IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'A' BENCH, MUMBAI.

Before Shri B.R. Baskaran (AM) & Smt. Kavitha Rajagopal (JM)

I.T.A. No. 6366/Mum/2018 (A.Y. 2008-09)

Pr.CIT-9 Room No. 210 2nd Floor Aayakar Bhavan M.K. Road Mumbai-400 020.	Vs.	M/s. ATC Telecom Infrastructure Pvt. Ltd. (Formerly known as M/s. Viom Network Ltd.) 408, 4th Floor, Skyline Icon Andheri Kurla Road Andheri, Mumbai-400 059.
(Appellant)		(Respondent)

I.T.A. No. 6147/Mum/2018 (A.Y. 2008-09)

M/s. ATC Telecom Infrastructure Pvt. Ltd. (Formerly known as M/s. Viom Network Ltd.) 408, 4th Floor, Skyline Icon Andheri Kurla Road Andheri, Mumbai-400 059.	Vs.	DCIT-9(1)(2) Room No. 210 2nd Floor Aayakar Bhavan M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

PAN : AACCT1282E

Assessee by	Shri P.J. Pardiwalla & Shri Satyen Sehti
Department by	Shri Sandeep Raj
Date of Hearing	10.10.2022
Date of Pronouncement	04.01.2023

O R D E R

Per B.R.Baskaran (AM) :-

These cross appeals are directed against the order dated 31.08.2018 passed by Ld CIT(A)-16, Mumbai and it relates to the assessment year 2008-09.

2. The assessee is aggrieved by the decision of Ld CIT(A) in confirming the

(a) disallowance of depreciation of Rs.14.72 crores on the additions of Rs.223.40 crores.

(b) disallowance made u/s 40(a)(ia) of the Act.

3. The revenue is aggrieved by the decision of Ld CIT(A) in granting relief in respect of

(a) disallowance of depreciation on purchase of assets from its holding company.
(b) disallowance of depreciation on the claim of site restoration cost.
(c) disallowance made u/s 40(a)(ia) of the Act.

4. The facts relating to the case are stated in brief. The present name of the assessee is "M/s ATC Telecom Infra P Ltd". Earlier it was known as Viom Networks Ltd and earlier to that, it was known as "Wireless TT Info Services Ltd (WTTIL). The company WTTIL was wholly owned subsidiary company of M/s Tata Teleservices Ltd (TTSL). The assessee is engaged in the business of providing passive infrastructure to telecom companies.

5. During the year under consideration, the TTSL sold its passive infrastructure undertaking to WTTIL by entering into a Business Transfer Agreement (BTA) on 8.11.2007 read with an Amendment Agreement dated 26.2.2008. As per the BTA, the passive infrastructure business was sold as a going concern by way of slump sale w.e.f. 31st October, 2007. However, the transfer process could be completed only by February, 2008. It is stated that during the period from November, 2007 to February, 2008, the business carried by TTSL on behalf of WTTIL.

6. The first issue relates to the disallowance of depreciation. The assessee claimed that it has received assets worth Rs.846.19 crores under BTA and accordingly claimed depreciation of Rs.62.28 crores. The AO took the view that, as per Explanation 4A to sec. 43(1) of the Act, the assessee can claim depreciation on the WDV of assets as available in the books of TTSL. The AO further noticed that the assets received by the assessee included site

restoration cost of Rs.8.06 crores (according to the assessee, it was Rs.6.00 crores only). The site restoration cost is the estimated cost that would be incurred on restoration of land on vacating the leased premises after dismantling the towers. The AO took the view that the site restoration cost is a notional expenditure. Accordingly, the AO disallowed the entire depreciation claim of Rs.62.28 crores.

6.1 Before Ld CIT(A), the assessee furnished detailed explanations on the claim of depreciation of RS.62.28 crores. Since there was not much discussion in the assessment order, the Ld CIT(A) called for a remand report from the AO. In the remand report, the issue of depreciation has been discussed under three heads, viz.,

(a) Disallowance of depreciation on the difference between purchase cost and the WDV of the holding company.

(b) Disallowance of depreciation on new additions for want of evidences.

(c) Disallowance of depreciation on the amount of "Site restoration cost" included in the value of assets.

The Ld CIT(A) deleted the disallowance with regard to item (a) and (c) above. Hence revenue is in appeal in respect of these two items. The Ld CIT(A) confirmed the disallowance with regard to item (b) above and hence the assessee is in appeal.

6.2.0 The first item relates to the disallowance of depreciation between purchase cost and the WDV of the holding company. The assessee had purchased the undertaking on slump sale basis by paying Rs.37 crores as detailed below:-

Fixed assets	-	846.19 crores
Current assets	-	17.33 crores
		863.52 crores
Less:- Liabilities		826.52 crores
		37.00 crores
		==========

The assessee claimed depreciation on the amount of Rs.846.19 crores. However, the WDV of assets in the hands of transferor TTSL was Rs.817.93 crores. Hence, the AO held in the remand report that the depreciation should be allowed on Rs.816.93 crores. In this regard, the AO referred to the provisions of Sec.43(6)(c)(i)(C) of the Act.

6.2.1 The Ld CIT(A) noticed that the Explanation 4A to sec. 43(1) invoked by the AO in the assessment order is not applicable to the facts of the present case. The above said Explanation 4A was related to the cases of sale and lease back of the transactions.

6.2.2 The Ld CIT(A) found that the provisions of sec. 43(6)(c)(i)(C) was related to the computation of WDV in the hands of seller of assets.

6.2.3 The Ld CIT(A) also noticed that the Explanation 6 to sec. 43 relating to the transfer of assets between holding company and subsidiary company would not be applicable in the facts of the present case, since the said Explanation 6 would apply only if such transfer is claimed as exempt u/s 47 (iv) and (v) of the Act. In the instant case, the ld CIT(A) noticed that the TTSL has declared capital gains u/s 50B of the Act.

6.2.4 The Ld CIT(A) also held that the Explanation 3 to sec. 43 will not also apply because, in order to make the said provisions of Explanation 3 applicable, it is required to be shown that the transfer of assets is for the purpose of reducing tax liability. In the instant case, there is no such allegation made by the AO.

6.2.5 Since the assessee has paid the amount of Rs.37 crores over and above the net asset value of assets, the Ld CIT(A) held that the proportionate cost out of Rs.37 crores is relatable to the fixed assets and hence depreciation should be allowed on the entire purchase cost of Rs.846.19 crores.

6.3 The revenue is aggrieved on this point. The ld D.R supported the order passed by the AO on this issue. The ld D.R also took support of the decision rendered by the co-ordinate bench in the case of ITO vs. Archroma India (P) Ltd (2021)(124 taxmann.com 432)(Mum), wherein it was held that the assets purchased under slump sale agreement would fall within the sweep of 5th proviso to sec. 32(1) of the Act.

6.3.1 We heard Ld A.R on this issue. The Ld A.R submitted that the fifth proviso sec, 32 referred to by the co-ordinate bench of Tribunal in the above said case has now exists as sixth proviso in the statute. The purpose of this proviso is to apportion the depreciation in the case of succession, amalgamation and demerger between the original company and the succeeding/ amalgamating/resulting company. He submitted that this proviso to sec. 32 will not apply to case of purchase of assets, not covered under clause (iv) and (v) of sec. 47 of the Act.

6.3.2 We heard the parties on this issue and perused the record. The ld CIT(A) has recorded a finding that though the transfer of assets was between holding company and subsidiary company, the exemption provided u/s 47 was not availed by the transferor company and the transferor company has offered capital gains on such transfer. Further, we notice that the fifth/sixth proviso as the case may be, relates to the case of apportionment of depreciation between the transferor-company and transferee company. We also agree with the analysis made and decision given by Ld CIT(A) holding that the provisions of Explanation 4A, 3 and 6 of Sec.43(1) shall not be applicable to the facts of the present case. The provisions of sec. 43(6)(c)(i)(C) was related to the computation of WDV and it is not applicable, since the assessee has purchased the assets in the hands of seller. Accordingly, we are of the view that the Ld CIT(A) was justified in holding that the assessee is entitled to claim depreciation on the purchase cost of Rs.846.19 crores.

6.4 The next issue raised by the revenue relates to the relief granted in respect of depreciation disallowed on site restoration cost of Rs.6.96 crores. We noticed earlier that the, while working out the cost of towers, the assessee has estimated the cost that would be incurred on restoration of land upon dismantling the tower. The AO took the view that the above said site restoration cost is a notional claim and accordingly disallowed the same. The Ld CIT(A) noticed that he had allowed identical claim in the assessee's own case in AY 2012-13, vide his order dated 24.4.2017. In that order, the Ld CIT(A) had held that the "asset retirement obligation" (akin to "site restoration cost") is not a contingent liability. The Ld CIT(A) had also noticed that the assessee has been following similar method of accounting in the earlier years. Accordingly, he had held that the depreciation is allowable on estimated "asset retirement obligation". Following the said order, the Ld CIT(A) allowed depreciation claim on the "Site restoration cost" also.

6.4.1 We heard the parties on this issue and perused the record. We notice that the "Site restoration cost" is an expenditure that will be incurred by the assessee after dismantling the towers. The assessee has estimated the expenditure that would be incurred on restoration of site upon dismantling the towers and included the same as part of cost of asset. Accordingly, it has claimed depreciation on the site restoration cost also. However, as per AS 10 relating to "Fixed Assets", the cost is computed as under:-

The cost of fixed asset includes:

- Purchase price
- Import Duties and other non-refundable taxes
- Direct cost incurred to bring the asset to its working condition
- Installation cost
- Professional fees like fees of architects

• General overhead of enterprise when these expenses are specifically attributable to acquisition/preparation of fixed assets

• Any expenses before the commercial production, including cost of test run and experimental production

• **Any expenses before the asset is ready for use not put to use**

• Loss on deferred payment arising out of foreign currency liability
• Price adjustment, changes in duties and similar factors.

The cost of fixed asset is deducted with:
• Trade discounts and rebates
• Sale proceeds of test run production

• Amount of government grants received/receivable against fixed assets (See AS- 12)

• Gain on deferred payment arising out of foreign currency liability

It can be noticed that the expenses incurred upto the point before the asset is ready for use should be capitalized as per the Accounting Standard 10. We may also refer to Explanation 8 to sec. 43(1) of the Act, which reads as under:-

> "Explanation 8:- For the removal of doubts, it is hereby declared that where any amount is paid is payable as interest in connection with the acquisition of an asset, so much of such amount as is relatable to any period after such asset is first to put use shall not be included, and shall deemed never to have been included, in the actual cost of such asset."

Admittedly, the site restoration cost is not a cost incurred before the asset is ready for use. It is an expenditure that will be incurred, when the asset is dismantled. Even though it may not be a contingent liability as held by Ld CIT(A), yet the cost of restoration of site cannot be included in the cost of asset, since it is not an expenditure incurred before the asset is ready to put to use. In this regard, in our view, the consistent accounting practice followed by the assessee may not be relevant, since the consistent practice cannot override the accounting standard and law.

6.4.2 In the written submissions, certain propositions have been raised:-

(a) The first proposition was that the provision for site restoration is an ascertained liability and hence it is fully allowable as deduction u/s 37(1) of the Act. The assessee has also placed reliance on certain case laws. However, the distinguishing factor is that in those cases, the expenditure akin to site restoration cost was required to be incurred within a definite period of time. On the contrary, in the instant case, the assessee was required to incur site restoration cost only when the towers are dismantled. Thus, there appears to be no definite period within which the said expenditure will be incurred. For example, in the case of Provision for leave encashment, there is a binding contract between the employer and employee for payment of leave encashment and further there is certainty of retirement. On the contrary, the site restoration cost shall be incurred only when the tower is dismantled and there is no certainty when the tower shall be dismantled. In view of this distinguishing factor, we are of the view that though there is certainty of incurring of expenses on site restoration, yet there is no definite time frame by which it would be incurred. Hence, it is a case of expectation of incurring certain expenses in future. Hence the site restoration cost may be allowable as deduction in the year of incurring of expenditure and not on estimated basis on prior hand. For example, when a machinery is installed, it is imminent that certain major overhauling expenditure shall be required to be incurred in future. If the above said proposition is accepted, then all assessees may claim future overhauling expenses as deduction u/s 37(1) in the year of installation of machinery. It will result in allowing deduction of future expenses that may be incurred and this proposition is not allowable under the accounting principles and under the Act. In view of the same, we are of the view that the assessee's claim for deduction u/s 37(1) is not allowable.

(b) The second proposition is that the assessee has chosen to claim depreciation on site restoration cost instead of claiming it as revenue expenditure. It was submitted that if the Tribunal disallows the depreciation, it would involve reframing of assessments of several years. In the earlier paragraph, we have held that the site restoration cost cannot be allowed u/s 37(1) in the facts and circumstances of the case. Hence this proposition would fail.

(c) The third proposition is that the either claiming of expenses in the first year itself or claiming the same over the years by way of depreciation is a tax neutral exercise and hence the claim of the assessee should not be disturbed. This proposition would also fail, since we have held that the assessee is not entitled to claim deduction of site restoration cost u/s 37(1) of the Act.

6.4.3 In view of the foregoing discussions, we are of the view that the depreciation on site restoration cost is not allowable as deduction. Accordingly, we are of the view that the Ld CIT(A) was not justified in allowing depreciation on site restoration cost. Accordingly, we reverse the order passed by Ld CIT(A) on this issue and restore the disallowance made by the AO on site restoration cost.

6.5 The next issue under depreciation claim relates to the disallowance of depreciation on new assets for want of evidences. During the year under consideration, the assessee claimed depreciation on new assets worth Rs.223.41 crores. In the assessment order, the AO had disallowed the claim of depreciation on this amount without assigning any reason. In the remand report, the AO stated that the assessee could furnish bills for about Rs.6 crores only and did not furnish copies of bills for the remaining amount. The AO further stated that the assessee could not relate the above said bills for Rs.6 crores with any specific asset. He also observed that the assessee could not produce any work order, details of making payment or deducting TDS. Accordingly, the AO recommended that the disallowance of depreciation claimed on Rs.223.41 crores should be sustained.

6.5.1 Before Ld CIT(A), the assessee produced invoices for an amount of Rs.24.19 crores. The assessee also produced 100 binders containing invoices. It was submitted that the assessee keeps track of goods received and goods issued (GR-GI) for the entire addition of fixed assets of Rs.223.40 crores and each invoice can be tracked to GR-GI. It was submitted that the assessee places bulk orders for materials and delivery is made from its warehouses as per the requisition received from construction sites. However, the ld CIT(A) took the view that based on sample invoices of Rs.24.19 crores, he cannot allow depreciation on the new additions of Rs.223.40 crores. Accordingly he disallowed depreciation of Rs.14.72 crores claimed on the new additions of Rs.223.40 crores.

6.5.2 We heard the parties on this issue and perused the record. We notice that the AO had made the disallowance of depreciation on the new additions without discussing anything in the assessment order. Only in the remand report, the AO has stated that the assessee did not produce bills. The submission of the assessee before Ld CIT(A) was that the number of towers installed by TTSL on its behalf during November, 2007 to Feb. 2008 was 6603 and the assessee has installed 879 new towers. It is submitted that the materials are purchased in bulk and kept in ware houses. The materials were issued to the construction sites as per the requisition. It is also submitted that the assessee keeps track of goods received and goods issued (GR-GI) for the entire addition of fixed assets of Rs.223.40 crores and each invoice can be tracked to GR-GI.

6.5.3 The assessee being a limited company, its accounts are audited and hence the purchase of materials could not be doubted with. As noticed earlier, the assessee contends that the receipt and issue of materials could be tracked by it in its computer systems. The number of new towers added by the assessee during the period from November, 2007 to March, 2008 was not disputed. Hence the new towers added would definitely have corresponding cost. The Ld CIT(A) has observed that the assessee could bring 100 binders before him. Accordingly, under these set of facts, we are of the view that there is no reason to suspect the addition of new towers worth Rs.223.41 crores. Accordingly, we are of the view that the assessee would be entitled for depreciation of Rs.14.72 crores claimed on the above said amount. Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the disallowance of the same.

6.6 We shall now take up the next item of dispute, viz., disallowance made u/s 40(a)(ia) of the Act. The assessing officer disallowed a sum of Rs.36.03 crores by invoking the provisions of sec. 40(a)(ia) of the Act for non-deduction

of tax at source. The CIT(A) deleted the disallowance to the extent of Rs.20.08 crores. With regard to the balance amount, the Ld CIT(A) granted relief to the extent of 0.85 lakhs, since the assessee had deducted tax at source. Accordingly, the Ld CIT(A) confirmed the balance amount of Rs.15.10 crores.

6.6.1 The revenue is contesting the relief granted to the extent of Rs.20.08 crores. The assessee is contesting the decision of Ld CIT(A) in confirming the balance amount.

6.6.2 With regard to the relief of Rs.20.08 crores granted by the assessee, we notice that the same relates to the tower rent given to various parties and the each of the payment was less than the threshold limit (Rs.1,20,000/- per annum) for making deduction u/s 194I of the Act. In this regard, the Ld CIT(A) has verified sample copies of rental agreements. Accordingly, we do not find any reason to interfere with the view expressed by Ld CIT(A) on this issue.

6.6.3 The disallowance confirmed by Ld CIT(A) consisted of following three types of expenses:-

Security expenses -	10.23 crores	
Repairs and maintenance	0.12 crore	
	10.35 crores	
Less:- TDS deducted on	0.85 crore	
	9.50 crores	(A)
Other expenses	5.60 crores	(B)
Total (A + B)	15.10 crores	

6.6.4 With regard to security expenses, the contention of the assessee is that it was paid for supply of security staffs only. It was further submitted that the provisions of sec. 194C shall be attracted only if it involves “carrying

on of any work". Even though supply of labourers is included u/s 194C, yet the said supply should be for carrying on any work. The assessee submitted that the security staffs do not carry on "any work" mentioned in sec. 194C of the Act and hence the said TDS provisions will not apply to the assessee. It was submitted that the Ld CIT(A) has misdirected himself in relying on the decision rendered by the Tribunal in the case of Glaxo Smithkline Pharmaceuticals Ltd (2011)(48 SOT 643)(Pune), since the Pune bench of Tribunal was seized of the question whether the provisions of sec. 194C or 194J shall apply. The Pune bench did not examine the issue on merits, i.e., whether the provisions of sec.194C itself shall apply to case of supply of manpower.

6.6.5 We heard Ld D.R on this issue and perused the record. Before us, the Ld A.R contended that the supply of security personnal does not involve "carrying on of any work" including supply of labour for 'carrying out any work'. It is the contention of Ld A.R, supply of security personnel does not fall within the meaning of "work" defined in sec. 194C. In support of above said proposition, the Ld A.R placed reliance on the following passage from the decision rendered by Hon'ble Supreme Court in the case of Birla Cement Works vs. CBDT (248 ITR 216) @ paragraph 11:-

> "11. The key words in section 194C are 'carrying out any work'. The learned counsel for the appellant contended that a word or collection of words should fit into the structure of the sentence in which the word is used or collection of words formed. The contention is that in the context of section 194C, carrying out any work indicates doing something to conduct the work to completion or something which produces such result. The mere transportation of goods by a carrier does not affect the goods carried thereby. The submission is that by carrying the goods, no work to the goods is undertaken and the context in which the expression 'carrying out any work' has been used makes it evident that it does not include in it the transportation of goods by a carrier. In *Bombay Goods Transport Association* v. *CBDT* [1994] 210 ITR 136, the Bombay High Court quashing the impugned circular has held that the expression 'carrying out any work' would not include carrying of goods. In *Calcutta Goods Transport Association* v. *Union of India* [1996] 219 ITR 486, similar view has been expressed by the Calcutta High Court. It has also been pointed out in this decision that the Parliament had sought to bring professional services and

> other works within the net of tax deduction at source. If such 'works' were already covered by section 194C, it was wholly unnecessary for the Parliament to introduce separate statutory provisions in this regard and, thus, it follows that the word 'work' is to be understood in the limited sense as product or result. The carrying out of work indicates doing something to conduct the work to completion or an operation which produces such result. In *V.M. Salgaocar & Bros. Ltd.* v. *ITO* [1999] 237 ITR 630, the Karnataka High Court has concurred with the views expressed by the Bombay and Calcutta High Courts. The High Courts of Gujarat, Madras, Orissa and Delhi have also expressed similar views. On the other hand, as already noticed, the Rajasthan High Court in the judgment under appeal has expressed the contrary view relying upon the decision in *Associated Cement Co. Ltd.'s* case (*supra*) ".

The Bombay High Court, in the case of East India Hotels Ltd vs. CBDT (320 ITR 526)(Bom) has also examined the application of provisions of sec.194C, when there is no involvement of carrying of any work. Following passage from the above said decision is relevant here:-

> "4. Section 194C as inserted did not define the word 'work'. However, a Circular No. 86, dated 29-5-1972 was issued by the Deputy Secretary to the Government of India, *inter alia* stating therein that section 194C would apply only in relation to "work contracts" and "labour contracts" and that section 194C would not apply to contracts for sale of goods. By way of illustration, it was stated that contracts for the construction of the buildings or dams or laying of roads and air fields or railway lines or erection/installation of plant and machinery would be in the nature of contract for work and labour covered under section 194C but, contract for sale of sea or river crafts would be a contract for sale and as such would fall outside the purview of section 194C of the Act. It was further stated in the said circular that contracts for rendering professional services by lawyers, physicians, surgeons, engineers, accountants, architects, consultants, etc. would not be regarded as contracts for "carrying out any work" under section 194C of the Act.
>
> 5. Another Circular bearing No. 93, dated 26-9-1972 was issued by the Deputy Secretary to the Government of India clarifying that service contracts which do not involve the carrying out of any work would be outside the scope of section 194C of the Act.
>
> 6. Thus, since inception there was no dispute that all service contracts are outside the purview of section 194C of the Act. Accordingly, no tax was required to be deducted by a person making payment to the hotel for availing the facilities/amenities provided by the hotel."

Both the above said decisions clarify that the "carrying on of any work" is the sine qua non for attracting the provisions of sec.194C of the Act.

6.6.6 The word "Work" is defined as under in the Explanation III:-

"For the purposes of this section, the expression "work" shall also include:-

(a) advertising

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods and passengers by any mode of transport other than by railways;

(d) catering."

In the instant case, the security charges involve supply of manpower only and the same does not involve "carrying on of any work" within the meaning of the definition of the term "work" given in the Explanation III. Hence we are of the view that the provisions of sec.194C are not attracted for expenses claimed as "security charges". Supply of manpower may not fall under the provisions of sec. 194J relating to "professional fees". Accordingly, we set aside the order passed by Ld CIT(A) on this issue and direct the AO to delete the additions made u/s 40(a)(ia) relating to security charges.

6.6.7 The balance amount of addition excluding two items, viz., tower rents and security charges are related to

(a) Repairs and maintenance – P & M

(b) Rent

(c) Repairs and Maintenance

(d) Legal & Professional Expenses

(e) Interest

(f) Others

The assessee did not show as to how the provisions of tax deduction at source are not applicable to the above said remaining amounts. Accordingly,

we confirm the disallowance made u/s 40(a)(ia) of the Act in respect of above said items.

7. In the result, the appeal filed by the assessee and the revenue are partly allowed.

Pronounced in the open court on 4.1.2023

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(B.R. BASAKARAN)
Judicial Member	Accountant Member

Mumbai; Dated : 04/01/2023

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai