

**IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI**

**BEFORE SHIR PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER
ITA No. 6148/Mum/2018(A.Y: 2009-10)**

M/s ATC Telecom Infrastructure Pvt. Ltd (formerly known as Viom Networks Limited) 404, 4 th Floor, Skyline Icon, Andheri Kurla Road, Andheri, Mumbai-400059.	Vs.	DCIT Cir.-9 (1)(2) Room No.210, 2 nd Floor, Ayakar Bhavan, M.K.Road, Mumbai-400020.
PAN/GIR No. : AACCT1282E		
Appellant	..	Respondent

ITA No. 6777/Mum/2018(A.Y: 2009-10)

DCIT Cir.-9 (1)(2) Room No.210, 2 nd Floor, Ayakar Bhavan, M.K.Road, Mumbai-400020	Vs.	M/s ATC Telecom Infrastructure Pvt. Ltd (formerly known as Viom Networks Limited) 404, 4 th Floor, Skyline Icon, Andheri Kurla Road, Andheri, Mumbai-400059
PAN/GIR No. : AACCT1282E		
Appellant	..	Respondent

Appellant by :	Shri.P.J.Pardiwala and Shri Satyen Sethi. AR
Respondent by :	Smt. Shailja Rai.CIT DR

Date of Hearing	05.06.2023
Date of Pronouncement	12.06.2023

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The Cross appeal is filed by the assessee and revenue against the order of the Commissioner of Income-Tax (Appeal) -16, Mumbai (hereinafter "the CIT(A)") passed u/s 250 of the Income-Tax Act (hereinafter "the Act").

We shall take ITA No. 6148/Mum/2018 for A.Y. 2009-10 as lead case and the facts narrated. The Assessee has raised the following grounds of appeal as under:

"1. That on the facts and the circumstances of the case and in law, the Commissioner of Income tax (Appeals)-16, Mumbai [briefly "the CIT(A)"] has erred in upholding the disallowance of depreciation on the entirety of the opening WDV of assets acquired during the period November, 2007 to March, 2008.

1.1 That on the facts and the circumstances of the case and in law, the CIT(A) ought to have held that the depreciation allowable to the Appellant on the assets acquired during the previous year relevant to the assessment year 2008-09 should be allowed on the basis of their actual cost as reduced by depreciation actually allowable in the assessment framed for the assessment year 2008-09.

2. That on the facts and the circumstances of the case and in law, the CIT(A) has erred in holding that depreciation on shelter

was rightly allowed @10% as against 15% claimed by the Appellant.

2.1 That on the facts and the circumstances of the case and in law, the CIT(A) has erred in not admitting the additional evidence regarding the claim of depreciation on shelter allegedly for the reason that no formal application under Rule 46A of IT Rules, 1962 was filed.

3. That on the facts and the circumstances of the case and in law, the CIT(A) has erred in upholding following disallowance u/s 40(a)(ia) of the Act:

<i>i. Rent</i>	<i>– Rs 1,14,56,688/-</i>
<i>ii. Professional & Legal expenses</i>	<i>– Rs 3,89,70,100/-</i>
<i>iii. Warehouse rent</i>	<i>– Rs 3,44,70,120/-</i>
<i>iv. Warehouse handling</i>	<i>– Rs 2,87,43,786/-</i>

4. That on the facts and the circumstances of the case and in law, the CIT(A) has erred in upholding disallowance of Rs.2,04,89,263/- being the communication charges of Rs.1,41,68,262/- and employee cost of Rs.63,21,001/- paid to TTSL.

4.1. That on the facts and the circumstances of the case and in law, the CIT(A) has erred in not admitting the additional evidence regarding claim of deduction of Rs.2,04,89,263/- paid to TTSL allegedly for the reason that no formal application under Rule 46A of IT Rules, 1962 was filed.”

2. At the time of hearing the Ld.AR submitted that the assessee is not pressing the grounds of appeals no.3 & 4. Accordingly, the

grounds of appeals no.3 & 4 of the assessee are withdrawn and are dismissed.

3. The brief facts of the case are that, the Assessee company is (formerly known as Viom Networks Ltd) is engaged in the business of infrastructure sharing services, online information and data base access and other services. The assessee has filed the return of income for the assessment year 2009-10 disclosing a total loss of Rs 238,60,76,495/-. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act are issued. In compliance to notice, the Ld AR of the assessee appeared from time to time and submitted the details and the case was discussed. The AO on perusal of the financial statements found that (i) the assessee has claimed deduction/ Amortization of preliminary expenses u/s 35D and the explanations were called with regard to the nature of the expenses. The assessee has filed the details mentioning that the Amortization of 1/5 of the preliminary expenses being fee paid to the registrar of companies towards increase in authorized share capital and to the registrar of stamps. Whereas the AO found that this expenditure is not for registration of the company and there is no public subscription of shares and there being only a subsidiary company Tata Tele Services Ltd. Hence the expenditure cannot be amortized u/s 35D

and it is in the nature of a capital expenditure and disallowed the claim of Rs 40,95,600/-

4. (ii) on the second disputed issue, the assessee has purchased the business of Tata Tele Services and where as in the assessment year 2008-09 depreciation on assets claimed by the assessee company was disallowed as the company was formed by having off the passive infrastructure of Tata Tele Services Ltd by means of a slump sale and the block wise value was not determined. whereas the assessee company has submitted a letter dated 08.11.2011 mentioning that the closing WDV in the books of accounts Tata Tele Services was taken over by the assessee company and was disclosed as opening WDV in the books of account. The Assesseing officer dealt on this issue at Para 4.1 to Para 4.5 of the order and made the addition as under:

4.1 Accordingly, when it was put forth to the assessee, as what is the basis for arriving at the block wise values, the assessee company had submitted vide letter dt: 8/11/2011 that the closing WDV as in the books of TATA TELE SERVICES was taken the opening WDV in the books of this company To this extent, a letter from TATA Tele Services was submitted (annexure 1). However, the stand of the assessee is found to be against the facts The following discrepancies are noted in this regard

(a) The total sale value of the assets is shown at Rs.1068.92,83,907/- in the depreciation schedule of Tata Tele Services and in the notes below it is submitted that the slump sale to the assessee company is for a consideration of only Rs. 37 crores,

(b) The WDV of the assets transferred as on 31/10/2011 is stated to be Rs 817,93,52,339/- in the notes to the depreciation schedule of Tata Tele Services

(c) The opening WDV shown as result of the assets transferred from TTSL is shown at Rs. 846,19,70,201/-in the depreciation schedule of the assessee company (Annexure II)

(d) Apart from the assets transferred by the business transfer agreement, assets in the interim period of operations being commenced by the assessee company is shown at Rs. 99,65,57.302/-

4.2. Thus, the amounts shown as sale/deletions or mentioned as the written down values of transferred assets in the books of Tata Tele Services do not match with the opening written down values in depreciation schedule of the assessee company. No reasonable explanation has been given in this regard. Moreover, the block-wise details are not available as per the record of Tata Tele Services nor has it been furnished despite the issue coming up for discussion in all hearings and questionnaires issued dt: 28/7/2011, 8/11/2011, 12/12/2011 & 22/12/2011 sent along with notices u/s 142(1) Also, the basis for arriving the interim period asset values is also not explained.

4.3. Therefore, as no basis for working out the WDVS of the assets taken over from TATA TELE SERVICES having been provided, following the order u/s 143(3) for AY 2008-09, the depreciation on the assets acquired from TATA TELE SERVICES is disallowed for the year under consideration For ATC Telecom infrastructure

4.4. Also, in the order u/s 143(3) passed in A.Y. 2008-09, depreciation was also not allowed on the additions to fixed assets in that year under consideration, as no details of the same were submitted. Accordingly, following that order, since no new material has been submitted for the year under consideration, which justifies the amount of depreciation claimed with proof, the depreciation on assets added during A.Y. 2008-09 is also disallowed for the year under consideration.

4.5. In view of the discussion made in preceding paras in 4.1 & 4.2., the depreciation claimed on the Opening WDV shown in the depreciation table is disallowed. This amounts to Rs. 129,09,25,900/-, as worked out under. The same is added back to the income of the assessee company.

Block of Assets	Amount of Opening WDV as given by assessee	Rate of Depreciation claimed	Amount of Depreciation Claimed
Building/ lease hold improvements	440,11,12,074	10%	44,01,11,207
Computers & Hardware	2,071	60%	1,243
Furniture & fixtures	0	10%	0
Plant & Machinery	567,20,89,663	15%	85,0813,450
Motor Vehicles	0	15%	0
Total			129,09,25,900

5. (iii) On the third disputed issue, the AO found that assessee has not submitted the details of the fixed assets added/acquired during the year and the assessee has submitted only partial details. Subsequently, the assessee has filed details in the CD on 28-12-2012 and the AO observed that certain details were missing. Finally AO is of the opinion that assessee has claimed depreciation in respect of additions at different sites and the complete details of assets are not filed and restricted the depreciation claim and disallowed Rs.21.98 Crores. (iv) on the fourth disputed issue, the AO found that assessee has made additions to fixed assets during the year, since the assessee could not prove that the said assets are used for welspin infrastructure, hence disallowed the claim of depreciation claim of Rs 4,62,20,935/-.

6.(v) On the fifth disputed issue, the AO observed that the assessee has claimed the depreciation on the shelter at the rate of @15% treating as plant and machinery instead of building @10%, the assessee was called to explain reasons and also nature of the shelters and the functional utilities. The assessee has filed the explanations, but the A,O was not satisfied with the claim, and is of the opinion that the shelter cannot be equated to the plant & machinery and disallowed the excess claim of depreciation of Rs. 2,31,48,810/-(vi) the sixth disputed issue is with respect to

disallowance of claim on asset retirement obligation, where the assessee has claimed depreciation on this asset, which is included in the block of buildings. The AO has discussed on the facts at Para 8 of the order with respect to depreciation and observed that assets retirement obligation is not a specific asset and not utilized and made addition of Rs 76 lakh (vii) the seventh disputed issue that the assessee has not deducted TDS on Various expenditures hence the AO has made disallowance u/s 40(a)(ia) of the Act of Rs.11,36,40,694/-(viii) on the eight disputed issue, the A.O found that the assessee has not deducted TDS on rent paid to Tata Tele Services Ltd and disallowed the claim invoking the provisions of section 40(a)(ia) of the Act of Rs.20,03,57,294/-(ix) the A.O found that the Assessee has claimed communication charges and employee cost paid to Tata Tele Services, since no details were filed,the A.O made disallowance of Rs. 2,04,89,2/-63(x) the last disputed issue, that the assessee has claimed an amount of Rs 4,64,75,410/- paid to Tata capital Ltd as interest on term loan being a subsidiary company and the same was disclosed as part of related party transactions in the tax audit report. The AO found that the interest paid to Tata Capital services ltd is at the rate of @10.5% and whereas the Bank of Maharashtra has charged interest @ 9.75% on its term loan sanctioned. therefore the AO considered the fair market value of interest and made addition of

differential interest rate paid which works out to Rs.33,19,672/-. Finally the Assessing officer assessed the total loss of Rs.227,10,00,000/ and passed the order U/sec143(3) of the Act dated 30-12-2011. Subsequently, the rectification order u/s 154 of the Act was passed on 19.01.2012 determining a total loss of Rs45,64,28,294/-.

7. Aggrieved by the assesment order, the assessee has filed an appeal before CIT(A), whereas the CIT(A) has considered the grounds of appeals, submissions of the assessee, findings of the AO and provisions of Act and sustained the additions in respect of (i) disallowance of depreciation on opening WDV of assets acquired during year (ii) disallowance of depreciation on shelter and (iii) disallowance of expenditure u/sec40(a)(ia) of the Act. Further CIT(A) granted relief in the other grounds of appeal and partly allowed the assessee appeal. Aggrieved by the CIT(A) order, the assessee and the revenue has filed the appeal before the Honble Tribunal.

8. At the time of hearing, the Ld.AR submitted that the CIT(A) has erred in sustaining the addition in respect of the depreciation on WDV of assets acquired during the assessment year 2008-09 and further CIT(A) relied on the earlier year decision and sustained the addition. Whereas the Hon'ble Tribunal in the assessee's own case for the Assessment year 2008-09 on the

same disputed issue of claim of depreciation on WDV, granted relief to the assessee. On the second disputed issue with respect depreciation the rate @10% applied for shelters, the CIT(A) has sustained the disallowance and rejected the admission of additional evidence under rule 46A of the IT rules as no formal application was filed. The Ld. AR submitted that shelter is part of plant & machinery in the mobile towers and it has integrated working functions and cannot function independently and relied on the judicial decisions to allow the rate of depreciation as plant & machinery. Further the Ld.AR submitted that the assessee has a good case on merits on this disputed issue and has filed an application for admission of the additional evidence under Rule 29 of ITAT rules and prayed for admission of additional evidence and substantiated the submissions with the factual paper book and case laws and prayed for allowing the appeal. Per Contra, the Ld. DR submitted that the rate applicable to shelters @10% and it is separate asset and can function independently and filed chart. The Ld.DR supported the order of the CIT(A) on the disputed issues.

9. We heard the rival submissions and perused the material on record. The Ld.AR submitted that the CIT(A) has erred in sustaining the addition in respect of the depreciation on WDV of assets acquired during the assessment year 2008-09 and further

CIT(A) relied on the earlier year decision and sustained the addition. We find the Hon'ble Tribunal in the assessee's own case for the A.Y. 2008-09 in ITA No. 6366/Mum/2018 order dated 04.01.2023 dealt on the same issue and granted the relief to the assessee and observed at Page 9 Para 6.5 to 6.5.3 of the order read as under.

"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 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.”

In the present case the facts and circumstances are identical and we respectfully follow the judicial precedence and set-aside order of the CIT(A) on this disputed issue and direct the assessing officer to delete the disallowance and we allow the ground of appeal in favour of the assessee.

10. Further the Ld.AR submitted that the CIT(A) has erred in sustaining the disallowance of depreciation on shelters treating as plant &Machinery and also CIT(A) has erred in not admitting the additional evidence under rule 46A of the IT rules as no formal application was filed. The Ld. AR submitted that shelter is part of plant &machinery in the mobile towers and it has integrated working functions and cannot function independently and relied on the judicial decisions to allow the rate of depreciation as plant

&machinery.The Ld.AR referred to page 75 to 82 of the paper book containing the photographs of the shelter with circuit panels sheets , tower connections and electricity circuits directly and indirectly connected for functioning/operations. The assessee is engaged in the business of providing infrastructure facilities to cellular/telecom operators and involves process of receiving, amplifying and transmitting the signals require both active and passive infrastructure. Whereas the Ld.DR objected for treatment as plant &machinery and shelters cannot be treated on par with the cold storages and relied on the material to support as building and rate of 10% depreciation is allowed. The assessee is filling the application for admission of additional evidences under Rule 29 of ITAT rules with the documents being photo graphs of shelters and copy of MSA with the cellular /telecom operators which were not available earlier and could not produce before the lower authorities, which play a important role in decision making in the adjudicating proceedings. Therefore considering the facts, circumstances, charts, additional evidence and the factual paper book, we are of the opinion that the assessee should not suffer for non filing of material information, as the evidences played vital role in decision making and we admit the additional evidence

and the assessing officer should be provided opportunity to verify and examine the material evidences. Accordingly, to meet the ends of justice, we set aside the order of the CIT(A) on this disputed issue and restore the entire disputed issue along with the additional evidence to the file of the Assessing officer to examine the evidences and functional profile and decide afresh on merits and the assessee should be provided adequate opportunity of hearing and shall cooperate in submitting the information and we allow the grounds of appeal of the assessee for statistical purposes.

11. In the result, appeal filed by the assessee is allowed for statistical purposes.

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12. The revenue has raised the grounds Appeal 1 to 4 as under:

“1. Whether in the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing relief of Rs. 26.46 crores on the assets over and above the WDV of Rs.756.27 crores in view of the provisions of section 43(6)(c)(i)(C), as there is no provision to allow depreciation on the amount in excess of Actual Cost as per section 43(6)(c)(i)(C)

2. a) Whether in the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing relief to the assessee of

Rs. 21,98,50,033/- on the depreciation claimed of Rs. 35,29,75,625/- on the fixed assets added during the

b) Whether in the facts and in the circumstances of the case, the Ld. CIT(A) erred in not appreciating the fact that ample opportunity was provided by the A.O. to the assessee during the course of assessment proceedings to furnish details of assets against which depreciation is being claimed, but the assessee failed to furnish the same.

3. a) Whether in the facts and in the circumstances of the case, the Ld. CIT(A) erred in allowing relief on the depreciation on site restoration cost of Rs. 76,00,000/-

b) "Whether in the facts and in the circumstances of the case, the Ld. CIT(A) erred in not taking into consideration that the AO's observations that the assessee did not submit any basis on which the assessee had estimated the asset retirement obligation liability before charging it to P&L A/c

4. a) Whether in the facts and in the circumstances of the case, the Ld. CIT(A) erred in deleting disallowance of Rs.33,19,672/- out of interest expenses

b) Whether in the facts and in the circumstances of the case, the Ld. CIT(A) failed to appreciate that the A.O. was correct in comparing the rate of interest paid to Tata Capital which was @ 10.5%, whereas interest charged by the Bank of Maharashtra was @ 9.75%"

13. The first ground of appeal raised by the revenue challenging the relief granted by the CIT(A) on the assets over and above the WDV and there is no provision to allow depreciation on the amount in excess of Actual Cost as per section 43(6)(c)(i)C) of the Act. We find the CIT(A) has dealt at Para 4.2 of the order and granted the relief .We find the Honble Tribunal in the assessee own case for A.Y.2008-09 in ITA.no6366/Mum/2018 dated 4-01-2023 has dealt at Page 5 Para 6.3.2 of the order and upheld the decision of the CIT(A) on this disputed issue read as under:

“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.”

In the present case, the facts and circumstances are identical and we respectfully follow the judicial precedence and accordingly, we uphold the decision of the CIT(A) on this disputed issue and dismiss the ground of appeal of the revenue.

14. The second ground of appeal raised by the revenue challenging the relief granted by the CIT(A) on the depreciation on the fixed Assets added/acquired during the F.Y.2008-09 though ample opportunities were provided to the assessee to submit the details of assets in the assessee proceedings. The Ld.DR contentions are that the CIT(A) has not call for any report/comment of the A.O on the material submissions of the assessee in the appellate proceedings. We find the CIT(A) has dealt on these facts and submissions and grant relief dealt at Para 4.3 to 4.3.3 of the order read as under.

“4.3. Vide this ground appellant has agitated against the disallowance of depreciation of Rs 21,98,50,033/-, in respect of additions to fixed assets of Rs.1599 Cr. made during the year. In Para 5 of the assessment order learned AO had mentioned that

in respect of the additions to fixed assets, the appellant only submitted part information. According to the AO there was no description of the assets or the places on which the assets were capitalized. of total capitalization, the AO has disallowed depreciation of Rs.21,98,50,033/- for the reason that in the CD submitted by the appellant on 26.12.2011 during assessment proceedings in support of additions to fixed assets, certain details were missing and the CD furnished vide letter dated 28 12 2011 also did not provide the requisite information. The AO has stated that there was no description of assets or the places where the assets were installed. The AO further pointed out that the details simply mentioned air conditioner charges at site, battery bank / stabilizer charges, pre- fabricated shelters, infra works for various blocks, etc. According to the AO descriptions were provided only in respect of computers and hardware. In Para 5.3 of the assessment order, the AO has mentioned amount of disallowable depreciation on different assets in respect of which complete details were not furnished by the appellant. Out of disallowable depreciation of Rs.35,29,75,625/-, depreciation of Rs.13,31,25,592/- was stated to be already disallowed as part of disallowance of depreciation on opening WDV. Accordingly, depreciation of Rs.21,98,50,033/- was disallowed by the AO while finalizing the order u/s 143(3) of the IT Act.

4.3.1 The Appellant has submitted that the AO disallowed depreciation of Rs 21,98,50,033/- without going into the DR

submitted that the assessee has submitted details in the court proceedings and also referred to the fact at page 24 of the paper book and page 83 the assessee has filed the details of CV also the information before the CIT(A) and the CIT(A) has considered all these facts and where in allowed the claim of the assessee we found the facts related the CIT(A) has considered all the facts and information accordingly we do not find the merit in the ground of appeal raised by the revenue dismissed this ground of appeal of the revenue details furnished by the appellant in the form of CD submitted on 28.12.2011. A copy of CD was filed during the course of hearing along with hard copy of first 100 pages of fixed assets register available in CD which the details of descriptions and locations of the assets. A certificate duly signed by authorized signatory was also filed stating that the CD was a replica of the CR filed before the AO vide letter dated 28.12.2011. The was required to fash the affidavit to this effect and the same was filed. It was also submitted that the approach of the AO was incorrect as the details of all the assets were available in the CD submitted by the appellant. After referring to table of disallowance of depreciation, it submitted that there was huge difference in disallowance of depreciation of different equipments. On air conditioners, depreciation of Rs.3,84,27,001/- disallowed whereas on shelters & generators, disallowance of depreciation was only Rs 1.26,944/-& Rs 70,500/- respectively. Further, no disallowance was made in respect of depreciation on towers Taking average cost of shelters, generators and air conditioners, it was submitted that the AO had effect disallowed

depreciation on seven shelters, two generators and 3558 air conditioners. This approach of the AO was stated to be erroneous because in the business of passive infrastructure services, grant of depreciation is governed by the use of tower as a whole and not the use of the equipments individually. It was submitted that in this business, allowance or disallowance of depreciation was governed on tower to tower as a unit and not the individual assets.

4.3.2 It was further submitted that as per the working of AO, two towers were not capable of being used, if generators were taken as benchmark to disallow depreciation. It was further submitted that if shelters were taken as benchmark, then seven towers were not capable of being used and in case, air conditioners were taken as benchmark, then 3558 towers were not capable of being used. In case, electrical equipments were taken as benchmark to disallow depreciation, then more than 4000 towers could not have been leased out. In support of the installation of air conditioners lack of correlation in disallowance of depreciation on air conditioners and electrical equipments was emphasized by the appellant. It was submitted that huge differences in disallowance of depreciation on various equipments proved that equipment wise working of disallowance of depreciation was incorrect by the AO. It was submitted that since revenue from leasing of towers amounting to Rs 509.94 Cr. has been accepted, therefore, it was implicit that all the towers were capable of being

leased out. Appellant claimed that without installation of all the requisite equipments, no tower could have been leased out and no revenue could have been realized. In view of above facts it was submitted that depreciation of Rs 21.98,50,033/- was wrongly disallowed.

4.3.3 I have carefully gone through the submission of the Appellant and the reasons for disallowance of depreciation of It is clear from the assessment order that the AO allowed depreciation on the total capitalization on the basis of information submitted by way of CDs submitted by the appellant during the course of assessment proceedings. On going through the CDs, I find that it indeed contained details of descriptions and locations of the assets. The CD had columns such as, asset number, class of asset, date of capitalization, name of site where assets were installed including site location code, etc. The second argument of the Appellant stating that in the business of passive infrastructure services, piecemeal disallowance of depreciation with reference to individual equipment was impermissible is also relevant. Appellant cited the example of depreciation on motor vehicle and stated that depreciation is allowed on vehicle as a unit and not on individual machinery parts. Once leasing of towers is accepted, then in the same breath, it cannot be said that for the want of capitalization of different equipments towers were not complete. During the relevant previous year, the Appellant has declared service revenue from lease of towers of Rs.509.94 Cr., which in the preceding year was Rs. 135.58 Cr

only. Though for the assessment year 2008-09, revenue realized was Rs.135.58 Cr only, but it was only for the part period of 5 months. Even if it is taken as Rs.300 Cr for the 12 months period, still the increase in revenue for more than Rs.200 Cr is hard to be ignored. Going by disallowance of depreciation on air conditioners, it cannot be said that 3558 towers were not capable of being used. This number will further go up substantially, if disallowance of depreciation on electrical equipments is taken as the benchmark. It is also correct that air conditioners would be installed only after equipment has been already in position for use. Hence in disallowance of depreciation in respect to air conditioners and electrical equipment does show that disallowance of depreciation on various equipments is far from correct. It is important to point out that the learned AO has accepted the additional revenue of Rs. more than 200 crores which had not been earned without additional towers. Having accepted the service revenue from leasing of towers, the AO was not correct in disallowing depreciation not on the basis of towers but on the basis of individual equipments. Moreover, the reason of disallowance regarding non submissions of descriptions of sites by AO is also not factually correct. Necessary details regarding description and locations of sites on which assets were installed are very available in the CD filed by the appellant before the AO vide submission dated 28.12.2011. In this regard appellant filed an affidavit before the under signed stating that the above mentioned details were filed before the AO during course of assessment proceedings. Also keeping in view the facts

of the case and evidences furnished before the AO, and the appellate proceedings the AO is directed to allow depreciation of Rs 21,98,50,033/- and appeal of the assessee company on this ground is allowed.

15. The Ld.DR contentions are that the assessee has not filed the information and the CIT(A) should have provided the opportunity to the A.O. for the examination of claim. The Ld.AR Submitted that the necessary details of location where the assets were installed are provided in the assessment proceedings in the CD on 28-11-2011 due to voluminous information, the physical copies/papers could not be filed. The Ld.AR referred to the pages 111 to 113 of the Paper book-II, which are copies of letters mentioning submission of CD to the A.O. is filed and Ld.AR highlighted on the 100 pages of CD containing fixed asset register for the F.Y.2008-09 at pages 114 to 213. Further Ld.AR mentioned that only due to voluminous information, the details were filed in the CD and the assessee has filed the affidavit mentioning the information was filed and the CIT(A) considered these facts and granted the relief. Whereas the Ld. DR could not controvert the findings of the Ld. CIT(A) on this disputed issue with any new cogent material or information to take a different view, accordingly we uphold the decision of the CIT(A) on this disputed issue and dismiss the ground of appeal of the revenue.

16. The third ground of appeal raised by the revenue challenging the relief granted on the depreciation on the site restoration charges of Rs.76,00,000/- overlooking the facts that the assessee has not explained the basis of asset retirement obligation before debiting to the profit & Loss account. We find the CIT(A) has dealt at Para 4.6 of the order and deleted the disallowance. Whereas, the Ld.DR submitted this disputed issue was decided in favour of the revenue. We find the Honble Tribunal in the assessee own case for A.Y.2008-09 in ITA.no6366/Mum/2018 dated 4-01-2023 had dealt at Para 4.1 to 4.3 of the order and reversed the decision of the CIT(A) on this disputed issue. In the present case the facts and circumstances are identical and we respectfully follow the judicial precedence and restore the disallowance made by the assessing officer on site restoration cost and we allow the ground of appeal of the revenue.

17. The last ground of appeal challenged, were the CIT(A) has erred in deleting the disallowance of Rs.33,19,672/- out of interest expenses overlooking the facts that the assessee has paid interest to Tata Capital Ltd @10.5% and whereas the interest charged by the Bank of Maharashtra

was@9.75% We find that the CIT(A) has dealt on the facts, circumstances and granted relief observing at Para 4.10 to 4.10.3 of the order as under:

“4.10 Vide this ground, the Appellant has agitated against the disallowance of Rs.33,19,672/ out of interest expense of Rs.4,64,75,410/- as a result of scaling down of interest paid to Tata Capital Ltd (TCL) from 10.5% to 9.75%. In para 11 of the assessment order the learned AO had mentioned that the appellant had paid an amount of Rs. 4,64,75,410/- as interest to Tata Capital on term loan. The AO had further pointed out that interest charged by the Tata capital was at the rate of 10.5% per annum where as interest charged by the bank of was at rate of per annum on the term loan taken by the appellant. During the relevant previous year, the Appellant has taken loans from banks and TCL as under.

- (i) Loan from Bank of Maharashtra vide agreement dated 10.12.2008 @ 13.75% interest*
- (ii) Loan form Allahabad Bank vide agreement dated 17.3.2009 @ 12.50% interest.*
- (iii) Loan from TCL vide agreement dated 18.1.2008 @ 10.5% interest.*

(iv) *Loan from Bank of Maharashtra vide agreement dated 24.5.2008 @9.75% interest.*

4.10.1 On the loan taken from TCL, the Appellant paid interest of Rs.4,64,75,410/- Since loan from Bank of Maharashtra was taken at the interest rate of 9.75%, therefore, the learned AO restricted the interest to TCL at rate of 9.75%. Accordingly, out of interest expense of Rs4,64,75,410/-, disallowance of Rs.33,19,672/- was made by the AO while framing assessment

4.10.2 During the appellate proceedings, it was submitted that the disallowance was made by invoking the provisions of section 40A(2)(a) of the Act. The crux of the submissions is that interest rate prevailing in the market was 9.75% to 13.75% per annum. It was further submitted that since loan from TCL was taken at lower rate than the average market rate, therefore, proportionate disallowance made by adopting interest rate at 9.75% was without any justification. 4.103 I have carefully considered the submissions of the Appellant and the reasons recorded by the AO. Merely because one of the loan was at a rate less than the rate at which loan from related party was taken is no ground to hold that undue benefit has been extended by the Appellant to the persons mentioned in section 40A(2)(b). Admittedly, loans from two other banks which were in public sector were taken at a high interest rate than the rate of interest paid to TCL. Since the prevailing rate of interest charged by the public sector banks varied from 9.75% to 13.755, therefore, even if, criteria of average interest are adopted,

still no disallowance was called for. It cannot be said that higher interest was paid by the Appellant on account of relationship with TCL. In the circumstances, no inference of undue benefit to TCL, can be raised. Therefore, disallowance of Rs 33,19,672/- is deleted.

18. The Ld.DR contentions are that the Assessing Officer has considered the facts of loan transaction between related party and the assessee, further the interest charged by the bank and the fair market value of the interest payable and made differential disallowance. The Ld.AR has referred to the Audited Balance Sheet placed at Page 90 of the paper book and in particular highlighted on the Schedule 3 of secured loans under the Loan Funds were Long term loans from the financial institutions and banks are disclosed and at page 103 of the paper book notes forming part of Balance sheet and Profit and loss account at S.no 6 describing the nature, terms and tenure of loans and short term loan from M/s Tata Capital Limited was repaid in January 2009 and no unsecured loan is outstanding as on 31-03-2009. The Loans from the PSU bank interest rate range from 9.75% to 13.75% and were as Loan was obtained from the Tata Capital Ltd is @10.5% which is within the range. We find the CIT(A) has dealt elaborately in the Para 4.10.3 of the order and deleted the addition. Whereas the Ld.DR could not controvert the

findings of the Ld. CIT(A) on this disputed issue with any new cogent material or information to take a different view, accordingly we uphold the decision of the CIT(A) on this disputed issue and dismiss the ground of appeal of the revenue.

19. In the result, the appeal filed by the revenue is partly allowed and the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 12.06.2023.

Sd/-
(S RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 12.06.2023
AR, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)
4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, अहमदाबाद / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//()

1.

ITA No. 6777,6148/Mum/2018
M/s ATC Telecom Infrastructure Pvt Ltd.

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(Asst. Registrar)
ITAT, Mumbai