

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "I-1" NEW DELHI
BEFORE SHRI S.V. MEHROTRA : ACCOUNTANT MEMBER
AND
SHRI A.T. VARKEY: JUDICIAL MEMBER

ITA no. 4722/Del/2013
Asstt. Yr: 2008-09
DCIT, Circle 17(1), Vs. M/s Vodafone Mobile Services Ltd.,
New Delhi. C-4B, Okhla Industrial Area,
New Delhi.
PAN: AAACS 4457 Q
(Appellant) (Respondent)

Appellant by : Sh. P. Pardiwala Sr. Adv.
Shri Deepak Chopra Adv.
Ms. Nena Singh Adv.
Respondent by : Shri Nihor Ranjan Pandey Add. CIT (DR)

Date of hearing : 05/10/2015.
Date of order : 30/12/2015.

ORDER

PER S.V. MEHROTRA, A.M.:

This appeal has been preferred by the assessee against the order dated 13.5.2013 passed by the CIT(A)-19, New Delhi pertaining to AY 2008-09.

Following grounds of appeal have been raised:

2. Brief facts of the case are that the assessee company was engaged in the business of providing cellular mobile telephony network in the telecom circle of Delhi. The assessee filed its return of income declaring total income of Rs. 5,81,140/-. The assessment was completed at a total income of Rs. 537,13,54,673/-, inter alia, by making following additions/ disallowances:

- | | |
|---|-----------------|
| - Disallowance of commission expenditure | Rs. 6,24,87,988 |
| - Disallowance of advertisement expenditure | Rs. 9,17,179/- |

- Disallowance on account of capitalization of WPC expenses Rs. 39,70,17,632

3. Ld. CIT(A) partly allowed the assessee's appeal. Being aggrieved, the department is in appeal before us and has taken following grounds of appeal:

1. *Ld. CIT(A) erred in law by allowing relief of Rs. 6,24,87,988/- against addition made by the AO by disallowing the commission expenses.*
2. *Ld. CIT(A) erred in law and on facts of the case in deleting the addition of Rs. 9,17,179/- made by the AO by disallowing advertisement expenses.*
3. *Ld. CIT(A) erred in law and on facts of the case in deleting the addition of Rs. 57,44,42,157/- made by the AO by disallowing Royalty-WPC expenses.*
4. *The appellant craves, leave or 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.*

4. Brief facts apropos ground nos. 1 & 2 are that assessee claimed expenditure of Rs. 62,48,79,875/- as commission in the P&L A/c. The AO required the assessee to furnish the details of top 25 distributors to whom commission was paid. The AO has noticed the assessee's reply as under:

"The assessee vide its written and oral submissions has submitted that it provides telecommunication services through two models viz., Pre-paid model and Post-paid model. The assessee thus submitted that while under the post-paid model it is paying commission to its agent while in case of pre-paid no commission is being, paid for distribution of the assessee's pre-paid talktime. The assessee further submitted that for the post-paid distributors mainly the following kinds of commission payments are made:

i) Amount payable on post-paid activation - this amount represents the amount paid to the dealers at the time of invoicing under the respective heads; and

ii) Month-end amount payable to dealers based on scheme launched by the company for specific period - 'this represents the amount paid to the dealers by cross check.

5. Further, the assessee was required to furnish the confirmation of the commission payments made to the top 25 parties, which was also filed before the AO. The assessee also submitted that since its books of a/c had duly been audited by the auditors and in their report they have not given any adverse comments, therefore, in the absence of any evidence, additions/disallowances were totally uncalled for. The AO, however, disallowed 10% of the commission expenses, inter alia, observing as under:

The reply of the assessee has been duly considered. The onus for proving the genuineness of a claim of expenditure lies on the assessee. This is more so, in view of the findings given in the assessment of preceding years where the commission expense has been disallowed. However, considering the fact that this year, assessee has filed confirmation letters and other details like Form 16As and taking a holistic view of the situation and considering all- the facts discussed above, 10% of the commission expenses amounting to INR 6,24,87,988 (10% of INR 62,48,79,875) are hereby disallowed and added to the income of the assessee.

6. Ld. CIT(A) allowed the assessee's appeal, inter alia, observing that AO had not been able to controvert the assessee's claim and had not brought any material on record to show that the commission expenditure was either

bogus or was not allowable deduction. Aggrieved, the revenue is in appeal before the ITAT.

7. Ld. DR relied on the order of AO.

8. Ld. Sr. counsel Shri Pardiwala submitted that disallowance has been made purely on ad hoc basis

9. We have considered the submissions of both the parties and have perused the record of the case. We have reproduced the observations of AO earlier from which it is evident that there was no basis for making any disallowance and the same was solely on ad hoc basis. We are in agreement with the findings of Id. CIT(A) that the AO had not brought any material on record to show that the commission expenditure was either bogus or was not an allowable deduction. It is well settled law that no ad hoc disallowance can be made unless the AO brings any specific detail on record which may call for any disallowance. Accordingly, this ground is dismissed.

10. Brief facts apropos ground no. 2 are that AO noticed that assessee had incurred advertisement expenditure amounting to Rs. 3,14,244/- on product launches and INR 9,08,662/- on granty signs. The AO was of the view that this expenditure gave enduring benefit to the assessee and, therefore, it should have been capitalized. He has referred to the assessee's submission wherein it was stated that the expenditure represented the assessee's display at various locations including at the dealer shop. Further, it was pointed out that granty signs had a very short shelf life as they keep changing with change in the product line of the assessee and did not bring into existence any tangible assets. The assessee relied on various decisions noted in the assessment order. The AO relied on the decision of the Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Vs. CIT AIR 1955 SC 89, wherein it was held that the line of demarcation between capital expenditure

and revenue expenditure is very thin. The AO, following the decision of the Hon'ble Supreme court in the case of Madras Industrial Investment Corporation, allowed only Rs. 3,05,727/- being 1/4th of the amount spent and disallowed the balance amount. The AO has further observed as under:

“However, a deduction amounting to INR 4,59,96,303 is allowed in respect of amounts similarly treated as capital expenditure in earlier years [Net Addition of INR (4,50,79,123/-)]”.

11. Ld. CIT(A) deleted the disallowance after taking note of various decisions of Hon'ble Delhi High Court in para 7.3 as under:

7.3 The appellant has relied on several judicial decisions including the following:

(i) CIT v Citi Financial Consumer Fin. Ltd. [2012] 335 ITR 29 (Delhi) Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of - Assessment years 2001-02 and 2002-03 - Expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in year in which it is incurred [In favour of assessee]

(ii) CIT v Salora Internationalltd [2009] 308 ITR 199 (DELHI) Advertisement expenditure for launching products is revenue expenditure

(iii) CIT v Pepsico India Holdings (P.) Ud.[2012] 207 Taxman 5 (Delhi) Section 37(1) of the Income-tax Act, 1961 - Business expenditure - Allowability of - Assessee incurred certain expenditure on advertising and marketing of its products and claimed it as business expenditure ', Assessing Officer disallowed expenditure incurred on glow signs and neon signs holding that same was of capital nature - Whether since expenditure in question was in fact in furtherance of business of assessee and, thus, had direct nexus with its business, and by putting neon signs and glow signs, no assets of

permanent nature was created, it was an allowable business expenditure - Held, yes [In favour of assessee]

12. Having heard both the parties, we do not find any reason to interfere with the order of Id. CIT(A), because the issue is squarely covered by various decisions noted by Id. CIT(A) in his order, particularly the decision in the case of Pepsico India Holdings (P) Ltd. (supra).

13. In the result, ground no. 2 of revenue is dismissed.

14. Brief facts apropos ground no. 3 are that assessee in its P& L A/c had claimed royalty/WPC expenses amounting to Rs. 76,59,22,876/-. The assessee was required to furnish the details of the basis of these royalty expenses and also to justify such claim. The assessee pointed out that this amount pertained to spectrum charges paid to DOT on a quarterly basis as a percentage of revenue. It was clarified that every telecom operator in India, in addition to the initial operator license fee, was required to pay GSM spectrum royalty for the usage of spectrum and microwave royalty for given microwave frequency usage on a regular basis year to year. This fee, was claimed to be in the nature of regulatory payment which was necessarily to be incurred on a regular basis for the conduct of its business. The assessee has relied on the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Fascel Ltd. (017 DTR 306) 2009, wherein it has been held that WPC-royalty expenses is a revenue expenditure. The assessee had also relied on following decisions:

- Bharti Cellular Ltd Vs DCIT in ITA No 5335/DeI/2003;
- Bharti Airtel Ltd Vs ACiT in ITA No 398/Mumj2006; and
- Comsat Max Ltd Vs DCIT ITA 728 & 701/DeI/2005;
- Mahanagar Telephone Nigam Ltd Vs CIT (100 TIJ 1).

15. The AO referred to the decision of Hon'ble Supreme Court in the case of Assam Bengal Cement Co. Ltd. (supra), wherein it has been observed and held as under:

"The appellant company acquired from the Government of Assam, for the purpose of carrying on the manufacture of cement, a lease of certain limestone quarries for a period of twenty years for certain half-yearly rents and royalties. In addition to the rents and royalties the appellant agreed to pay the lessor annually a sum of Rs. 5,000 during the whole period of the lease as a protection fee and 'in consideration of that payment the lessor undertook not to grant to any person any lease, permit or prospecting licence for limestone in a group of quarries without a condition that no limestone should be used for the manufacture of cement. The appellant also agreed to pay Rs. 35,000 annually for five years as a further protection fee and the lessor in consideration of that payment gave a similar undertaking in respect of the whole district. The question was whether in computing the profits of the appellant the sums of Rs. 5,000 and Rs. 35,000 paid to the lessor by the appellant could be deducted under section 10(2)(xv) of the Indian Income-tax Act, 1922. The Income-tax authorities, the Appellate Tribunal and High Court on a reference under section 66(1) held that the amount was not an allowable deduction under section 10(2)(xv). On appeal to the Supreme Court:

Held, that the payment of Rs. 40,000 was a capital expenditure and was therefore, rightly disallowed as a deduction under section 10(2)(xv) of the Act."

16. He, accordingly held that royalty, which was paid, in order to get the right to use the spectrum, was capital in nature and allowed 25% of the

amount claimed. Thus, net addition of Rs. 39,70,17,632/- was made, observing as under:

In addition to this amount, a deduction amounting to INR 17,74,24,525/- is allowed in respect of amounts similarly treated as capital expenditure in earlier years.”

17. Ld. CIT(A) relying on the decision of Hon'ble Delhi High Court in CST Vs. Vs. Fascel Ltd. 221 CTR 305 (supra) allowed the assessee's claim.

18. We have considered the rival submissions and have perused the record of the case. The facts are not disputed. The decision relied upon by the AO in the case of Assam Bengal Cement Co. Ltd. was rendered in entirely different factual matrix. The impugned amount was paid as a protection fee and was not a payment which was necessary for running the business, as is in the present case. The assessee could not run the business without making these payments on quarterly basis and, therefore, by no stretch of reasoning this could be held as capital in nature. The issue is no more res integra in view of the decision of Hon'ble Delhi High Court in the case of Fascel Ltd. 221 CTR 305 (supra), wherein it has been held as under:

WPC-royalty expense cannot be said to be in the nature of a capital expenditure since no enduring benefit accrues to the Appellant on this account. This payment is in the form of a recurring charge incurred by the Appellant on a quarterly basis towards usage of spectrum allocated to the Appellant for provision of telecom services. The said charge therefore does not result in acquisition of any right and therefore, acquires the character of 'revenue' expenditure. The said expense being incurred wholly and exclusively for the purpose of the business of the Appellant is fully deductible under section 37(1) of the

Act. Reliance was placed on the decision of the jurisdictional Delhi High Court in the case Commissioner of Income Tax Vs Fascel Limited (017 DTR 306) 2009.”

19. Accordingly, we see no reason to interfere with the order of Id.

CIT(A). Ground is dismissed.

20. Ground no. 4 is general and requires no adjudication.

21. In the result, revenue's appeal is dismissed.

Order pronounced in open court on 30/12/2015..

Sd/-
(A.T. VARKEY)
JUDICIAL MEMBER
Dated: 30/12/2015.

Sd/-
(S.V. MEHROTRA)
ACCOUNTANT MEMBER

MP

Copy of order to:

1. Assessee
2. AO
3. CIT
4. CIT(A)
5. DR, ITAT, New Delhi.