

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH, 'A': NEW DELHI**

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER**

**&**

**SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.1110 to 1113/Del/2023**

**[Assessment Year: 2016-17 to 2019-20]**

<b>DCIT Circle 4 (2) New Delhi</b>	<b>Vs</b>	<b>Bharti Hexacom Ltd. Bharti Crescent 1 Nelson Mandela Road, Vasant Kunj, Vasant Kunj, South West, Delhi-110070 PAN No.AAACH1766B</b>
Appellant		Respondent

Appellant by	Ms. Nimisha Singh, CIT DR
Respondent by	Sh. Ajay Vohra, Sr. Advocate Sh. Rohit Jain, Advocate Sh. Deepesh Jain, Advocate Sh. Shivam Gupta, Advocate

<b>Date of Hearing</b>	<b>18.09.2025</b>
<b>Date of Pronouncement</b>	<b>12.12.2025</b>

**ORDER**

**PER C.N. PRASAD, JM,**

All these appeals are filed by the revenue against the order of the learned CIT(A) / NFAC, Delhi dated 16.02.2023 and 17.02.2023 for Assessment Years 2016-17 to 2019-20.

2. First we take up the appeal for A.Y.2016-17 wherein the revenue has raised following grounds :-

“1. Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by allowing the license fee on revenue sharing basis after July 31, 1999 to be treated as revenue expenditure ignoring the fact that Revenue has filed SLP before Hon'ble Apex Court against the order of Hon'ble Delhi High Court for A. Y.2003-04, 2004-05, 2006-07 and 2007-08 in ITA Nos. 1328/2010, 1336/2010, 114/2012 and 996/2011 (consolidated order) dated 19.12.2013 on the very same issue and which is still pending adjudication before the Supreme Court.

2. Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the addition made by AO on account of disallowance of subscriber verification penalty by ignoring the fact that Revenue has filed appeal before the Hon'ble ITAT against the above decision of CIT(A) in AY 2012-13, AY 2013-14 and AY 2014-15 and AY 2015-16 which is still pending adjudication.

3. Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the disallowance under section 40(a)(ia) representing free airtime given as discount to the distributors on maximum retail price of prepaid coupons ignoring the fact that further appeal u/s 260A was recommended and appeal before Hon'ble Delhi High Court was filed in assessee's own case for A. Y.2004-05, 2005-06, 2006-07 and 2008-09 against the orders of the Hon'ble ITAT (Composite order in ITA Nos. 1623/D/2013 (for A. Y. 2004-05) & 1624/Del/2013 (for A.Y.2005-06) Dated: and 26.07.2016 Nos.3394/D/2012(for composite A. order in Y.2008-09) ITA & 2899/Del/2013(for A. Y.2006-07) filed by assessee and ITA No.2795/Del/2012(for A. Y.2008-09) filed by Revenue).

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

3. Brief facts are that the assessee filed its return of income on 26.11.2016 electronically declaring income of Rs.1450,15,02,290/- and the assessment was completed under Section 143(3) on 30.12.2019 determining the income of the assessee at Rs.1967,86,66,900/-. In the course of assessment proceedings the AO noticed that the assessee debited the above said payment towards license fees and spectrum charges to its profit and loss account. The assessee was show caused to explain why the license fees and spectrum charges claimed as revenue expenditure should not be treated as capital in nature and accordingly deduction u/s.35ABB

should be allowed. The assessee furnished detailed reply which the AO extracted in order in pages 2 to 4 wherein the assessee contended that the issue stands decided in assessee's favour in earlier years by the Hon'ble High Court of Delhi for the A.Y. 2003-04 to 2007-08 and the decision of the Tribunal in assessee's own case for A.Y. 2008-09 and 2009-10 wherein the Hon'ble Delhi High Court held that the license fee on revenue sharing basis after 31.07.1999 should be treated as revenue expenditure and is allowable u/s.37(1) of the Act.

4. However, the AO rejected the explanation of the assessee for the reason that the revenue did not accept the decision of the Hon'ble High Court of Delhi and SLP has been filed and is pending for adjudication. Accordingly, the AO amortized variable license fee and made net addition of Rs.543,35,81,005/- by allowing Rs.53,37,03,706/- as revenue expenditure u/s.37(1) of the Act.

5. The AO also disallowed subscriber verification penalty paid by the assessee to Department of Telecom treating the said payment as not allowable expenditure u/s. 37(1) of the Act.

6. The AO also disallowed free Air time charges allowed to distributors u/s. 40(a)(ia) for non deduction of TDS u/s. 194H of the Act by treating the said amount as commission expenses.

7. On appeal the learned CIT(A) following the decision of the Hon'ble Delhi High Court in assessee's own case for the A.Ys. 2003-04 to 2009-10 deleted the license fee and spectrum

charges which are amortized by the AO u/s. 35ABB, and allowed as revenue expenditure. The Learned CIT(A) also deleted the disallowance made by the AO in respect of subscriber verification penalty by following various decisions. The Ld. CIT(A) also deleted the disallowance made by the AO u/s. 40(a)(ia) in respect of discount allowed by the assessee to prepaid card distributors following the decision of the Hon'ble Karnataka High Court and also the decision of Guwahati Bench of Tribunal in assessee's case for A.Y. 2006-07 to 2010-11 in ITA No.258 to 262/Gau/2013 dated 29.06.2015.

8. The learned Senior Counsel for the assessee Shri Ajay Vohra appearing for the Assessee, at the outset, submitted that in so far as license fee is concerned (other than spectrum usage charges SUC) the issue is covered against the assessee by the Hon'ble Supreme Court in the decision of CIT Vs. Bharti Hexacom Ltd., in assessee's own case reported in 458 ITR 593 which is placed at pages 283 to 411 of paper book and in view of this decision of Hon'ble Supreme Court he submits that the license fee is thus required to be amortized as per section 35ABB of the IT Act.

9. Coming to spectrum usage charges the Ld. Counsel for the assessee stated that the Hon'ble Apex Court in the case of CIT Vs. Bharti Hexacom (supra) deals with only allowability of license fee and not spectrum usage charges. Therefore, it is submitted by the learned Counsel that the decision of Hon'ble Supreme Court in the case of CIT Vs. Bharti Hexacom will not apply to the spectrum usage charges.

10. The Learned Counsel for the assessee further stated that in the scrutiny assessment for subsequent assessment years i.e. A.Y. 2021- 22 to 2022-23 the AO expressly segregated the license fee and SUC and allowed the SUC as revenue deduction in the completed assessments and copies of the assessment orders are placed at pages 542-560 for the A.Y. 2021-22 at pages 561-581 for the A.Y.2022-23 respectively. The Ld. Counsel further stated that recently the Delhi Bench of the Tribunal in assessee's sister concern's reported as *Bharti Airtel Ltd. Vs. PCIT (2025) 171 taxman.com 754* has allowed similar SUC as revenue expenditure taking cognizance of the fact that the same has been allowed as revenue expenditure by the AO. The Ld. Counsel further stated that the Hon'ble Delhi High Court in the case of ***CIT Vs. Fascel Ltd. (221 CTR 305)*** held that SUC, Wireless Planning Commission charges are allowable as revenue charges. He also stated that similar view has been taken by the Hon'ble Delhi Bench in the case of *ACIT Vs. Vodafone West Ltd. (2025) 173 taxmann.com 585* wherein Wireless Planning Charges Commission which are similar to SUC are held to be allowable as revenue expenditure. Therefore, the Learned Counsel for the assessee submitted that the issue of allowability of SUC as revenue expenditure is covered in favour of the assessee and appeal of the revenue to that extent is liable to be dismissed.

11. Coming to the subscriber verification penalty which is ground No.2 of grounds of appeal of the revenue, the Ld. Counsel stated that the issue is covered in favour of the

assessee in assessee's own case in ITA No. 3522/Del/2019 dated 16.06.2023 for the A.Y. 2015-16 and a copy of the Tribunal's order is placed at pages 258 to 271 of the paper book. The Ld. Counsel stated that the issue is also covered in favour of the assessee in assessee's own case in ITA No.6547 and 6548/Del/2019 dated 19.07.2023 for the A.Y. 2013-14 and 2014-15 a copy of the order is placed at pages 272-282. Referring to these decisions the Learned Counsel for the assessee submitted that the Tribunal deleted the disallowance made u/s.37(1) in respect of subscriber verification penalty observing that the disallowance of expenditure made by the AO is in relation to penalty paid to the department of telecom for violation of KYC norms and that the payment made for violation of KYC norms could not fall within the ambit of Explanation 1 to Section 37(1) of the Act.

12. Coming to discount on prepaid instruments i.e. the disallowance under Section 40(a)(ia) for non deduction u/s. 194H of the Act, the Learned Counsel for the assessee submitted that the issue is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of ***Bharti Cellular Ltd. Vs. ACIT (2024) 160 taxmann.com 12*** wherein the Hon'ble Apex Court held that no TDS u/s. 194H of the Act is applicable on such discounts. The Ld. Counsel further stated that the issue is also decided by the Tribunal in assessee's own case for the A.Y.'s 2013-14 to 2015-16 in ITA No. 3522/Del/2019 dated 16.06.2023 and ITA No. 6547 and 6548 /Del/2019 dated 19.07.2023.

13. On the other hand the Ld. DR strongly placed reliance on the orders of the authorities below. The Ld. DR further submits that the Hon'ble Supreme court in the case of **CIT Vs. Bharti Hexacom (458 ITR 593)** held that license fee cannot be allowed as revenue expenditure u/s. 37(1) of the Act. The Ld. DR further submitted that the Supreme Court vide judgment dated 16th October, 2023 in the matter of CIT, Delhi vs. Bharti Hexacom Ltd. (Civil Appeal No. 11128 of 2016) held that the telecom operators' variable annual licensing fee paid under the 1999 Policy is a capital expense that must be amortized in accordance with section 35ABB of the Income Tax Act. This ruling has clarified the long-running conflict of several telecom providers.

14. It is submitted that section 4 of the Telegraph Act grants a single license for the establishment, upkeep, and operation of telecommunications services. The license fee is allocated as capital expenditure and revenue expenditure without any legal justification because the license is not provided for divisible rights that envisioned divisible payments. In order to classify the nature of the expense, the Supreme Court used the "Nature of Original Obligation" test to determine the nature of the variable annual license fee. It held that it is crucial to consider whether the subsequent payment made in installments has a direct connection to the original obligation.

15. The Supreme Court has further observed that capital expenditure does not always bring into existence an asset for the enduring benefit of the trade. The nature of the advantage acquired has to be considered in the commercial sense; only

when the advantage is in the capital field, deduction on the said expenditure could be disallowed by applying the enduring benefit test. If the advantage consists merely of facilitating trading operations or enabling the effective or profitable management or conduct of business, while leaving the fixed capital untouched, the said expenditure would be on the revenue account, though the advantage may endure for an indefinite period. Thus, the Supreme Court has laid the principle that the enduring benefit test is not conclusive and cannot be mechanically applied without considering the commercial aspects of the transaction. It was also held in the above cited judgment that the nature of payment that was made for the same purpose cannot have different characterization merely because of change in the manner of the payment. The High Court is not right in apportioning the expenditure partly as capital expenditure and partly as revenue expenditure. In view of the above, the one-time entry fee as well as the variable annual license fee paid by the taxpayer under the Policy of 1999 are capital in nature and will be amortized in accordance with section 35ABB of the Act.

16. Heard rival submissions, perused the orders of the authorities below and the case laws relied on.

17. Ground No.1 of the grounds of appeal raised by the revenue with regard to license fee and the spectrum charges is as under :-

*“1. Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by allowing the license fee on revenue sharing basis after July 31, 1999 to be treated as revenue expenditure ignoring the fact that Revenue has filed SLP before*

*Hon'ble Apex Court against the order of Hon'ble Delhi High Court for A. Y.2003-04, 2004-05, 2006-07 and 2007-08 in ITA Nos. 1328/2010, 1336/2010, 114/2012 and 996/2011 (consolidated order) dated 19.12.2013 on the very same issue and which is still pending adjudication before the Supreme Court."*

18. On perusal of the decision of the Hon'ble Apex Court in the case of ***CIT Vs. Bharti Hexacom reported in 458 ITR 593***, we observed that the issue before the Hon'ble Apex Court was whether the variable license fee paid by the assessee to the Department of Telecommunications under the new Telecom policy of 1999 is revenue expenditure in nature and is allowable deduction u/s.37 of the Act or whether the same is capital in nature and shall be amortized u/s.35ABB of the Act. The Hon'ble Apex court held that the payment of entry as well as variable annual license fee paid by the assessee to the Department of Telecommunications ("DoT") under the policy of 1999 is capital in nature and should be amortized in accordance with Section 35ABB of the IT Act.

19. Further we observed that the issue before the Hon'ble Apex Court was only with regard to variable license fee, other than spectrum usage charges ("SUC") and whether such expenditure is allowable as revenue or capital in nature. The Hon'ble Apex Court did not deal with the issue of SUC as the same was not an issue before their lordships. Therefore, respectfully following the Apex Court decision in the case of ***CIT Vs. Bharti Hexacom (supra)*** we hold that the variable license fee paid by the assessee to DoT under New Telecom policy of 1999 is capital in nature and to be amortized u/s. 35ABB of the Act. To this extent we reverse the findings of the

Ld. CIT(A) and partly allow ground No.1 of the grounds of appeal of the revenue.

20. Coming to spectrum usage charges (“SUC”), the decision in the case of **DCIT Vs. Bharti Hexacom (supra)** is not applicable since the decision deals with only allowability of license fee and not SUC. We further observed that the issue of allowability of spectrum usage charges as revenue expenditure is covered in favour of the assessee in assessee’s sister concern case reported as **Bharti Airtel Ltd. Vs. PCIT (supra)** wherein the Tribunal held as under :-

*“10.5 At the same time, after taking into consideration the judgment of the Hon’ble Supreme Court in Bharti Hexacom's case (supra), we are of the considered view that allowability of interest/penalty in the context of AGR issue was not in issue are of the considered evolved around the determination of validity of Hon'ble Delhi High Court holding a part of the license fee to be capital expenditure and part to be revenue expenditure. The Hon'ble Delhi High Court had held that the license fee payable up to 31 July 1999 should be treated as capital expenditure which is to be amortised under section 35ABB of the Act, and the variable annual license fee payable on revenue sharing basis after 1 August 1999 should be treated a revenue expenditure and in that context only the Hon'ble Supreme Court had examined the agreement signed under the Policy of 1994 letter issued by the DOT proposing the migration to the Policy of 1999 and the amendments made to the existing license agreement with effect from 1 August 1999 and laid down that variable annual license fee to be paid on the basis of the annual gross revenue. It was held that the reliance placed by the Hon'ble High Court in cases of Jonas Woodhead and Sons India Limited v. CIT 91 Taxman 1/224 ITR 342 (SC)(SC); CIT v. Best and Co [1966] 60 ITR 11 (SC); Southern Switch Gear Limited v. CIT 232 ITR 359 (SC) was misplaced, as these cases do not deal with a single source or purpose to which the payments in different forms have been made. The purpose of the payments in the said case was traceable to different subject matters. In the instant case, the*

*license issued under section 4 of the Telegraph Act is a single license issued for establishing, maintaining and operating the telecommunication services. The license is not granted for divisible rights that conceived divisible payments; hence, the apportionment of license fee as capital expenditure and revenue expenditure is without any legal basis. The High Court decision would have sustained if the facts were such that, even if the taxpayer does not make the payment of variable annual license fee based on the annual gross revenue, the taxpayer would be able to hold the right for establishing the network and running the business. The fact that the failure to pay the variable annual license fee will lead to revocation of the license vindicates the legal position that the said fees is paid towards the right to operate the telecommunication services. Although the license fee is paid in a deferred manner, the nature of the payment flowing from the licensing conditions cannot be re-characterised. A single transaction cannot be split up in an artificial manner into capital payment and revenue payment by simply considering the mode of payment, as this will contradict the settled position of law and the Supreme Court decisions, which suggest that payment in installments does not change the capital payment into revenue payment. When a payment is made in two parts, ie. lump sum payment and the payment in instalments, the nature of the two payments would be distinct only when the periodic payments have no nexus with the original obligation. In the instant case, the successive payment of variable annual license fee has the nexus with the original obligation, i.e. consideration for the right to establish, maintain and operate telecommunications services. The taxpayer has been granted a composite right relating to establishing, maintaining and operating the telecommunication services. The said right cannot be artificially bifurcated into right to establish telecommunication services on one hand and right to maintain and operate telecommunication services on the other. Such bifurcation is contrary to the terms of the licensing agreement, and the Policy of 1999 and the nomenclature and manner of payment irrelevant. It is noteworthy that, even under the Policy of 1994, the consideration for the license was bifurcated in two parts. A fixed payment in first three years of the license regime and a variable payment from the fourth year of the license regime onwards based on the number of subscribers and subject to prescribed of 1994 were treated as capital and were duly amortised. There is no*

*basis of reclassifying the under the new Policy of 1999. The nature of payment that was made for the same purpose cannot have different characterization merely because of change in the manner of the payment. The High Court is not right in apportioning the expenditure partly as capital expenditure and partly as revenue expenditure. In view of the above, the one-time entry fee as well as the variable annual license fee paid by the taxpayer under the Policy of 1999 were held capital in nature and were to be amortised in accordance with section 35ABB of the Act. It is pertinent to mention that these very findings have been considered by the PCIT and reproduced on page 87 of the impugned order and have been made basis to form a different opinion, as formed by AO.*

*10.6 We are of considered view that aforesaid conclusions in Bharti Hexacom's case (supra), have been considered out of context by the PCIT thus there was inherent fallibility in the approach of PCIT to examine the question with regard to taxability of interest/penalty as payable by the assessee under the license agreement entered into between the assessee and the Department of Telecommunication by reference the judgement of the Hon'ble Supreme Court in Bharti Hexacom's case (supra). Thus on this aspect alone the direction of PCIT are liable to be quashed.*

*10.7 Still to examine the issue, for completeness, we will like to reproduce the relevant clauses of agreement, copy of which is available at page no.368 to 3752 of PB Volume III, here in below:-*

*"10. Suspension, Revocation or Termination of License;*

*10.2(1) The LICENSOR may, without prejudice to any other remedy available for the breach of any conditions of LICENSE, by a written notice of 60 Calendar days from the date of issue of such notice to the LICENSEE at its registered office, terminate this LICENSE under any of the following circumstances:*

*If the LICENSEE:*

*(a) fails to perform any obligation(s) under the LICENSE including timely payments of fee and other charges due to the LICENSOR;*

*(b) fails to rectify within the time prescribed any defect/deficiency/correction in service/equipment as may be pointed out by the LICENSOR*

*(c) goes into liquidation or ordered to be wound up.*

*(d) is recommended by TRAI for termination of LICENSE for noncompliance of the terms and conditions of the LICENSE"*

### **PART-III FINANCIAL CONDITIONS**

#### **18. FEES PAYABLE:**

##### **18.1 Entry Fee:**

*No additional entry fee shall be charged from CMSPs for migration to UASL.*

##### **18.2 License Fees:**

*The Licensee shall pay License fee annually @ 10% of Adjusted Gross Revenue (AGR), excluding spectrum charges. Separate spectrum charges would be required to be paid by the licensee.*

*The Licensor reserves the right to modify the above mentioned License Fee at any time during the currency of this Agreement.*

##### **18.3 Radio Spectrum Charges:**

*18.3.1 In addition to the license fee as per clause 18.2, the Licensee shall pay spectrum charges on revenue share basis of 2% of AGR towards WPC Charges covering royalty payment for the use of cellular spectrum upto 4.4 MHz 4.4 MHz and License fee for Cellular Mobile handsets & Cellular Mobile Base Stations and also for possession of wireless telegraphy equipment as per the details prescribed by Wireless Planning & Coordination Wing (WPC). Any additional band width, if allotted subject to availability and justification shall attract additional License fee as revenue share (typically 1% additional revenue share if Bendwidth allocated is upto 6.2 MHz 6.2 MHz in place of 4.4 MHz + 4.4 MHz).*

*18.3.2 Further, royalty for the use of spectrum for point to point links and access links (other than Cellular Service Spectrum) shall be separately payable as per the details and prescription of Wireless Planning & Coordination Wing. The fee/royalty for the use of spectrum /possession of wireless telegraphy equipment*

*depends upon various factors such as frequency, hop and link length, area of operation etc. Authorization of frequencies for setting up Microwave links by Cellular Operators and issue of Licenses shall be separately dealt with WPC Wing as per existing rules*

*18.3.3 The above spectrum charge is subject to unilateral review by WPC Wing from time to time which shall be binding on the licensee.*

*19. Definition of 'Adjusted Gross Revenue':*

*19.1 Gross Revenue :*

*The Gross Revenue shall be inclusive of installation charges, late fees, sale proceeds of handsets (or any other terminal equipment etc.), revenue on account of interest, dividend, value added services, supplementary services, access or interconnection charges, roaming charges, revenue from permissible sharing of infrastructure and any other miscellaneous revenue, without any set-off for related item of expense, etc*

*19.2 For the purpose of arriving at the "Adjusted Gross Revenue (AGR)" the following shall be excluded from the Gross Revenue to arrive at the AGR:*

*1. PSTN related call charges (Access Charges) actually paid to other eligible/entitled telecommunication service providers within India;*

*II. Roaming revenues actually passed on to other eligible/entitled telecommunication service providers, and III. Service Tax on provision of service and Sales Tax actually paid to the Government if gross revenue had included as component of Sales Tax and Service Tax*

*20. Schedule of payment of ANNUAL LICENSE FEE and other dues:*

*20.1 For the purposes of the License Fee, the 1st year shall end on 31st March following the date of commencement of the License Agreement and the License fee for the First year shall be determined on a pro-rata basis for the actual duration of the "year". From second year onwards, the year shall be of Twelve English calendar months from 1st of April to the 31st March for payment of License Fee*

*EXPLANATION: The License fee for the last quarter of the first year and last quarter of the last year of the*

*License will be computed with reference to the actual number of days after excluding the other quarters, each being of three months*

*20.2 License Fee shall be payable in four quarterly installments during each financial year (FY). Quarterly installment of license fee for the first three quarters of a financial year shall be paid within 15 days of the completion of the relevant quarter. This Fee shall be paid by the LICENSEE on the basis of actual revenue (on accrual basis) for the quarter, duly certified with an affidavit by a representative of the LICENSEE, authorized by the Board Resolution coupled with General Power of Attorney. However, for the last quarter of the financial year, the LICENSEE shall pay the License Fee by 25th March on the basis of expected revenue for the quarter, subject to a minimum payment equal to the actual revenue share paid of the previous quarter.*

*20.3 The LICENSEE shall adjust and pay the difference between the payment made and actual amount duly payable (on accrual basis) for the last quarter of financial year within 15 days of the end of the quarter.*

*20.4 The quarterly payment shall be made together with a STATEMENT in the prescribed form. Quarterly STATEMENTS of each year shall be required to be audited by the Auditors (hereinafter called LICENSEE'S Auditors) of the LICENSEE appointed under Section 224 of the Companies Act, 1956. The report of the Auditor should be in prescribed form as Annexure-II.*

*20.5 Any delay in payment of License Fee payable, or any other dues payable under the LICENSE beyond the stipulated period will attract interest at a rate which will be 5% above the Prime Lending Rate compounded monthly and a part of the month shall be reckoned as a full month for the purposes of becoming due. The interest calculation of interest. A month shall be reckoned as an English calendar month*

*20.6 Final adjustment of the License fee for the year shall be made based on the gross revenue figures duly certified by the AUDITORS of the LICENSEE in accordance with the provision of Companies Act 1958.*

*20.7 A reconciliation between the figures appearing in the quarterly statements submitted in terms of the clause 20.4 of the agreement with those appearing in annual accounts shall be submitted along with a copy*

*of the published annual accounts audit report and duly audited quarterly statements, within 7 (seven) Calendar days of the date of signing of the audit report. The annual financial account and the statement as prescribed above shall be prepared following the norms as prescribed in Annexure.*

*20.8 In case, the total amount paid as quarterly License Fee for the 4 (four) quarters of the financial year, falls short by more than 10% of the payable License Fee, it shall attract a penalty of 150% of the entire amount of short payment. However, if such short payment is made good within 60 days from the last day of the financial year, no penalty shall be imposed. This amount of penalty shall be payable within 15 days of the date of signing the audit report on the annual accounts, failing which interest shall be further charged per terms of Condition 20.5*

*20.9 The Fee/royalty payable towards WPC Charges shall be payable at such time(s) and in such manner as the WPC Wing of the DoT may prescribe from time to time.*

*20.10 All sums becoming due and payable as mentioned in this License Agreement shall be paid by the LICENSEE through a demand draft or Pay Order payable at New Delhi, drawn on any Scheduled Bank, in favour of the Pay & Accounts Officer (HQ), DOT or any other Authority if so designated by LICENSOR*

*20.11 The LICENSOR, to ensure proper and correct verification of revenue share paid, can, if deemed necessary, modify, alter, substitute and amend whatever stated in Conditions 20.4, 20.7, 22.5 and 22.6 hereinbefore and hereinafter written.*

*20 12 The LICENSEE shall separately pay the access charges for carriage of calls originating in its network but carried and terminated in the Other Service Providers' networks. The LICENSEE shall also separately pay charges for network resources obtained by the LICENSEE from other licensed service providers. This will be governed by the determination of TRAI if any."*

*10.8 After taking into consideration the aforesaid relevant clauses, we are of the considered view that the interest and penalty clauses are enshrined in the license agreement as compensatory mechanism for delayed payment of three components i.e entry fee,*

*license fee and charges. Charges is not specifically defined but when we take into consideration the aforesaid clauses we find that apart from entry fee and license fee the Licensee was supposed to pay Radio Spectrum Charges and royalty for the use of spectrum for point to point links and access links. These charges admittedly were considered as revenue expenditure. Thus sub clause 10.2 mentions that for delayed payment of fee and other charges due to this provision of clause of termination of license can be invoked. It is very much apparent from the clause of license agreement that the interest is payable on the quantum of delayed payment of license fee determined as per the license agreement. Penalty is payable in case the total amount paid as quarterly License Fee for the 4 (four) quarters of financial year, falls short by more than 10% of the payable License Fee. Delayed payment of penalty shall also be liable to interest.*

21. We also further observed that Delhi Bench of ITAT in the case of CIT Vs. Vodafone West India Ltd. (supra) by following the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Fascel Ltd. (supra) Wireless Planning Commission charges are held to be revenue expenditure by observing as under :-

*18. The Revenue's third substantive ground seeks to revive the Assessing Officer's action disallowing the assessee's royalty and Wireless Planning Commission (WPC) charges treated as capital expenditure in the course of assessment and deleted in the CIT(A)'s lower appellate order. Suffice to say, it emerges herein as well that this tribunal in Vodafone Idea Ltd. case [2017] 83 taxmann.com 7 (Delhi - Trib.) (Del.) has followed CIT v. Fascel Ltd. [2009] 221 CTR 305 (Delhi) whilst concluding such expenses as revenue in nature only.*

22. We further observed that in assessee's own case for the A.Y. 2022-23 the AO while completing assessment u/s. 143(3) r.w.s. 144B dated 26.03.2024 considered only variable license fee for disallowance and amortized u/s. 35ABB excluding the spectrum usage charges of Rs.221,92,14,889/-from out of Rs.571,81,77,034/- and spectrum charges were considered as

revenue expenditure u/s. 37(1) of the Act. In view of the above we hold that the spectrum usage charges (SUC) are allowable as revenue expenditure. To that extent ground No.1 of appeal of the revenue is dismissed.

23. Coming to ground No.2 of grounds of appeal which is in respect of subscriber verification penalty, we observed that the issue is covered in favour of the assessee in assessee's own case in ITA No.3522/Del/2019 for A.Y. 2015-16 dated 16.06.2023 wherein the Tribunal held that the said penalty was paid for violation of KYC norms and such payment made for violation of KYC norms would not fall within the ambit of Explanation 1 to Section 37(1) of the Act, by observing as under :-

*“10. We have considered rival submissions, decisions relied upon and materials on record. Undisputedly, the disallowance of expenditure made by the Assessing Officer is in relation to penalty paid to the Department of Telecommunication for violation of KYC norms. The issue arising for consideration is, whether the payment of penalty is allowable as business expenditure u/s. 37(1) of the Act. A reading of section 37(1) makes it clear that any revenue expenditure laid out or expended wholly or exclusively for the purpose of business is allowable as deduction while computing the business income. However, Explanation 1 to said section carves out an exception by providing that any expenditure incurred by an assessee for a purpose, which is an offense or which is prohibited by law, shall not be allowed as deduction.*

*Therefore, it needs to be examined whether penalty paid for violation of KYC norms falls within the purview of expenditure incurred towards an offense or is prohibited by law.*

*11. Before us, learned Departmental Representative has furnished certain circulars/guidelines issued by the Department of Telecommunication, Government of India. As could be seen from the documents furnished before us, one of the conditions of the license agreement between the Department of Telecommunication and the*

service provider/licensee, is that the licensee shall ensure adequate verification of each and every customer before enrolling him as a subscriber and instructions issued by the licensor in this regard, from time to time, shall be scrupulously followed by the licensee. One more condition of the license agreement is, the licensor may also impose financial penalty for violation of terms and conditions of license agreement.

12. The communication dated 24.12.2008 issued by the Department of Communication, Government of India, further stipulates that if any number is found working without proper verification, a minimum penalty of Rs.1000/- per violation of subscriber number verification shall be levied on the licensee apart from immediate disconnection of the subscriber number by the licensee. It further provides that in case the licensee is not complying with the service verification condition, penalty at graded scales to be imposed after 1st April 2009 as a deterrent measure. However, the issue is, whether the penalty is paid for any offense or is prohibited by law as per Explanation 1 to section 37. From the facts on record, it does not transpire that the violation of KYC norms entails any criminal liability or prosecution. As per the license agreement, for violation of any terms of the agreement including KYC norms, the assessee is to be visited with penalty of various amounts. As already discussed, such penalty is imposed as a deterrent measure and not for any offense or due to prohibition of law. It is further necessary to observe, the penalty arises because of breach of certain terms and conditions of the license agreement, hence, in regular course of business.

13. ITA No. 3522/Del/2019

13. Pertinently, in case of *Mangal Keshav Securities Ltd. vs. ACIT* (2016) 46 ITR(T)458 (Mumbai), the coordinate Bench, while dealing with more or less identical issue of penalty levied by Stock Exchange for violation of KYC norms, has held that payment made towards penalty for violation of KYC norms would not fall within the ambit of Explanation 1 to section 37(1) of the Act. Thus, in our view, in the facts of assessee's case, the exceptions provided under Explanation 1 to section 37(1) of the Act will not get attracted. Thus, we do not find any infirmity in the decision of learned Commissioner (Appeals) in deleting the disallowance. Ground raised is dismissed.”

24. Respectfully following the said decisions we reject ground No.2 in appeal of the revenue.

25. Coming to ground No.3 of revenue which is regarding disallowance u/s. 40(a)(ia) of the Act for non deduction of TDS u/s.194H of the Act on the discount on prepaid instruments, the issue is covered in favour of the assessee by the decision of Hon'ble Apex court in the case of Bharti Cellular Ltd. Vs. ACIT (supra) wherein the Hon'ble Supreme Court held as under :-

*“39. Coming back to the legal position of a distributor, it is to be generally regarded as different form that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. The reason is, that the distributor in such cases is an independent contractor. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party. The distributor has rights of distribution and is akin to a franchisee. Franchise agreements are normally considered as sui generis, though they have been in existence for some time. Franchise agreements provide a mechanism whereby goods and services may be distributed. In franchise agreements, the supplier or the manufacture, i.e. a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services. There is a close relationship between a franchisor and a franchisee because a franchisee's operations are closely regulated, and this possibly is a distinction between a franchise agreement and a distributorship agreement. Franchise agreements are extremely detailed and complex. They may relate to distribution franchises, service franchises and production franchises. Notwithstanding the strict restrictions placed on the franchisees which may require the franchisee to sell only the franchised goods, operate in a specific location, maintain premises which are required to comply with certain requirements, and even sell according to specified prices - the relationship may in a given case be that of an independent contractor. Facts of each case and the authority given by 'principal' to the franchisees matter and are determinative.*

*40. An independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary. As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied. The distinction is that independent contractors work for themselves, even when they are employed for the purpose of creating contractual relations with the third persons. An independent contractor is not required to render accounts of the business, as it belongs to him and not his employer.*

26. We also observe that the issue is covered in favour of the assessee in assessee's own case in ITA No.3522/Del/2019 dated 16.06.2023 for the A.Y. 2015-16 wherein the Tribunal held as under :-

*“17. Having considered rival submissions, we find, while dealing with identical issue in assessee's own case for earlier assessment years, various Benches of the Tribunal have held that the provisions of section 194H are not attracted to the discounts given to distributors. Hence, section 40(a)(ia) would not be applicable. Pertinently, the Hon'ble Rajasthan High Court has decided the issue in favour of the assessee in earlier assessment years. In fact, in the latest order passed for the assessment year 2009-10, the Tribunal in order dated 08.11.2016 in ITA No. 5980/Del/2012, has deleted similar disallowance, following the coordinate Bench decision. Facts being identical, respectfully following the decision of the coordinate Benches in assessee's own cases as well as the Hon'ble Rajasthan High Court, we hold that the provisions of section 194H are not applicable to the discounts given to the distributors. Therefore, we do not find any infirmity in the decision of learned first appellate authority in deleting the disallowance made u/s. 40(a) of the Act. Ground raised is dismissed.”*

27. Respectfully following the above said judgments ground No. 3 of grounds of appeal of the revenue is rejected.

**ITA No.1111/Del/2023 (A.Y.2017-18)**

28. In this appeal the revenue has raised following grounds of appeal :-

1. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by allowing the license fee on revenue sharing basis after July 31, 1999 to be treated as revenue expenditure ignoring the fact that Revenue has filed SLP before Hon'ble Apex Court against the order of Hon'ble Delhi High Court for A.Ys.2003-04, 2004-05, 2006-07 and 2007-08 in ITA Nos. 1328/2010, 1336/2010, 114/2012 and 996/2011 (consolidated order) dated 19.12.2013 on the very same issue and which is still pending adjudication before the Supreme Court.*

2. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the disallowance under section 40(a)(ia) representing free airtime given as discount to the distributors on maximum retail price of prepaid coupons ignoring the fact that further appeal u/s 260A was recommended and appeal before Hon'ble Delhi High Court was filed in assessee's own case for A.Ys. 2004-05, 2005-06, 2006-07 and 2008-09 against the orders of the Hon'ble ITAT (Composite order in ITA Nos. 1623/D/2013(for A. Y.2004-05) & 1624/Del/2013(for A. Y.2005-06) Dated:26.07.2016 and composite order in ITA Nos 3394/D/2012 (for A.Y. 2008-09) & 2899/Del/2013(for A. Y2006-07) filed by assessee and ITA No.2795/Del/2012(for A.Y.2008-09) filed by Revenue).*

3. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by directing the AO to allow the deduction u/s 801A of Rs. 82,31,94, 128/- after verification in view of his decision to delete the disallowance u/s 40(a)(ia) pertaining to undertaking North East (NESA) Circle. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

29. Ground No.1 of ground of appeal of the revenue which is in respect of license fee including spectrum usage charges which is similar and identical to the ground No.1 raised by the revenue in its appeal for A.Y. 2016-17 and the decision taken therein would apply mutatis mutandis to the ground raised by the revenue for the A.Y. 2017-18. We order accordingly.

30. Coming ground No.2 we observed that this ground is similar and identical to ground No.3 raised by the revenue in its appeal for A.Y. 2016-17 and the decision taken therein would apply mutatis mutandis to the ground raised by the revenue for the A.Y. 2017-18. We order accordingly.

31. Coming to ground No. 3 of ground of appeal of revenue which is in respect of the direction given to AO for allowing deduction u/s.80-IA after verification, since the disallowance u/s. 40(a)(ia) pertaining undertaking North East circle was deleted by Ld. CIT(A) we observed that the AO while completing the assessment made disallowance u/s.40(a)(ia) and restricted the deduction u/s.80-IA of the Act on remaining income. The assessee contended before the Ld. CIT(A) that National Faceless Assessment Centre has erred both on facts and in law in not allowing the corrected deduction u/s.80-IA including on variation of its income on account of disallowances pertaining to undertaking North East circle. The Ld. CIT(A), since disallowance made u/s. 40(a)(ia) was deleted by him, he has directed the AO to verify and allow deduction u/s.80-IA of the Act on the enhanced income, which was originally disallowed by the AO on account of disallowance made u/s.40(a)(ia) of the Act. We see no infirmity in the order

passed by the Ld. CIT(A) and, therefore, reject ground No.3 raised by the revenue.

**ITA No. 1112/Del/2023 A.Y. 2018-19**

32. The revenue has raised following grounds of appeal :-

1. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by allowing the license fee on revenue sharing basis after July 31, 1999 to be treated as revenue expenditure ignoring the fact that Revenue has filed SLP before Hon'ble Apex Court against the order of Hon'ble Delhi High Court for A. Y.2003-04, 2004-05, 2006-07 and 2007-08 in ITA Nos. 1328/2010, 1336/2010, 114/2012 and 996/2011 (consolidated order) dated 19.12.2013 on the very same issue and which is still pending adjudication before the Supreme Court.*

2. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the addition made by AO on account of disallowance of subscriber verification penalty by ignoring the fact that Revenue has filed appeal before the Hon'ble ITAT against the above decision of CIT(A) in AY 2012-13, AY 2013-14 and AY 2014-15 and AY 2015-16 which is still pending adjudication.*

3. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the disallowance under section 40(a)(ia) representing free airtime given as discount to the distributors on maximum retail price of prepaid coupons ignoring the fact that further appeal u/s 260A was recommended and appeal before Hon'ble Delhi High Court was filed in assessee's own case for A. Y.2004-05, 2005-06, 2006-07 and 2008-09 against the orders of the Hon'ble ITAT (Composite order in ITA Nos. 1623/D/2013(for A. Y.2004-05) & 1624/Del/2013(for A. Y.2005-06) Dated:26.07.2016 and composite order in ITA Nos.3394/D/2012(for A.Y.2008-09) & 2899/Del/2013(for A. Y.2006-07) filed by assessee and ITA No.2795/Del/2012(for A. Y.2008-09) filed by Revenue).*

4. *The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of*

*appeal at any time before or during the hearing of this appeal.*

33. Ground No.1 of ground of appeal of the revenue which is in respect of license fee including spectrum usage charges which is similar and identical to ground No.1 raised by the revenue in its appeal for A.Y. 2016-17 and the decision taken there in would apply mutatis mutandis to the ground raised by the revenue for the A.Y. 2018-19. We order accordingly.

34. Coming ground No.2 we observed that this ground is similar and identical to the ground No.2 raised by the revenue in its appeal for A.Y. 2016-17 and the decision taken therein would apply mutatis mutandis to the ground raised by the revenue for the A.Y. 2018-19. We order accordingly.

35. Coming to ground No. 3 we observed that this ground is identical to ground No. 3 of grounds of appeal for the A.Y. 2016-17 which is in respect of disallowance of u/s. 40(a)(ia) for non deduction of TDS u/s. 194H on discount given to distributors, and the decision taken therein shall apply mutatis mutandis to the appeal for the A.Y. 2018-19. We order accordingly.

**ITA No. 1113/Del/2023 A.Y. 2019-20**

36. The revenue has raised following grounds of appeal :-

1. *Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by allowing the license fee on revenue sharing basis after July 31, 1999 to be treated as revenue expenditure ignoring the fact that Revenue has filed SLP before Hon'ble Apex Court against the order of Hon'ble Delhi High Court for A. Y.2003-04, 2004-05, 2006-07 and 2007-08 in ITA Nos. 1328/2010, 1336/2010, 114/2012 and 996/2011 (consolidated order)*

*dated 19.12.2013 on the very same issue and which is still pending adjudication before the Supreme Court.*

*2. Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the disallowance under section 40(a)(ia) representing free airtime given as discount to the distributors on maximum retail price of prepaid coupons ignoring the fact that further appeal u/s 260A was recommended and appeal before Hon'ble Delhi High Court was filed in assessee's own case for A. Y 2004-05, 2005-06, 2006-07 and 2008-09 against the orders of the Hon'ble ITAT (Composite order in ITA Nos. 1623/D/2013(for A. Y.2004-05) & 1624/Del/2013(for A. Y.2005-06) Dated.26.07.2016 and composite order in ITA Nos.3394/D/2012(for A. Y.2008-09) & 2899/Del/2013(for A. Y2006-07) filed by assessee and ITA No 2795/Del/2012(for A. Y.2008-09) filed by Revenue)*

*3. Whether Ld. CIT(A) has erred on question of law and the facts and circumstances of the case by deleting the addition made by AO on account of disallowance of subscriber verification penalty by ignoring the fact that Revenue has filed appeal before the Hon'ble ITAT against the above decision of CIT(A) in AY 2012-13, AY 2013-14 and A Y 2014-15 and AY 2015-16 which is still pending adjudication.*

*4. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground(s) of appeal at any time before or during the hearing of this appeal.*

37. Ground No.1 of appeal of the revenue is in respect of license fee including spectrum usage charges which is similar and identical to the ground No.1 raised by the revenue in its appeal for A.Y. 2016-17 and the decision taken therein would apply mutatis mutandis to the ground raised by the revenue for the A.Y. 2019-20. We order accordingly.

38. Coming to ground No.2 which is identical and similar to ground No. 3 in appeal for the A.Y. 2016-17 which is in respect of disallowance u/s. 40(a)(ia) for non deduction of TDS u/s. 194H on discount allowed to distributors on prepaid

cards, the decision taken therein shall apply mutatis mutandis for the A.Y. 2019-20. We order accordingly.

39. Ground No.3 of appeal of revenue is identical to ground No.2 of grounds of appeal for A.Y. 2016-17 which is in respect of subscriber verification penalty and the decision taken therein shall apply mutatis mutandis for A.Y. 2019-20. We order accordingly.

40. In the result, the appeals of the revenue are partly allowed as indicated above.

Order pronounced in the open court on 12.12.2025.

Sd/-

Sd/-

**[M. BALAGANESH]**  
**ACCOUNTNANT MEMBER**

**[C.N. PRASAD]**  
**JUDICIAL MEMBER**

**Dated:12.12.2025**

*NEHA, Sr.P.J.\**

Copy forwarded to:

1. Appellant
2. Respondent
3. PCIT
4. CIT(A)
5. DR

Asst. Registrar,  
ITAT, New Delhi