not maintaining separate books of accountfor two different segment of telecommunication services.

The Revenue in support of its submissions has placed reliance on the decision in the case of Arisudana Spinning Mills vs. CIT (supra). We find that the ratio laid down in the aforesaid decision would not apply in the instant case. The need to maintain separate books of account in the said case was necessitated because of the natureof business of the assessee therein. The assessee therein had claimed the benefit of deduction u/s. 80IA of the Act in respect of manufacturing activity and trading activity. In the instant case, the assessee is providing telecommunication services. No manufacturing or trading activity was carried out by the assessee except for sale of Pagers. Be that as it may, as pointed earlier there is no statutory requirement for maintaining separate books for two different segments.

20. The Department raised an objection that the assessee is ineligible to claim the benefit of deduction u/s 80IA of the Act as it fails to fulfil the conditions of section 80IA(3) of the Act. The undertaking has been allegedly formed after merger/reconstruction of two divisions i.e. cellular telephone service division and radio paging service division.

The above argument advanced by the Revenue is contrary to the CBDT Circular No.5 of 2005 (supra). The aforesaid circular in an unambiguous terms explains that, "*this deduction is inter alia available to an undertaking providing telecommunication services if such undertaking is formed by splitting up or*

reconstruction of a business already in existence or by the transfer to a new business of old plant and machinery."

The Circular (supra) further clarifies that the condition introduced by the Finance (No.2) Act, 2004 will not apply to undertakings which have started providing telecommunication services prior to 01-4-2004. Documents on record clearly show that the assessee started providing telecommunication services after 01/4/1995 but before 01/4/2004. Thus, even if the assessee's undertaking is formed after merger/reconstruction, still the assessee would be eligible for deduction u/s.80IA of the Act in the light of CBDT circular (supra).

21. In the light of our findings above, we see no infirmity in the order of CIT(A) in coming to the conclusion that the assessee had started telecommunication services after 01/04/1995 and the assessee is eligible for deduction u/s. 80IA(4) of the Act. The findings of the CIT(A) on this issue are confirmed and the appeal of Revenue is dismissed. Thus, both the issues emerging from the appeal of the Revenue are decided in favour of the assessee.

22. The Revenue had filed an application for admission of additional evidences. The additional evidences filed by the Revenue are to buttress the arguments that the assessee had commenced telecommunication services prior to 01/04/1995. The additional evidences filed by the Revenue includes communication between assessee with the DoT, invoices to substantiate sale of Pagers and the licence agreement for radio paging services. This case has travelled between Assessing Officer and the Appellate Authorities four times

over a period of decade. Four times the assessment order has been passed. The issue that was considered time and again in assessment proceedings and the Appellate proceedings was the assessee's eligibility to claim deduction u/s. 80IA of the Act, with reference to assessee's date of start of telecommunication services. Sufficient time was available to the Department to furnish these evidences. For the reasons best known to the Department these additional evidences which are factual and were very much in existence even during at the time of passing first assessment order for AY 2005-06 were not relied upon by the Department.

Dehors, belated filing of these additional evidences, even if these additional documents are admitted, it would not make any material difference.As sale of pagers during FY 1994-95 has already been admitted by the assessee and the same has been reflected in the books of account. In so far as the communication between the assessee and the Telecom Department, it only reflects installation of some junction boxes by the Telecom Department to facilitate paging services to be provided by the assessee. Installation of junction box would in no manner be conclusive to hold that the assessee started telecommunication services – radio paging services. The radio paging services commenced only after assigning of frequency and clearance from WPC Wing of DoT. Therefore, this additional evidences filed by the Revenue would not support the case of Revenue. Hence, the Revenue's application for admitting additional evidences at this belated stage is rejected.

ITA NO.5078/MUM/2017 (AY 2005-06) –APPEAL by ASSESSEE:

23. The assessee has filed appeal assailing the findings of CIT(A) in respect of disallowance of deduction u/s. 80IA of the Act on other incomes. The assessee in appeal has raised three grounds. The ld.Counsel for the assessee stated at Bar that he is not pressing ground No.1 of the appeal. The ground no.1 of appeal is accordingly dismissed as not pressed.

24. Ground No.2 of the appeal reads as under:

*"2.Dis**allowance of deduction under section 80IA of the Act on 'Other Income'***

2.1 On the facts and in the circumstances of the case and in law the learned CIT(A) has erred in upholding that deduction u/s 801A of the Act can be allowed only on direct income derived from the specified activity, thereby ignoring the non obstante sub-section 2A of section 80IA which provides that to be eligible for deduction u/s 801A of the Act, income arising should be business income of the eligible undertaking, i.e. telecom undertaking of the Appellant in the present case

2.2On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the order of the learned AO in excluding the following incomes while computing deduction u/s 80IAoftheAct:

(a) Interest income amounting to INR. 6,09,99,174; and
(b) Miscellaneous income amounting to INR 4,98,14,610;"

25. The ld.Counsel for the assessee submits that the assessee had earned interest income of Rs.6.09 crores and miscellaneous income of Rs.4.98 cores. The assessee claimed deduction u/s. 80IA of the Act in respect of the aforesaid income. The same was disallowed by the Assessing Officer and the CIT(A). The ld.Counsel for the assessee submitted that Delhi Bench of the Tribunal in the case of Bharat Sanchar Nigam Ltd.(BSNL) reported as 156 ITD 847 (Del-Trib) has held that deduction for telecommunication services is allowable in respect of "*profits of eligible business and not restricted to profits derived from eligible business as mentioned in section 80IA of the Act.*"

Thus, the provisions of sub-section(2A) of Section 80IA of the Act are much wider in scope as compared to the provisions of section 80IA(1) of the Act. The deduction in computing total income of an undertaking providing telecommunication services shall be in accordance with the provisions of sub-section (2A) of section 80IA of the Act. The ld.Counsel for the assessee further submits that the decision rendered by Tribunal in the case of BSNL (supra) was upheld by the Hon'ble Delhi High Court in the case of PCIT vs. BSNL reported as 388 ITR 371. The ld.Counsel for the assessee further referred to the observations of the DRP for assessment year 2013-14. He referred to the findings of DRP at para 12, wherein the DRP had recorded,"*the Hon'ble Delhi High Court has held the deduction u/s. 80IA(2A) of the Act is also allowable in respect of other incomes, which are part of profits and gains of eligible business. The decision of Hon'ble Delhi High Court has been accepted by the Revenue as no SLP has been filed by the Revenue against aforesaid decision."*

26. Per contra, the ld. Departmental Representative vehemently defended the findings of CIT(A) on this issue.

27. Both sides heard. The short issue for adjudication in the appeal by assessee is:Whether interest income and miscellaneous income earned by the assessee would be eligible for deduction u/s. 80IA of the Act? We find that similar issue had come up before the Tribunal in the case of BSNL vs. DCIT (Supra). The Tribunal after examining and comparing the provisions of section 80IA(1) and 80IA(2A) held as under:

"13.2. On a reading of sub-section (1) of section 80-IA, we find that the legislature specifically uses the words meaning and import of which is plain and unambiguous in the context it is to be construed. Deduction under section 80- IA in terms of sub-section (1) is available to "gross total income" of an assessee where "gross total income" is restricted to "profits and gains derived by..... from any business referred to in sub-section (4)". The deduction is available of an amount equal to hundred percent of the profits and gains derived from such business for ten consecutive assessment years" subject to the provisions of the section. The meaning and intention of the legislature has been legally settled and well understood to mean that only those profits come under the ambit which can be said to be "derived from" such business. The intention of the legislature on a plain reading of the said sub-section is loud and clear. Reference to the decisions which establish a nexus of the first degree at this stage is refrained from as the position is well-settled legally and at this stage is not an issue for consideration in the present proceedings as both the parties agree that sub-section (1) of section 80-IA envisages only first degree nexus for the purposes of claiming deduction. The fact that deduction is available to hundred percent of the profits for a period of ten consecutive years is also not an issue under debate and even otherwise we find that the above provision in the said extent is clear and unambiguous.

13.3. What we may take note of is that on reading of only this sub-section in isolation what emanates clearly is that the deduction is applicable to any undertaking or an enterprise from any business referred to in sub-section (4) of section 80-IA which the legislature describes as "eligible business". The said sub-section sets out in unequivocal terms that the deduction is available to the gross total income of such undertaking/enterprise which "includes" "profits and gains derived from" such business. The meaning and limits of first degree nexus of the said phrase is well-understood by the tax payer, the tax collector and the Legislature. The said sub-section also sets out the period and extent of deduction available as hundred percent for ten years."

The Co-ordinate Bench further held that:

"13.10. Thus the dispute of bringing sub-section (1) into play for a tax payer falling in sub-section (2A) of section 80-IA to our minds cannot arise. According to the assessee sub-section (2A) does not put the restriction contemplated in sub-section (1) of section 80-IA in the face of the non-obstante clause coupled with the specific omission to use the well understood term "derived from". This argument is notwithstanding the argument that considering the assessee's nature of business the direct nexus presumed by sub-section (1) of section 80-IA is also fulfilled. On a careful reading of the above provisions, we find that the legislature has left no ambiguity in the wording of the sub-section (2A). Having started with the non-obstante clause in sub-section (2A) which over-rides the mandate of sub-section (1) and (2), the legislature is well aware that the phrase "derived from" has been used only in sub-section (1). The meaning of the said terms is judicially well-accepted and understood

and it is not the case of that Revenue that the legislature was not conscious of the said term. It is seen that the import of this term continues to exist for an assessee covered under subsection (2) of section 80-IA. The legislature has consciously retained it for enterprise/undertaking falling in sub-section (2) and the proviso thereto only keeping in mind the nature of the enterprises/undertakings contemplated under sub-section (2) the option of claiming deduction in any ten consecutive years is given to be claimed from the first fifteen years of beginning operation is given.

13.11. Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, wherever it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation. The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived from". The requirements of the first degree nexus of the profits from the eligible business has not been brought into play"

The Tribunal finally concluded that in terms of non- obstinate clause used in section 80IA(2A), deduction for telecommunication services is available in respect of "profits of eligible business" and is not restricted to "profits derived from eligible business" as mentioned in section 80IA(1) of the Act. The aforesaid findings of the Tribunal were affirmed by the Hon'ble Delhi High Court. We further observe that the DRP in directions dated 21/09/2017 for assessment year 2013-14 has observed that no SLP has been filed against the decision of Hon'ble Delhi High Court by the Revenue and allowed assessee's claim of deduction u/s. 80IA of the Act in respect of other incomes. Respectfully following the decision of Hon'ble Delhi High Court in the case of BSNL(supra), we direct the Assessing Officer to allow the benefit of deduction u/s. 80IA of the Act +in respect of interest

Income as well as miscellaneous income. Ground No.2 of the assessee's appeal is thus allowed.

28. Ground No.3 of the appeal by the assessee reads as under:-

> "***3. Interest under section 234B of the Act***
> *3.1. On the facts and circumstances of the case and in law, the learned CIT(A) has erred in not holding that interest under section 234B of the Act cannot be levied for the period beyond the date of the original assessment order which was issued in 3rd September 2007".*

29. Charging of interest u/s. 234B of the Act is mandatory and consequential. We deem it appropriate to restore this issue back to the file of Assessing Officer for charging interest in accordance with the provisions of section 234B of the Act. Ground No.3 of the appeal is thus, allowed for statistical purpose.

30. In the result, appeal by the assessee is partly allowed in the terms aforesaid.

31. To sum up, appeal by the Revenue is dismissed and appeal by the assessee is partly allowed.

Order pronounced in the open court on Monday the 28th day of November, 2022.

Sd/-	Sd/-
(M. BALAGANESH)	(VIKAS AWASTHY)
लेखाकार सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated 28/11/2022
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषितCopy of the Order forwarded to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-
4. आयकर आयुक्तCIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt.Registrar)**/**
Sr.Private SecretaryITAT, Mumbai