

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE
DR. BRR KUMAR, ACCOUNTANT MEMBER
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

ITA No. 4658/Del/2016
Asstt. Year: 2010-11

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| DCIT, Circle-25(2), Room No. 196A, C.R. Building, New Delhi. (Appellant) | Vs. | Tikona Infinet Ltd. 3 rd Floor, 225, Okhla Industrial Estate, Phase-III, New Delhi. PAN AAACM6427C (Respondent) |
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| Assessee by: | Shri Akshay Shah, CA Shri Vipul Shah, Adv. |
| Department by : | Shri H.K. Chaudhary, CIT-DR |
| Date of Hearing | 03.04.2023 |
| Date of pronouncement | 24.04.2023 |

ORDER

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue is directed against the order of the Ld. Commissioner of Income Tax (Appeals) - 22, New Delhi ("**CIT(A)**") dated 28.06.2016 pertaining to the Assessment Year ("**AY**") 2010-11.

2. The Revenue has taken the following grounds of appeal: -

- "1. *On the facts and in the circumstances of the case and in law, the Ld.CIT(A) has erred in the case of M/s TikonaInfinet Limited (PAN AAACM6427C) for the A.Y. 2010-11 deleting the addition of Rs.3,90,40,000/- on account of Licence Fee as capital expenditure.*

2. *On the facts and circumstances of the case and law, the Ld.CIT(A) has erred in deleting the addition of Rs.23,60,79,000/- u/s 41(1) on account of unexplained creditors.”*

3. Ground No. 1 relates to addition of Rs. 3,90,40,000/- on account of licence fee as capital expenditure made by the Ld. Assessing Officer (“**AO**”) which has been deleted by the Ld. CIT(A). The Ld. AO has discussed this issue in para 5 of his assessment order framed by him on 26.03.2013 under section 143(3) of the Income Tax Act, 1961 (**the “Act”**). The assessee is engaged in the business of information technology enabled services. It paid the impugned sum to Govt. of India, Department of Telecommunication in consideration for grant of licence to operate and provide the services. The assessee claimed that it is revenue expenditure. The Ld. AO, however held it to be capital expenditure as it gives enduring benefit to the assessee. According to him, the Act provides for such capital expenditure to be amortised as per provision of section 35ABB over unexpired portion of the licence. The unexpired portion of the licence from assessee’s document is 8.5 years. Therefore, only Rs. Nil is allowable under section 35ABB. He, therefore, added the impugned amount to the income of the assessee.

3.1 On appeal, the Ld. CIT(A) discussed the issue in para 6 of his appellate order. The Ld. CIT(A) deleted the impugned addition by observing and recording his findings as under:-

“6 As per the appellant, the agreement with department of Telecommunication was entered into on 13.04.2000 for internet services for fifteen years. In December, 2004, the Government of India permitted amendment of the existing ISP license, to allow VPN (Virtual Private Network) services subject to a payment of one time entry fee of Rs. 10 crores and financial bank guarantee of Rs. 1 crores. However, the said provisional permission to offer VPN services in accordance with new guidelines did not contain detailed terms and conditions. Therefore, the Internet Service Providers Association of India and ISPs filed a petition before Hon’ble TDSAT. As per the order of TDSAT, the revised guidelines were issued by DOT vide letter dated 22.06.2006 according to which the license fee was payable at 6% of the revenue on revenue sharing basis. The said payment on revenue sharing basis has been claimed by the appellant u/s 37(1). The appellant has relied on the decision of Hon’ble ITAT Mumbai in the case of Bharti Airtel Ltd. reported in 48 DTR 416

and also the decision of Hon'ble Delhi Tribunal in the case of M/s. MTNL reported in 8 SOT 376 holding that the deduction of licence fee is to be allowed in the year of payment. Appellant also relied on the decision in the case of Vodafone Essar Ltd. reported in 38 SOT151 (Ahmedabad) and several other cases of ITAT Mumbai in the cases of Bharti Airtel Ltd."

3.2 Aggrieved, the Revenue is in appeal before the Tribunal.

4. The Ld. DR relied on the order of the Ld. AO and drew our attention to para 5.1 (pages 3 to 8) of the Ld. AO's order. The Ld. AR supported the order of the Ld. CIT(A). He submitted that the Ld. CIT(A) has decided the issue in favour of the assessee by relying on the decision of the Hon'ble Delhi High Court in CIT vs. Bharti Hexacom Ltd. (2019) 417 ITR 250 (Delhi). The Ld. AR contended that licence fee is not first time payment/initial payment. It is in fact revenue sharing and payments are made annually.

5. We have carefully considered the rival submissions and perused the records. The assessee has placed a copy of Licence Agreement dated 11.07.2006 in the Paper Book at pages 7 to 53. Clause 5 thereof deals with "Fee Payable". Clause 5.1 says that the licensee shall pay one time non-refundable entry fee of Rs. 2.50 crore before signing of the licence and clause 5.2 says that in addition to the entry fee, the annual licence fee including USO contribution @ 15% of Adjusted Gross Revenue (AGR) shall be payable. With effect from 01.01.2006, the annual licence fee including USO contribution shall be 6% of Adjusted Gross Revenue. The assessee has explained that Rs. 2.50 crore was treated as one time licence fee and accordingly the said amount which was paid for 20 years was adjusted @ 12.50 lacs per year and the said amount is being amortized every year under section 35ABB of the Act. The case of the assessee is that it is the "Annual Fees" every year at an agreed 6% of Gross Revenue which amounted to Rs. 3,90,40,000/- for AY 2010-11 which has been claimed as revenue expenditure as against Rs. 1,85,60,000/- of the preceding year. The assessee has contended that in three preceding AY(s) and in succeeding AY 2011-12 the said payment of licence fee has been allowed as revenue expenditure in

assessments completed under section 143(3) of the Act. A different view has been taken by the Ld. AO in AY 2010-11 presently under consideration. The contention of the assessee could not be controverted by the Ld. DR. In our view, a different approach without there being variation in facts or in law is not justified. The Ld. CIT(A) has placed reliance on the decision of Hon'ble Delhi High Court in Bharti Hexacom Limited (supra) as also on the decision of Delhi Tribunal in the case of M/s. MTNL reported in 8 SOT 376 for recording his findings in favour of the assessee with which we concur. Accordingly ground No. 1 of the Revenue is rejected.

6. Ground No. 2 relates to addition of Rs. 23,60,79,000/- under section 41(1) of the Act on account of unexplained creditors which stands deleted by the Ld. CIT(A). The Ld. AO has discussed this issue in para 6 of his order. He found that the assessee has shown sundry creditors at Rs. 23,60,79,000/- as on 31.03.2010 in Schedule 11 of Balance Sheet. He required the assessee to furnish the details in the format devised by him. The assessee furnished a list of sundry creditors comprising of their name and closing balance exceeding Rs. 1 lac. The Ld. AO again asked the assessee to furnish complete address, PAN and confirmation of creditors. This was not done. Once again the assessee was asked to furnish confirmation of creditors exceeding Rs. 5 lacs. This was also not done. Therefore, the Ld. AO made the impugned addition.

6.1 On appeal, the assessee submitted before the Ld. CIT(A) that the addition under section 41(1) cannot be made as trading liability did not cease. The Ld. CIT(A) enquired from the assessee about the payment to the creditors and the assessee submitted the details of payment made to those creditors in subsequent years. The break-up of repayments to creditors and the amount written back in subsequent years has been given by the Ld. CIT(A) in para 7.1 of his appellate order as under:-

| | Rupees | Rupees |
|---|---------------|---------------|
| Sundry Creditors as at 31.03.2010 | | 236,079,138/- |
| Payment made in subsequent years | | |
| FY-10-11 | 117,313,674/- | |
| FY-11-12 | 64,363,932/- | |
| FY- 12-13 | 7,684,562/- | |
| FY -13-14 | 6,191,492/- | |
| FY -14-15 | 3,542,494/- | |
| FY- 15-16 | 31,494,907/- | 230,591,062/- |
| Written back and taken into income subsequently | | |
| FY- 10-11 | 545,131/- | |
| FY- 11-12 | 1,431,498/- | |
| FY- 12-13 | 827,714/- | |
| FY- 14-15 | 2,456,277 | 5,260,620/- |
| Balance | | 227,456/- |

6.2 The Ld. CIT(A) allowed opportunity to the Ld. AO to examine and offer rebuttal if any on the factual correctness of the above details. The Ld. AO did not offer any comments. The Ld. CIT(A) presumed the factual correctness of the details which are also based on audited annual accounts of subsequent years.

6.3 The Ld. CIT(A) recorded his observations and findings which we reproduce hereunder:

“7.3 The AO had made an addition on the ground that confirmations, PAN , copies of Income Tax Return and complete address along with contra account from the books of creditors were not filed. This was the sole reason for making the addition. At the outset, an addition u/s 41(1) can be made only if a genuine trade liability has ceased to exist for the reasons mentioned in section 41(1) of the I.T. Act. If a particular liability is not genuine, the addition for the same is to be made in the year in which the corresponding expenditure was claimed and not in the year under appeal. To summarise, if the AO doubts the genuineness of opening balance of creditors and comes to a conclusion that the corresponding creditors are bogus i.e. the expenditures that led to creation of the credit balances in the books of the appellant were never incurred, the additions can be made only u/s 37(1) that too only in the year in which the expenditures were incurred. The addition u/s 41(1) can be made only if the credit balances are accepted as genuine and remission or cessation of the same has taken place or the said liability has ceased to exist in the year under appeal for the reasons mentioned in section 41(1). The majority of creditors are well established public sector undertakings or limited companies. Therefore, the question of identity of creditors cannot be questioned. The AO has not made the addition by holding that these liabilities ceased to exist during the

*year. The addition has been made by holding that the creditors were bogus. As held, the addition for bogus creditors cannot be made u/s 41(1). **Therefore, this addition could be deleted on that ground alone.** Still in order to give a fair chance to the AO , the evidence of repayment to creditors was called for by the undersigned and the said evidence, further strengthens the deletion of addition. The evidence also establishes that the creditors were genuine , so the addition of this amount could not have been made even in the years in which the corresponding expenditure was claimed u/s 37(1).*

7.4 Moreover, the amount involved pertains to Sundry Trade Creditors of large number. Individual amounts were not very large. Expecting an assessee to file copies of income tax return of Trade Creditors was not a reasonable demand and AO could have issued notices u/s 133(6) if he doubted the genuineness. Most of the balances pertain to established and well known entities like BSNL, MTNL, Bharti Airtel Ltd, HCT Info Systems Ltd, Tata Tele Services Ltd, etc and it was not difficult to do so. Therefore, as held, the liability to pay did not cease in A.Y. 2010-11. The appellant has made payments to creditors in subsequent years in most of the cases. Even in cases where it has not paid, the amount has been written off in subsequent years u/s 41(1). Consequently, the addition made is not justified and the ground no. 4 is allowed.”

6.4. The Revenue is aggrieved and is before the Tribunal.

7. The Ld. DR relied on the order of the Ld. AO. The Ld. AR submitted that the Ld. AO has disallowed the entire amount of sundry creditors as reported in the audited balance sheet in Schedule 11 under section 41(1) of the Act. He reiterated the same arguments which were advanced before the Ld. CIT(A) and supported the order of the Ld. CIT(A) relying on the decision of Hon'ble Delhi High Court in CIT vs. Hotline Electronic (2012) 18 taxmann.com 363 (Delhi); decision of Ahmedabad Bench of the Tribunal in ACIT vs. The Sandesh Limited in ITA Nos. 2920 & 2921/Ahd/2011 rendered on 20.04.2012 and decision of Jaipur Bench of the Tribunal in ITO vs. Shri Devendra Kumar Maloo in ITA No. 192/JP/2016 rendered on 25.04.2017.

8. We have carefully considered the submission of the parties and perused the records. The Ld. AO has added to the income of the assessee the entire amount standing in the name of sundry creditors as reflected in the Balance Sheet as on 31.03.2010 for want of submission by the assessee of details as per the format devised by him under section 41(1) of the Act. On

appeal, the Ld. CIT(A) obtained from the assessee details of re-payment to the creditors and the amounts written back in subsequent years. The Ld. CIT(A) allowed the Ld. AO reasonable opportunity to offer rebuttal, if any which the Ld. AO chose not to avail. Since the details were culled from audited annual accounts of subsequent years, the Ld. CIT(A) presumed the factual accuracy thereof.

8.1 The Ld. CIT(A) did not agree with the Ld. AO who made the impugned addition under section 41(1) of the Act. According to him, an addition under section 41(1) of the Act can be made only if a genuine trade liability has ceased to exist for the reasons enumerated in section 41(1) of the Act. We agree. The Ld. CIT(A) has recorded the finding that the Ld. AO has not made the impugned addition by holding that these liabilities ceased to exist during the year.

8.2 The Hon'ble Delhi High Court in Hotline Electronics Ltd. (supra) held that unless there is evidence to show that the creditor has remitted the debt or otherwise by operation of law the liability to pay him has ceased, there can be no benefit arising to the assessee within the meaning of clause (a) of section 41(1) and that unless notices were issued to the creditors and they had stated that they have given up the claims against the assessee, no decision can be taken by the income-tax authorities, merely on the ground that the debts remained unpaid in the assessee's books for a number of years, that the liability has ceased or has been remitted.

8.3 None of the conditions precedent for applicability of the provisions of section 41(1) is fulfilled in the case of the assessee. The Ld. AO was thereof not justified at all to invoke the provisions of section 41(1) to make the impugned addition and the Ld. CIT(A) has rightly observed that the impugned addition can be deleted on this ground alone.

8.4 The Ld. CIT(A) also observed that the Ld. AO has made the impugned addition by holding that the creditors were bogus. In our opinion the Ld. AO

was not justified in treating the entire trade creditors as bogus when majority of them were well-established public sector undertakings or limited companies e.g. BSNL, MTNL, Bharti Airtel Ltd., HCT Info-systems Ltd. and Tata Tele Services Ltd. etc. as observed by the Ld. CIT(A) whose identity cannot be questioned.

8.5 Accordingly, we endorse the findings of the Ld. CIT(A) that the liability to pay did not cease in AY 2010-11; payments were made to the creditors in subsequent years in most of the cases and that even in cases where the assessee has not paid, the amount has been written off in subsequent years. There is no substance at all in the Ground No. 2 of the Revenue which we hereby reject.

9. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on 24th April, 2023.

sd/-
(DR. BRR KUMAR)
ACCOUNTANT MEMBER

sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER

Dated: 24/04/2023

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Copy forwarded to -

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

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| Date on which the typed draft is placed before the dictating Member | |
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| Date on which the approved draft comes to the Sr. PS/PS | |
| Date on which the fair order is placed before the Dictating Member for | |

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| pronouncement | |
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