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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 03.02.2015**

\+ **ITA 1110/2011**

CIT ..... Appellant

versus

BHARTI TELENET LTD ..... Respondent

ITA 386/2012

CIT ..... Appellant

versus

BHARTI INFOTEL LTD ..... Respondent

ITA 387/2012

CIT ..... Appellant

versus

BHARTI INFOTEL LTD ..... Respondent

ITA 193/2013

COMMISSIONER OF INCOME TAX: DELHI-I ..... Appellant

versus

BHARTI INFOTEL LTD. ..... Respondent

Present: Mr. Balbir Singh, Sr. Standing Counsel for Revenue
with Ms. Rubal Maini, Advocate, in all cases.
Mr. Ajay Vohra, Sr. Advocate with Ms. Kavita Jha
and Ms. Shradha, Advocates for assessee, in all cases.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

1. Common questions of law are urged by the Revenue in these four appeals. ITA 1110/2011 concerns the assessee Bharti Telenet Limited for AY 2001-02. This is the most comprehensive appeal of

the Revenue, which seeks to urge seven substantial questions for consideration of the Court. The other appeals are in respect of the assessee Bharti Infotel Limited. ITA No.386/2012 is in respect of AY 2002-03; ITA No.387/2012 is in respect of AY 2003-04 and ITA No.193/2013 is in respect of AY 2004-05. The questions of law urged are as follows: -

> (1) Whether the ITAT was justified in the eyes of law in dismissing the appeal of the revenue on the issue of the disallowance of the variable license fee.
>
> (2) Whether the Ld. ITAT was justified in the eyes of law in deleting the disallowance of Rs.1,31,25,000/- made by the AO on account of upfront fee paid by the assessee.
>
> (3) Whether the ITAT was justified in the eyes of law in dismissing the appeal of the revenue with regard to the issue of claim of the assessee of expenses amounting to Rs.3,59,39,412/- incurred on the basic telephone projects in Delhi, Haryana, Tamil Nadu and Karnataka and for verification that they are capital or revenue in nature.
>
> (4) Whether the ITAT was justified in the eyes of law in remitting the mater back to the file of the AO concerning the issue about the claim of the software expenses.
>
> (5) Whether the ITAT was justified in the eyes of law in dismissing the appeal of the revenue with regard to the disallowance of the interest of Rs.8,80,36,863/- paid by the assessee.
>
> (6) Whether the ITAT was justified in the eyes of law in dismissing the appeal of the revenue with regard to the disallowance of Rs.37,55,161/- on account of the delayed payment.
>
> (7) Whether the ITAT was justified in the eyes of law in dismissing the appeal of the revenue on the issue of Rs.14,05,886/- claimed by the assessee in the revised return.

In Bharti Telenet/ITA No.1110/2011

Question Nos.1&6

2. This Court notices that of the above, question no.1 (disallowance of variable license fee) and question no.6 which is in respect of disallowance of interest, for different amounts, have been urged as the only questions in the other appeals i.e., ITA Nos.386/2012, 387/2012 and ITA 193/2013. Regarding the question no.1 for AY 2001-02, the amount of Rs.1,68,25,201/- for which expenditure was claimed, was disallowed by the AO, under Section 35ABB. The relevant discussion by the Assessing Officer is as follows: -

> *"7. It is also seen that the assessee company has claimed a sum of Rs.8,19,46,881/- on account of variable license fees. This issue has also been discussed in the earlier years orders for assessment year 2000-01, of the assessee company, thus, for the purpose of brevity and avoidance of repetition, same is not discussed in detail here again. It is also held hereby that the assessee company is eligible only for part of payment rest is the expenditure which has to be amortized over a period of 17 years as per the provisions u/s 35ABB. Accordingly, the licence fees amounting to Rs.51,21,680/- for the current year is allowed and rest being Rs.7,68,25,201/- is disallowed as revenue expenditure and is added back to the income of the assessee company, hereby."*

3. The ITAT directed relief to the assessee by following the decision of the ITAT itself in the case of *Mahanagar Telephone Nigam Ltd. vs Additional Commissioner of Income Tax* (2006) 100 TTJ Delhi 1. It is not disputed by counsel for the parties that the issue - as to whether such amounts are to be disallowed under Section 35ABB has now been answered against the Revenue by

another Division Bench in *CIT v. Bharti Hexacom Ltd.*, ITA No.1336/2010 by a judgment dated 19.12.2013.

4. So far as question no.6, i.e., disallowance on account of interest on delayed payment to DoT (towards the license fee), the initial addition by the AO was directed to be deleted by the ITAT. This too was considered in *Bharti Hexacom (supra).* The Court while observing that the claim of licence fee payment was varied w.e.f. 31.7.1999 inasmuch as prior to that it was a fixed amount whereas subsequently it was altered to variable one - held as follows:

> *"The answer to the question would depend upon the finding whether payment related to license fee payable for the period prior to 31.7.1999 or was for the subsequent period. If interest was paid in respect of the license fee payable for the period prior to 31.7.1999, it would have to be crystallized. Similarly, if interest is payable for license fee for the period post 31.7.1999, it should be treated as revenue in nature/character."*

5. This Court notices that after recording as above in *Bharti Hexacom* (supra), the matter was remitted to the Assessing Officer for working out the correct position. Accordingly, we direct the Assessing Officer to work out the correct position and determine whether the allowance claimed is to be capitalized or treated as revenue depending upon the payment period, i.e., before 31.7.1999 or subsequent to it. Question no.6 is answered accordingly.

Question No.2

6. This relates to the upfront fee and loans - in respect of which - an amount of Rs.1,31,25,000/- was claimed for AY 2001-02. The initial determination of the AO was upset by the Tribunal which held that the fee is to be treated as revenue expenditure. This Court

notices that the issue is covered by the decision in *Commissioner of Income Tax v. Gujarat Guardian Limited*, (2009) 177 Taxman 434. This position was not disputed. Accordingly, the finding in the impugned order to this extent is upheld.

Question No.3

7. This question, i.e., the manner in which Rs.3,59,39,412/- is to be treated, concerns how pre-operative expenses are to be dealt with. The AO held it to be capital expenditure. The assessee, however, disputed this, contending that the expense was incurred on account of an expansion of ongoing business and cited several judgments. The very same issue stands covered by the decision of this Court in *CIT v. Modi Industries Ltd.*, 200 ITR 341 (Delhi). This has received further endorsement in judgments reported as *CIT v. Monnet Industries*, 221 CTR 266 (Del) and *CIT v. Relaxo Footwears*, 293 ITR 231 (Del).

Question No.4

8. The assessee had claimed Rs.50,10,742/- as software expenditure. Even though the AO had initially disallowed the claim, the ITAT directed remitting of the matter. The ITAT relied upon its Special Bench decision in *Amway India Enterprises v. DCIT*, to hold that there has to be further determination of an application of the functional test, and that the expenditure claimed should not be processed only on whether it is capital expenditure. In *CIT v. Amway India Enterprises* (2012) 346 ITR 341 (Delhi), it was held as follows: -

> *"the first issue being: the treatment to be accorded to expenditure incurred by the assessee on purchase of software applications. These applications being : MS office software, antivirus software, Lotus notes software and message*

exchange applications. The assessee in respect of these applications acquired a license to use the said applications on payment of consideration. The said expenditure has been disallowed by the Assessing Officer in each of the assessment years by treating the expenditure as one incurred on capital account. Accordingly, depreciation at the rate of 25 per cent was allowed to the assessee. The assessee carried the matter in appeal to the Commissioner of Income-tax (Appeals) (hereinafter referred to as "the CIT (A))". The Commissioner of Income-tax (Appeals), while sustaining the order of the Assessing Officer, allowed depreciation at the rate of 60 per cent. This resulted in both the assessee and the Revenue being aggrieved. Consequently, cross-appeals were filed by both the assessee and the Revenue.

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The first issue, in our opinion , has been considered and decided against the Revenue in a judgment delivered by us passed in ITA Nos.1110 of 2006 and 1111 of 2006 titled CIT v. Asahi India Safety Glass Ltd. – since reported in (2012) 346 ITR 329 (Delhi).

9. It is contended that the decision in *Amway (supra)* was disapproved and impliedly overruled in *CIT v. Asahi India Safety Glass Ltd*., ITA No.1110/2006, decided on 4.11.2011. In a subsequent decision, *Amway India Enterprises (supra)* itself was disapproved and over ruled.

10. In the light of the above development, the question of law has to be answered in favour of the assessee. A direction remitting the matter for consideration, affirmed by the ITAT is accordingly set aside.

Question No.5

11. The issue of interest disallowance - for the sum of Rs.8,80,36,863/- (ITA No.1110/2012), Rs.12,00,42,041/- (ITA

No.86/2012), Rs.1,50,85,590/- (ITA 387/2012) and Rs.4,83,77,550/- (ITA 193/2012), the AO sought to disallow this amount, on the ground that the assessee had borrowed amounts for the relevant assessment years, and was paying interest, but at the same time, had invested other amounts which were not yielding income. In the present case, the CIT (A) and ITAT held that there was no nexus between the borrowing from the external sources/financial institutions - for which interest payments were made - and the investments made by the assessee in its subsidiaries. Dealing with an identical issue in *CIT, Delhi-I, New Delhi v. Bharti Televentures Ltd.* ITA 1337/2010, decided on 3.1.2011), it was held as follows: -

> *"12. In the instant case, from the order of the CIT(A) and that of ITAT, as reproduced above, in paragraphs 3 and 6, we note that the assessee was maintaining a bank account with mixed common funds in which all deposits and withdrawals were made. There was no specific instance noted by the Assessing Officer in respect of any direct nexus between the borrowed fund and the said advances made to the subsidiaries. The Assessing Officer had made general observations without going into the depth of the matter and without pointing out any specific instance where an interest bearing borrowing was advanced to the subsidiaries or establishing that the borrowings made by the appellant were not for business purposes. Both the appellate authorities below were of the view that the assessee had explained the sources of the advances and investments made to the subsidiaries, which could not be linked to the borrowed funds and that the advances were made out of the assessee"s own capital. At the relevant time the assessee was found to be having an adequate non-interest bearing fund by way of Share Capital and Reserves. Even otherwise, the advances were found to be made to the subsidiaries for business considerations which is nothing ITA Nos. 1337/10, 1339/10 & 1340/10 Page 12 of 12 but the commercial expediency of assessee. That being the factual position reflected from the record of the assessee, the onus that laid on it stood discharged.*

> *13. We are in entire agreement with the findings recorded by the CIT(A) as also by ITAT in all the three cases and do not find any ground to interfere with those findings."*

12. Following the above decision, we are of the opinion that the impugned order cannot be faulted. This question is answered in favour of the assessee and against the Revenue.

Question No.7

13. The Assessing Officer had not adjudicated on the claim of expenditure for the sum of Rs.14,05,886/- made in the revised return. The CIT (A) granted the relief to the assessee in the following terms:

> *"15.2 During the appellant proceedings it has been argued by the Ld. A.R. that any return filed within the period described u/s 139 (5) has to be considered. The processing/initiation of the return u/s 143 (1) does not effect the validity of the revised return as the processing/preparing intimation u/s 143 (1) is not an assessment.*
>
> *15.3 I have considered the issue carefully. The arguments of the Ld. A.R. in this regard are valid and legally correct. Intimation u/s 143 (1) is not an assessment of income under the IT Law and therefore time to file revised return is not curtailed. The A.O. while finalizing the assessment u/s 143 (3) has incorrectly ignored/over looked the revised return filed by the appellant company within the stipulated period u/s 139 (5). In view of these facts the expenses of Rs.14,05,886/- are held to be allowable as these were wrongly claimed by the appellant company in respect of A.Y. 2002-03 from where these expenses have been deleted and claimed in respect of A.Y. 2001-02 to which they pertain, by filing the revised return of income. Relief allowed Rs.14,05,886/-*

14. The ITAT affirmed the view of the CIT (A). In the opinion of this Court, no substantial question of law arises because the

controversy turns on appreciation of pure findings of fact. The Revenue cannot, therefore, succeed on this question.

15. In view of the above discussion, the matter is remitted only in respect of ITA 1110/2010 to work out the directions in respect of Question No.6, i.e., the allowability or otherwise for the sum of Rs.37,55,161/- on account of delayed payment. This is to be considered in the light of the decision in *CIT v. Bharti Hexacom Ltd.*, ITA 1336/2010, decided on 15.12.2013.

16. The appeals are accordingly disposed of in the above terms.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

FEBRUARY 03, 2015
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