आयकर अपीलीय अधिकरण
मुंबई पीठ "आई-2 ", मुंबई

श्री विकास अवस्थी, न्यायिकसदस्यएवं
श्री एम बालगणेश, लेखाकार सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I-2", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
आअसं. 216/ चंडी/2011 (नि.व. 2006-07)
ITA NO.216/CHANDI/2011(A.Y.2006-07)
आअसं. 1173/चांडी /2011 (नि.व. 2007-08)
ITA NO.1173/CHANDI/2011(A.Y.2007-08)

Vodafone India Ltd.
(Formerly known as ' Vodafone Essar Limited')
Peninsula Corporate Park,
Ganpatrao Kadam Marg,
Lower Parel, Mumbai – 400 013.
PAN:AAACH-5332-B ..... अपीलार्थी/Appellant

बनाम Vs.

Additional Commissioner of Income Tax,
Range -1,
Chandigarh. ..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Salil Kapoor with
S/Shri Vibhu Jain and Ninad Patade
प्रतिवादी द्वारा/Respondent by : Shri Anand Mohan

सुनवाई की तिथि/ Date of hearing : 20/12/2022
घोषणा की तिथि/ Date of pronouncement : 16/03/2023

<u>आदेश/ORDER</u>

PER VIKAS AWASTHY, JM:

These two appeals by the assessee are for Assessment Year 2006-07 and 2007-08. The appeal of assessee in ITA NO.216/Chandi/2011 is directed against the assessment order dated 05/02/2011 passed u/s. 144C(13) r.w.s. 143(3) of the Income Tax Act, 1961 [in short 'the Act'] for the Assessment

Year 2006-07 and ITA No.1173/Chandi/2011 by the assessee is directed against the order of Commissioner of Income Tax (Appeals) Chandigarh dated 17/11/2011, for the Assessment Year 2007-08.

2. Since, the grounds raised in both the appeals germinate from same set of facts, these appeals are taken up together for adjudication and are decided by this common order. For the sake of convenience the appeals are decided in seriatim of assessment year.

ITA NO.216/Chandi/2011- A.Y. 2006-07:

3. The gist of grounds raised by the assessee in appeal are as under:-

Ground No.1: Disallowance of claim of deduction u/s. 80IA of the Act;

Ground No.2: Disallowance of deduction u/s. 80IA of the Act on 'Other Incomes';

Ground No.3 : Disallowance of depreciation on provision for 'Asset Retirement Cost' (in short ARC);

Ground No.4 : Disallowance u/s. 14A of the Act;

Ground No.5 : Disallowance of interest on loans advanced to the subsidiaries by the assessee;

Ground No.6 : Disallowance of interest on ' Capital Work-in-Progress';

Ground No.7 : Disallowance of interest on 'External Commercial Borrowings' (ECB);

Ground No.8 : Disallowance of expenditure incurred in connection with raising of loans;

Ground No.9 : Disallowance of Roaming Cost u/s. 40(a) (ia) of the Act;

Ground No.10 : Disallowance of provision for doubtful debts while computing book profit u/s. 115JB of the Act;

Ground No.11: Initiation of penalty u/s. 271(1)(c) of the Act; and

Ground No.12: Levy of interest u/s. 234B, 234C & 234D of the Act.

4. Apart from above grounds of appeal, the assessee raised additional ground of appeal vide application dated 14/02/2013 however, the same was subsequently withdrawn by the assessee vide application dated 06/05/2013.

DEDUCTION U/S. 80IA OF THE ACT.

5. Ground No.1 and 2 of appeal are inter connected, hence, taken up together for adjudication.

6. Shri Salil Kapoor appearing on behalf of the assessee submitted that the assessee is eligible to claim deduction u/s. 80IA of the Act, the issue has been decided by the Tribunal in assessee's own case for the immediate preceding Assessment Year i.e. Assessment Year 2005-06 in ITA No.5598/Mum/2017 by the Revenue decided on 28/11/2022. The ld.Counsel for the assessee submits that the Tribunal vide aforesaid order held that the assessee / appellant commenced telecommunication services after 01/04/1998, hence, is eligible to claim deduction u/s.80IA of the Act.

6.1 In respect of deduction u/s. 80IA of the Act on 'Other Incomes', the ld.Counsel for the assessee pointed that in assessee's appeal in ITA No.5078/Mum/2017 for Assessment Year 2005-06, the Tribunal placed reliance on the decision in the case of Bharat Sanchar Nigam Limited (BSNL) 156 ITD 847 (Del-Trib) and allowed deduction on "Other Incomes'.

7. Shri Anand Mohan representing the Department vehemently defended the impugned order. However, the ld. Departmental Representative fairly stated that the assessee's eligibility to claim deduction u/s. 80IA of the Act and

deduction u/s. 80IA on 'other incomes' has been considered by the Tribunal in assessee's own case for Assessment Year 2005-06.

8. Both sides heard. The Assessing Officer disallowed assessee's claim of deduction u/s. 80IA of the Act primarily for the reasons; the assessee had set up its business prior to 01/04/1995 and assessee has been formed by way of splitting up / re-construction of business. The above issues have already been decided by the Tribunal in appeal by the Department in assessee's case for assessment year 2005-06 vide order dated 28/11/2022(supra). The Tribunal has held that the assessee started telecommunication services after 01/04/1995 and hence, eligible for deduction u/s. 80IA(4) of the Act. The Co-ordinate Bench further held that even if the assessee's undertaking is formed after merger/re-construction there would be no impediment to claim deduction u/s. 80IA of the Act in the light of CBDT Circular No.5 of 2005. Following the order of Tribunal in assessee's own case for assessment year 2005-06 ground No.1 of appeal is allowed.

9. In ground No.2 of appeal the assessee has claimed deduct ion u/s.80IA in respect of income from 'Other Incomes' The Tribunal in ITA No.5078/Mum/2017 in appeal by the assessee for 2005-06 (supra) has accepted assessee's claim of deduction u/s. 80IA of the Act on 'other incomes' viz. interest income and miscellaneous income, by placing reliance on the decision in the case of Bharat Sanchar Nigam Limited reported as 156 ITD 847 (Del-Trib) Hence, ground No.2 of the present appeal is allowed for parity of reasons.

DEPRECIATION ON PROVISION FOR 'ARC'

10. The ld.Counsel for the assessee narrating the facts in respect of the issue submits – the assessee entered into licence agreement with owners of premises for installing telecom towers on their premises. The clause -11 of licence agreement cast an obligation on the assessee to restore the leased premises to its original form at the time of vacating the premises/removal of towers. The ld.Counsel for the assessee referred to one of the sample licence agreement at page 222 of the Paper Book. The ld.Counsel for the assessee submits that the liability for restoring the premises to its original conditions arises as soon as the assessee enters into an agreement with the owner of the premises. The asset restoration cost is the estimated cost to be incurred at the leased and shared network sites and office premises to restore them to their original condition at the end of the lease period and the same is recognized as per Accounting Standard (AS) -29. The assessee claimed depreciation amounting to Rs.63.60 lacs on 'ARC' obligation capitalized during the year as the provision made is in effect directly attributable to the cost of acquisition of capital. The ld.Counsel for the assessee fairly submits that the Delhi Bench of Tribunal in assessee's Group concern, DCIT vs. Vodafone Essar Digilink Ltd., 170 ITD 430 (Del-Trib) has rejected assessee's claim of depreciation of capitalized amount. The ld.Counsel for the assessee further pointed that the assessee has filed an appeal against the said order of Tribunal before the Hon'ble Delhi High Court in Income Tax Appeal No.660 of 2018. The Hon'ble High Court has admitted the question of law on this issue vide order dated 01/06/2018 and the said appeal of the assessee is pending for final adjudication.

10.1 The ld.Counsel for the assessee made alternate Prayer for allowing assessee's claim of provision for ARC u/s. 37(1) of the Act as revenue expenditure. He asserted that the said charges have been incurred for ascertained liability and is directly related to the business, hence, are allowable as revenue expenditure. In support of this proposition, the ld.Counsel for the assessee placed reliance on the decision in the case of M/s. Vedanta Limited vs. JCIT, in Tax Case (Appeal) No.2117 to 2119 of 2018.

10.2 Without prejudice, the ld.Counsel for the assessee made alternate prayer that the ARC liability should be allowed on proportionate basis i.e. allowed to be amortized over the period of lease. To support his contention, the ld.Counsel for the assessee placed reliance on the following decisions:

(i) Madras Industrial Investment Corporation Ltd. vs. CIT, 225 ITR 802 (SC)

(ii)Hindustan Aluminum Corporation vs. CIT, 144 ITR 474 (Cal).

(iii)First Leasing Company of India Ltd. vs. CIT, 292 ITR 110 (Mad)

11. Per contra, the ld. Departmental Representative vehemently supported the findings of Assessing Officer on this issue. The ld. Departmental Representative countering the proposition to treat the expenditure as revenue submits that no scientific basis of estimating / creating provision is given by the assessee. The ld. Departmental Representative further pointed that a perusal of clause -11 of the Licence Agreement would show that the assessee is liable for restoration of damage caused during installation. There is no mention of damage caused at the time of removal of structure, hence, the assessee is not under obligation to make repairs to the premises at the end of lease period. The ld. Departmental Representative further referred to clause-23 of the agreement to contend that it is a duty of the owner to repair the

damage caused at the time of removal of structure. No document whatsoever was produced by the assessee before the Assessing Officer to show that any such tower was removed and the expenditure was incurred by the assessee to restore the building's structure to its original position. The ld. Departmental Representative further contended that in any case it is a contingent liability, which cannot be allowed u/s. 37(1) of the Act. The ld. Departmental Representative submits that for any contingent liability there has to be some reasonable estimate based on scientific method. The assessee has failed to show the basis for creating the provision. The ld. Departmental Representative in support of his submissions placed reliance on the following decisions:

(i) Rotork Control India Pvt. Ltd. vs. CIT, 314 ITR 62 (SC)

(ii)Thermax Babock & Wilcox Ltd. vs. DCIT, 72 TTJ 827(Pune).

The ld. Departmental Representative submits that even for amortization there has to be some reliable estimate, in the instant case the assessee has failed to show the basis for computing provision.

12. Rebutting the arguments advanced on behalf of the Department, the ld.Counsel for the assessee submits that clause-23 of the agreement is unrelated to restoration of damage caused to the structure at the time of installation or thereafter at the time of removal of telecom tower. He further asserted that the decisions on which reliance has been placed by the ld. Departmental Representative has already been considered by the Hon'ble Madras High Court in the case of Vedanta Ltd.(supra).

13. We have heard the submissions made by rival sides and have examined the orders of authorities below. The ld. Counsel for the assessee has made three propositions for allowing provision for ARC. The first proposition is, that

the same be considered as capital in nature and the assessee be allowed depreciation on capitalized amount. This proposition has already been rejected by the Delhi Bench of Tribunal in assessee's group concern M/s. Vodafone Essar Digilink Ltd.(supra). Though the assessee has filed appeal against the decision of Tribunal before Hon'ble Delhi High Court, the appeal of the assessee has been admitted, however, no stay is operative against the Tribunal order. Therefore, the first proposition of the assessee is rejected.

13.1 The second proposition is that the provision on ARC be allowed as expenditure u/s. 37 of the Act. The ld. Counsel for the assessee has drawn our attention to Clause-11 of the Licence Agreement. The same is reproduced herein under:

> *"11. The Licensee agrees that it shall carry out the installation work in a professional manner with least inconvenience to members/owners of the Building. The Licensee also agrees that it shall restore to the same conditions any area it has affected due to its installation work."*

A perusal of Clause -11 of the licence agreement shows that the assessee has agreed to restore the leased premises in case of any damage caused due to installation work. Thus, liability is fasten on the assessee to restore the leased premises to the original condition in case of any damage caused due to installation work at the time of executing licence agreement The liability is ascertained however, the same would be crystallized only in the year of vacating the leased premises. It is a well settled principle that the provision has to be created on some reliable /rational basis. The assessee has purportedly furnished the basis on which provision has been created before the Assessing Officer, however, the same has not been examined by the Assessing Officer and has been rejected at threshold. In the case of Rotork Control India Pvt. Ltd. vs. CIT (supra) on which both sides have placed reliance

it has been held that the provision has to be made on some reliable estimates in respect of present obligation.

13.2 In Vedanta Ltd. vs. JCIT (supra), one of the question before the Hon'ble Madras High Court was:

> *"Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that the amount of Rs.30,91,868/- debited in the profit and loss account towards provision for site restoration cost was not an allowable deduction under the Act.?"*

The Hon'ble High Court after considering catena of decisions concluded as under:-

> *" 29. Thus on the conspectus of the legal precedents discussed above, we are of the clear opinion that for the three Assessment Years in question, the provision made by the Assessee for 'Site Restoration cost' under the contractual obligations of the Assessee in the Product Sharing Contract, made on scientific basis was clearly an allowable expenditure under Section 37(1) of the Act. The only ingredient required to be complied with for Section 37(1) of the Act is that the expenditure in question should be laid out or expended wholly for the purpose of business of the Assessee. There is no dispute that the Provision in question was made wholly and exclusively for the purpose of business. The only dispute was that expenditure not actually incurred in these years and the amount was to be spent in future out of the Provision made during these Assessment years namely A.Y.1996- 1997 to 1998-1999.*
>
> *30. We find no prohibition or negation for making a provision for meeting such a future obligation and such a provision being treated as a revenue expenditure under Section 37(1) of the Act. The Hon'ble Supreme Court in the case of Calcutta Company Limited clearly held that the words Lay (laid out) or Expend includes expendable in future also, which has been quoted by us above. The making of a Provision by an Assessee is a matter of good business or commercial prudence and it is to set apart a fund computed on scientific basis to meet the expenditure to be incurred in future. There is no time frame or limitation prescribed for the said provisions to be actually spent. Merely because in the context like the one involved in this case, the contract period was long viz., 25 years, which too now stands extended by period of ten years or more and therefore the actual work of site restoration may happen after 35 years depending upon the actual exploration of oil reserves and the Site restoration would be undertaken only if there is no longer some oil to be explored or drawn out and, therefore, it cannot be said that the provision made for the three Assessment Years presently at the beginning of the Contract period was irrational or an disallowable expenditure. The question of commercial expediency is a usual business and the economic decision to be taken by the Assesee and not by the Revenue Authorities and*

therefore the provision made on a reasonable basis, cannot be disallowed under Section 37(1) of the Act, unless it can be said to be have no connection with the business of the Assesee. The words wholly and exclusively for the purpose of business is a sufficient safeguard and check and balance by the Revenue Authorities to test and verify the creation of provisions for meeting a liability by the Assessee in future and its connectivity with the business of the Assessee. Assuming that such set apart provision is not actually spent in future or something less is spent on Site Restoration, nothing prevents Revenue Authorities and Assessee himself to offer it back for taxation in such future year, the unspent Provision to be brought back to tax as per Section 41(1) of the Act."

[Emphasized by us]

Thus, what is essential for allowing the provision as revenue is (i) it should be for the purpose of business exclusively; (ii) the provision is for present obligation; and (iii) based on reliable estimates. In the present case the assessees has been able to substantiate that condition (i) & (ii) above are satisfied. The assessee has purportedly furnished working of provision before the Assessing Officer The assessee's method of determining provision was not examined by the Assessing Officer. We deem it appropriate to restore this issue back to the file of Assessing Officer to examine the same, in accordance with law. The ground No.3 of the appeal is thus, partly allowed for statistical purpose.

DISALLOWANCE U/S. 14A OF THE ACT.

14. The ld.Counsel for the assessee submits that during the period relevant to assessment year under appeal, the assessee has not received any income exempt from tax on the investments made. Hence, no disallowance u/s. 14A is warranted. To support his contention the ld.Counsel for the assessee placed reliance on the decision in assessee's own case in ITA No.2285/Mum/2014 for Assessment Year 2008-09 decided on 12/10/2022.

15. Per contra, the ld. Departmental Representative placed reliance on the assessment order.

16. Both sides heard. It is an unrebutted fact that during the period relevant to the assessment year under appeal, the assessee has not earned any income exempt from tax on the investments. It is no more resintegra that no disallowance u/s. 14A of the Act is warranted where the assessee has not earned any exempt income during the relevant period. We further observe that the Assessing Officer has made disallowance invoking provisions of Rule 8D. The provisions of Rule 8D are effective from assessment year 2008-09. In the impugned assessment year Rule 8D has no application.[Re. Godrej & Boyce Mfg. Co. Ltd. vs. DCIT, 328 ITR 81 (Bom).] Hence, ground No.4 of the appeal is allowed.

INTEREST ON LOANS TO SUBSIDIARIES:

17. The ld.Counsel for the assessee submits that during the period relevant to assessment year under appeal, the assessee has raised secured loans amounting to Rs.10451.78 million and unsecured loans amounting to Rs.3700 million. The secured and unsecured loan form part of the common pool of funds available with the assessee. No specific details/ accounts are maintained with respect to utilization of the common pool of funds. A part of common pool of funds was utilized by the assessee to extend financial support to its subsidiaries viz.

S.No.	Name of subsidiary	Loan Amount (Rs. In crores)	Interest Rate
1.	Vodafone South Ltd.	662.00	Nil
2.	Vodafone Digilink Ltd.	168.00	Nil
3.	Vodafone Cellular Ltd.	40.00	7.7%
	Total	870.00	

The ld.Counsel for the assessee submits that the assessee and its subsidiaries are engaged in the business of providing mobile telecom services PAN India. There is significant inter-dependance between the assessee and its group companies for providing cellular services in different telecom circles. Therefore, loan advanced by the assessee to its group concerns were driven by commercial expediency. In support of his submissions the ld.Counsel for the assessee placed reliance on the decision in the case of SA Builders Ltd. vs. CIT, 288 ITR 1(SC).

17.1 The ld.Counsel for the assessee pointed that interest free loans to the tune of Rs.830 crores were advanced to the subsidiaries. The assessee has own sufficient interest free funds to cover such interest free loans. The ld.Counsel for the assessee referred to the Balance Sheet of the assessee as on 31/03/2006 to show that own funds of the assessee comprising of share capital and reserves and surpluses are aggregating to Rs.8632 crores. To support his propostion, the ld.Counsel for the assessee placed reliance on the following decisions:

(i) CIT vs. Reliance Industries Ltd., 410 ITR 466 (SC)

(ii) CIT vs. Reliance Utilities & Power Ltd. , 313 ITR 340 (Bom).

18. Per contra, ld. Departmental Representative vehemently defended the impugned order. The ld. Departmental Representative submits that the assessee failed to substantiate business consideration with the subsidiaries to whom loans were advanced. The ld. Departmental Representative further submitted that Vodafone South Limited to whom loans were advanced were running into huge losses. The assessee failed to show prudence in advancing interest free loans to loss making company.

19. Both sides heard, orders of authorities below examined. The Assessing Officer has disallowed interest free loans advanced to the sister concerns. The primary contention of the assessee is that loans have been advanced to sister concerns out of commercial expediency. It is an undisputed fact that the loans has been advanced by the assessee to the group concerns who were in the same business and are providing cellular services in different telecom circles in India. The stand of the assessee before the authorities below for providing interest free loans to subsidiaries is that the subsidiaries are in the initial years of business and require huge initial outlay of funds and the telecommunication business has long gestation period. It may not be possible for new entities to obtain entire requirement of funds from banks / financial institutions. Therefore, the assessee extended loans / advances to its subsidiaries in the initial years of business. We find merit in the explanation furnished by the assessee. The Hon'ble Supreme Court of India in S.A Builders Ltd. vs. CIT(Supra) has held that once it is established that interest free loans has been advanced to sister concerns on account of commercial expediency, the interest paid on such loans by assessee cannot be disallowed. In so far as the objection of Revenue regarding advancement of loans to a loss making group concern, we hold that it is the assessee who has the exclusive right to take a call regarding advancing of loans to the group concern, the Assessing Officer cannot sit in the arm chair of the assessee and decide to whom loan is to be extended or at what rate of interest loan is to be extended. Once the assessee has been able to establish commercial expediency for extending the loan, which in our considered view the assessee has been successful in the present case, the interest expenditure cannot be disallowed.

19.1 The assessee has further shown that to cover the interest free loans advanced to Vodafone South Limited and Vodafone Digilink Limited aggregating to Rs.830 crores, the assessee has sufficient own funds to cover the investment. The Hon'ble Bombay High Court in the case of Reliance Utilities and Power Limited (supra) has held that, where the assessee is having mixed bag of interest free funds and interest bearing funds and the assessee has made investment out of such common pool of funds, the presumption would be that the investments are made out of interest free funds available with the company provided the said funds are sufficient to meet the investments. Thus, in the facts of the case and the decisions discussed above, we find merit in ground No.5 of the appeal. The disallowance of interest expenditure on loans given to subsidiaries is directed to be deleted. The assessee succeeds on ground No.5 of the appeal.

INTEREST ON CAPITAL WORK-IN-PROGRESS AND INTEREST ON ECB.

20. In ground No.6 & 7 of appeal the assessee has assailed disallowance of interest Rs.1,63,96,415/- on Capital Work-in-Progress and disallowance of interest Rs.38,70,010/- on ECB. The ld. Counsel for the assessee submits that the assessee has acquired fixed assets from the borrowed capital during the year relevant to the assessment year under appeal. The assets were acquired not for the purpose of extension of its existing business but to provide better quality of services to the customers. The Assessing Officer while disallowing interest on capital work-in-progress and interest on ECB has erred in holding that the assessee has extended its existing business, by making substantial addition to the fixed asset base of the company. The Assessing Officer on wrong appreciation of facts has erred in coming to the conclusion that

interest paid on capital borrowed is for acquisition of assets for extension of business, hence, not allowable as deduction u/s. 36(1)(iii) of the Act. The ld. Counsel for the assessee asserted that the assessee has utilized borrowed funds for the purpose of carrying out its existing operations more efficiently. The expenditure on capital work-in-progress was for facilitating its existing operations and not in connection with extension of its existing operations. The investments in network assets is a continuous process to improve quality of services for its subscribers, hence, the assets acquired cannot be construed for extension of existing business operations. In telecommunication business the extension of business mean expansion beyond geographical area, where telecommunication services are rendered. The assessee is providing telecommunication services in Mumbai Telecom Circle and even after acquiring new assets the geographical area of operation remain confined to Mumbai Telecom Circle. The ld. Counsel for the assessee in support of his submissions placed reliance on the following decisions:

(i) DCIT vs. Core Healthcare Ltd., 252 ITR 61 (Guj).

(ii) ITW Signode India Ltd. vs. DCIT, 110 TTJ 170 (Hyd-Trb)

In respect of ECBs the ld. Counsel for the assessee submits that ECB was raised by the assessee for the purpose of acquiring fixed assets for supporting and smooth running of existing business. The ECB loan was received on 10/03/2006 and the same was not utilized up to end of the Financial Year 2006 i.e. 31/03/2006. The interest cost on the ECB has not been capitalized during the impugned assessment year, nor depreciation has been claimed thereon. The ld. Counsel for the assessee finally submitted that as long as borrowings are for the purpose of business, it is not relevant as to whether they are in the

nature of capital or revenue. The proviso to section 36(1)(iii) is not attracted as it is not a case of extension of existing business.

21. Per contra, the ld. Departmental Representative vehemently defending the assessment order submitted that the assessee had acquired loans and raised ECBs for expansion of business . With the acquisition of new assets, the subscriber base of the assessee has increased, the increase in subscriber base is also an extension of business. Therefore, proviso to section 36(1)(iii) of the Act is attracted. The ld. Departmental Representative referred to the findings of the Assessing Officer in para 5.4 to 5.6 of the assessment order. The ld. Departmental Representative pointed that there has been substantial addition in the fixed assets of the assessee under the head 'Plant and Machinery'. This shows that there has been substantial expansion of the existing business by the assessee. The ld. Departmental Representative further pointed to the observations of the Assessing Officer in para 5.6 of the impugned order that capital work-in-progress has not been utilized for the purpose of business during the year under consideration, hence, interest expenses on capital work-in-progress is not allowable as deduction.

21.1 In respect of ECB loans, the ld. Departmental Representative pointed that the Assessing Officer has categorically mentioned that ECB loans were not utilized by the assessee till 31/03/2006, hence, interest paid on such loans is not allowable u/s. 36(1)(iii) of the Act. The said loans have been diverted to subsidiaries for non-business consideration. Hence, the interest amounting to Rs.38.70 lacs cannot be allowed as deduction to the assessee.

22. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee has raised loans during the

period relevant to the assessment year under appeal and has paid interest on said loans. The assessee has admittedly used borrowed funds for acquiring assets. The contention of the Revenue is that the assets acquired by the assessee are for expansion of the existing business, hence, proviso to section 36(1)(iii) of the Act gets attracted, consequently, interest paid on such borrowed capital is not allowable u/s. 36(1)(iii) of the Act.

23. Au Contraire, stand of the assessee is that purchase of asset in assessee's case does not lead to extension of business but has merely improved quality of service. In terms of telecommunication business, expression extension is used where the business of the assessee has grown in geographical terms. It is an undisputed fact that even after having acquired new assets, the area of operation of the assessee has not extended. The assessee was providing telecommunication services in Mumbai Telecom Circle and even after substantial investment in new assets, the area of operation remain confined to Mumbai Telecom Circle. The investment in assets / Plant & Machinery/ Network equipment by the assessee have improved the quality of services, this may have resulted in increase of the subscriber base to some extent. Increase in volume of subscriber base within the same territory of operation cannot be termed as extension of business. Therefore, we do not find merit in the observations of the Assessing Officer that the interest u/s. 36(1)(iii) of the Act has to be disallowed.

23.1 The reason for rejecting assessee's claim of interest expenditure on ECBs is that interest in respect of borrowed capital can only be allowed from the date on which such asset is first 'put to use'. It is an admitted fact that ECB loans were not utilized upto 31/03/2006. In so far as other borrowed funds

the Assessing Officer has not raised any such objection. In the preceding part of the order, we have held that the borrowed funds have been utilized for the purpose of business. Once it is established that the funds are used wholly and exclusively for the purpose of business interest paid on such borrowed funds is allowed u/s. 36(1)(iii) of the Act. In the case of ECBs, it is not the case of Revenue that ECB loan was diverted for non-business purpose. The assessee has received ECB loans on 10/03/2006, the funds were available with the assessee, even if, ECB loan was not utilized, interest paid thereon would be allowable. Hence, ground No.6 & 7 of the appeal are allowed.

EXPENDITURE ON RAISING OF LOANS:

24. The ld. Counsel for the assessee submits that during the period relevant to the assessment year under appeal, the assessee incurred following expenditure in relation to raising of loans:

(i) Loan arrangement fee	Rs. 47.69 million
(ii)Bank Guarantee	Rs. 6.79 million
Total	Rs. 54.48 million

The secured and unsecured loans were raised purely for business exigencies. The assessee has largely utilized borrowed funds for the strategic business requirement for conducting telecommunication operations in different Telecom Circles. The observations of the Assessing Officer that the loan funds have been utilized for non-business consideration are contrary to the facts on record. The assessee has utilized borrowed funds for conducting cellular phone operations in different Telecom Circles.

24.1 Without prejudice to the primary contension, the ld. Counsel for the assessee submits that it is a well settled principle of law that expenditure incurred for raising loan is revenue expenditure irrespective of the purpose or motive for which such loan is obtained. To support his contention, the ld. Counsel for the assessee placed reliance on the decision in the case of India Cements Ltd. vs. CIT, 60 ITR 52(SC).

25. The ld. Departmental Representative submits that the secured and unsecured loans raised have been utilized for non-business consideration. Hence, the expenses incurred to raise the loans have been rightly disallowed u/s. 37(1) of the Act.

26. We have heard the submissions made by rival sides and have examined the orders of authorities below. The assessee during the period relevant to assessment year under appeal has raised secured and unsecured loans. The Assessing Officer has disallowed expenditure on raising of loan for the reason that loan has been disbursed for capital expenditure and not for augmentation of the working capital and loan funds have been utilized for non-business considerations. While deciding the preceding grounds we have held that the loans have been utilized by the assessee for the purpose of business. The loans that have been advanced to the group concern are on account of business exigencies

26.1 The Hon'ble Apex Court in the case of India Cements Ltd. vs. CIT (supra) has held that expenditure on raising of loan is revenue in nature, hence, allowable. The nature of expenditure on raising of loan does not depend upon nature and purpose of loan. Hence, we have no hesitation in holding that the

expenditure incurred for raising of the loan is allowable u/s.37(1) of the Act. The ground No.8 of the appeal is thus, allowed.

DISALLOWANCE OF ROAMING COST U/S. 40(a)(ia) OF THE ACT.

27. In ground No.9 of appeal, the assessee has assailed disallowance of roaming cost u/s. 40(a)(ia). The ld.Counsel for the assessee submits that during the year under consideration the assessee incurred expenses on roaming charges. Payments are made to other telecom operators to enable subscribers of the assessee to make or receive calls originating / terminating on other telephone networks. Roaming service is in the nature of automated services and no human intervention for switch over to the network of other telecom operators while in roaming is warranted. The Assessing Officer made disallowance u/s. 40(a)(ia) of the Act on the pretext that the provisions of section 194C and/ or section 194J of the Act are attracted on payments made to other telecom operators. The ld.Counsel for the assessee submitted that the issue is squarely covered by the decision of Kolkata Bench of the Tribunal in the case of Vodafone East Ltd. vs. Addl. CIT, 156 ITD 337.

28. The ld. Departmental Representative vehemently placed reliance on the assessment order and the observations of DRP on the issue and prays for dismissing ground No.9 of the appeal.

29. We have heard the submissions made by rival sides and have examined the orders of authorities below. One of the issue before Kolkata Bench of Tribunal in the case of Vodafone East Ltd. vs. ACIT (supra) was with respect to deduction of tax at source in respect of roaming charges paid by the assessee to other telecom operators. The Co-ordinate Bench after analyzing the facts of the case and various decisions held that the payment of roaming charges does

not fall under the ambit of TDS provision either u/s. 194C or 194J of the Act, hence, addition made u/s. 40(a)(ia) of the Act was deleted. We find that the facts and the reason for making disallowance u/s.40(a)(ia) of the Act in the impugned order are similar to the case of Vodafone East Ltd.(supra). No distinction has been pointed by the Revenue in the present case. Thus, for parity of reasons, disallowance u/s. 40(a) (ia) of the Act is directed to be deleted. The assessee succeeds on ground No.9 of appeal.

BOOK PROFIT U/S. 115JB OF THE ACT.

30. In ground No.10 of appeal the assessee has assailed disallowance of deduction of provision for doubtful debts while computing book profit u/s. 115JB of the Act. The ld.Counsel for the assessee submits that during the year under consideration the assessee created provision for doubtful debts of Rs.218.31 million. A reversal of Rs.326.79 million was also made during Assessment Year 2006-07, thus, resulting into a net reversal of provision for bad debt and doubtful debts amounting to Rs.108.47 million. The Assessing Officer added back Rs.218.31 million to the book profit but did not reduce 326.79 million from the book profits. The provisions of section 115JB require that where amount is sought to be excluded from computation of book profit by way of writing back of the provision the book profits of such year ought to be increased by such provision. He further submitted that since, book profit has been increased by 218.31 million for the purpose of section 115JB of the Act the Assessing Officer ought to have reduced the book profits by Rs.218.31 million from the total amount of Rs.326.79 million. In respect of the balance amount of Rs.108.47 million, the ld.Counsel for the assessee pointed that the same has actually been written off. Hence, clause-1 of Explanation to sub-

section (2) of section 115JB of the Act would not get attracted. In support of this contention the assessee placed reliance on the decision in the case of CIT vs. Vodafone Essar Gujarat Ltd., 397 ITR 55 (Guj).

31. On the other hand, ld. Departmental Representative placed reliance on the assessment order and prayed for dismissing the appeal of assessee.

32. We have heard the rival submissions and have examined the orders of authorities below. It is not in dispute that the provision made for doubtful debts amounting to Rs.218.31 million has been added back by the Assessing Officer while computing book profits u/s. 115JB of the Act by applying clause (i) of Explanation -2 to section 115JB(2) of the Act. When the assessee chose to write back the provision for doubtful debts by creating it in its P&L Account, which in the present case is Rs.326.79 million, the same would obviously be outside the ambit of provision of section 115JB of the Act. In fact, this is specifically provided in clause (i) of Explantion-1 to section 115JB(2) of the Act under expression "as reduced by" while computing book profit u/s. 115JB of the Act. In view of this, we direct the Assessing Officer to reduce Rs.326.79 million towards provision for doubtful debts written back while computing book profits u/s. 115JB of the Act. The assessee succeeds on ground No.10 of appeal.

PENALTY U/S.271(1)(c)OF THE ACT:

33. In ground No.11 of appeal, the assessee has assailed initiation of penalty proceedings u/s. 271(1)(c) of the Act. Challenge to penalty proceedings at this stage is premature, accordingly, ground No.11 of the appeal is dismissed.

INTEREST U/S. 234B, 234C, & 234D OF THE ACT.

34. The assessee in ground No.12 has assailed levy of interest u/s. 234B, 234C & 234D of the Act. Charging of interest under aforesaid sections is mandatory and consequential, hence, ground No.12 of the appeal is dismissed.

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

ITA NO.1173/CHANDI/2011-A.Y.2007-08:

36. Both sides are unanimous in stating that the grounds raised by the assessee in appeal for assessment year 2007-08 and the facts germane to said grounds are identical to the facts in assessment year 2006-07.

37. The gist of grounds raised by the assessee in appeal for 2007-08 is asunder:

Ground No.1: General in nature;

Ground No.2: Disallowance of deduction u/s. 80IA of the Act;

Ground No.3: Disallowance of deduction u/s. 80IA of the Act on 'Other Incomes';

Ground No.4 : Disallowance of depreciation on provisions for 'Assessment Restoration Cost';

Ground No.5 : Disallowance u/s. 14A of the Act;

Ground No.6 : Disallowance of interest on loans advanced to the subsidiaries by the assessee;

Ground No.7 : Disallowance of interest on ' Capital Work-in-Progress';

Ground No.8 : Disallowance of expenditure incurred in connection with raising of loans;

Ground No.9 : Disallowance of Roaming Cost u/s. 40(a) (ia) of the Act; and

Ground No.10: Levy of interest u/s. 234B, 234C & 234D and withdrawal of interest u/s. 244A of the Act.

38. All the issues raised in aforesaid grounds of appeal have been adjudicated by us while deciding the appeal of assessee in ITA No.216/Chandi/2011 (supra). The findings given therein on various issues would *Mutatis Mutandis* apply to the grounds raised in the instant appeal. For parity of reasons, the appeal of the assessee for assessment year 2007-08 is partly allowed.

39. To sum up, appeals of assessee for assessment year 2006-07 and 2007-08 are partly allowed in the terms aforesaid.

Order pronounced in the open court on Thursday the 16th day of March, 2023.

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

मुंबई/ Mumbai, दिनांक/Dated 16/03/2023
Vm, Sr. PS(O/S)

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded to <u></u>:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्तCIT
4. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)/
Sr.Private Secretary, ITAT, Mumbai