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

\+ **INCOME TAX APPEAL Nos. 782/2017 & 784/2017**

Date of decision: 3rd December, 2018

PR. COMMISSIONER OF INCOME TAX-09 ..... Appellant
Through Mr. Zoheb Hossain, Sr. Standing Counsel.

versus

M/S VODAFONE MOBILE SERVICES LTD. ..... Respondent
Through Mr. Sachit Jolly & Mr. Siddharth Joshi, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

The above captioned appeals under Section 260A of the Income Tax Act, 1961 (Act, for short) in the case of M/s Vodafone Mobile Services Limited pertain to Assessment Year 2008-09 and arise from the order of the Income Tax Appellate Tribunal (Tribunal, for short) dated 30th September, 2016.

2. By order dated 12th September, 2017, the appeals were admitted for hearing on the following two substantial questions of law :-

> "C. Whether the Ld. ITAT has erred in deleting the disallowance made by the A.O u/s 80IA ignoring the

> AO's finding that the income from sharing fibre cables and cell sites is not derived from the undertaking of telecommunication business?
>
> D. Whether the Ld. ITAT has erred in deleting the disallowance of deduction u/s 80IA made by the A.O of the cheque bounce charges received by the assessee ignoring the AO's finding that the same are penal in nature and not an income derived from the undertaking of telecommunication business?"

The said order had declined to issue notice and frame questions of law on the issue whether the licence fee was expenditure of capital nature and not allowable under Section 37(1) of the Act in view of decision of this Court in ***Commissioner of Income Tax versus Bharti Hexacom Limited***, (2014) 265 CTR (Del) 130. The Bench had also refused to issue notice on the question whether amended provisions of Section 80IA would be applicable to the respondent-assessee in view of the decision of the Madras High Court in ***Commissioner of Income Tax versus Best Corporation Limited***, (2017) 395 ITR 367 (Mad.).

3. Sub-sections (1) (2) and (2A) to Section 80IA of the Act read:-

> (1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (*iii*) of sub-section (4) or generates power or commences transmission or distribution of power or undertakes substantial renovation and modernisation of the existing transmission or distribution lines :

Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (*a*) or clause (*b*) or clause (*c*) of the *Explanation* to clause (*i*) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (*ii*) of sub-section (4), shall be hundred per cent of the profits and gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years.

Sub-section (2A) was examined and interpreted by the Delhi High Court in ***Principal Commissioner of Income Tax versus Bharat Sanchar Nigam Limited***, (2016) 388 ITR 371 (Delhi) as reflecting the legislative intent not to restrict and control the benefit limited to "profits and gains derived by an undertaking or an enterprise" an expression used in sub-section (1) to Section 80IA of the Act. Consciously and deliberately the legislature has not

used the expression “profits and gains derived by an undertaking or an enterprise” in sub-section (2A) to Section 80IA of the Act. Sub-section (2A) to Section 80IA begins with the non-obstante clause and stipulates that an undertaking providing 'telecommunication services' would be entitled to deduction of the profits and gains of the eligible business. Scope and ambit of deduction under sub-section (2A) to Section 80IA, applicable to an undertaking engaged in 'telecommunication service', is wider and comprehensive to include hundred or thirty percent of profits and gains of the eligible business in the first five and further five years, respectively. Income qualifying for deduction under sub-section (2A) is not confined to ‘income derived from’, an expression used in Sub-Section (1) to Section 80IA. Accordingly entire profit and gain attributable to eligible business in case of an undertaking engaged in 'telecommunication service' was allowable as a deduction under Section 80IA(2A) of the Act.

4. In the said case, Bharat Sanchar Nigam Limited had claimed deduction under sub-section (2A) to Section 80IA on interest from others, liquidated damages, income from sale of directories, publications, forms, waste papers, extraordinary items and refund of universal service fund. Profits or income earned in the above accounts were held as allowable and eligible for deduction under Section 80IA(2A) of the Act.

5. The aforesaid ratio is binding dicta as we examine the two questions raised by the Revenue in these appeals.

6. Learned Senior Standing Counsel for the Revenue has submitted that sub-section (2A) to Section 80IA refers to clause (ii) of sub-section (4) to Section 80IA of the Act. 'Telecommunication services' would mean the business services specified in clause (ii) of sub-section (4) to Section 80IA and the said services alone would be eligible business. The argument is correct but would not affect our final decision since the services rendered by the respondent- assessee fall within the expression 'telecommunication service'. Profits and gains attributable and relatable to the 'telecommunication service' qualify and are to be allowed as a deduction under Section 80IA of the Act.

7. Clause (ii) of sub-section (4) to Section 80IA reads as under:-

> "**80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.**
>
> (4) This section applies to—
>
> (*ii*) any undertaking which has started or starts providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services on or after the 1st day of April, 1995, but on or before the 31st day of March, 2005.

> *Explanation.*—For the purposes of this clause, "domestic satellite" means a satellite owned and operated by an Indian company for providing telecommunication service;"

Clause (ii) states that an undertaking which has started or starts providing 'telecommunication services' in the nature of basic or cellular including radio paging, domestic satellite services, network of trunking, broadband network and internet services on or before 1st day of April, 1995 but before 31st day of March, 2005 would be eligible and covered under Section 80IA of the Act. The Explanation further stipulates that for the purpose of this clause, 'domestic satellite' means a satellite owned and operated by an Indian Company and providing 'telecommunication services'. 'Telecommunication service' as per clause (ii) would refer to a broad and wider range of services. It is not restricted to end user services. It would include 'telecommunication services' rendered to another person also engaged in 'telecommunication services' or other business.

8. The Assessing Officer had denied benefit of sub-section (2A) to Section 80IA to profits and gains from the revenue earned from sharing of infrastructure facilities in the form of cell-sites and fibre cable with other companies or undertakings engaged in 'telecommunication services'. This he held would amount to leasing of the said assets to third parties and income from the leasing would not be income derived from

'telecommunication services'. He held that the respondent-assessee was not engaged in the business of leasing of assets. Reference was made to judgments which interpret contours and scope of the expression "derived from industrial undertaking".

9. The aforesaid findings were reversed by the Commissioner of Income Tax (Appeals), who accepted the contentions raised by the respondent-assessee, which were summarized as under:-

> "i) The Appellant has to develop sites for rendering services to various subscribers. At these sites, the Appellant would need to construct infrastructure facilities in the form of civil work, setting up of towers, installation of batteries, air conditioners and D.G. sets, antennas and Base Tran receiver Station-BTS and other such assets which are used for providing network connection to subscribers.
>
> ii) As a part of its telecommunications operations, the Appellant has entered into cell site sharing arrangements with other telecom operators wherein it makes available spare space/capacity on its telecommunication cell sites to other telecom operators for setting up their antenna and placing microwave and BTS equipment. The above arrangements are not in the nature of leasing arrangement since the cell sites continue to be under the operation and control of the Appellant and are used by the Appellant for undertaking its telecommunications business.
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> iii) Under the above arrangement, the Appellant incurs the initial set-up cost on the cell sites and ensures supply of electricity, security, air-conditioning, etc. The costs incurred by the Appellant are shared by all the telecommunication operators who have been made

available space on such cell sites, based on actual expenses incurred / to be incurred by the Appellant. The above arrangements, therefore, assist the Appellant in reducing its establishment, operation and maintenance costs in relation to the cell sites and achieving greater financial efficiencies.

iv) Since the above arrangements are entered into by the Appellant in the ordinary course of its telecommunications business with a view to achieve cost reduction and greater operational efficiencies, revenues arising under such arrangements are business receipts of the telecommunication operations of the Appellant. Accordingly, as cell site revenues of Rs.5,07,20,198 have direct nexus with rendering of services in telecommunication sector, they have to be been taken into consideration for computing deduction under section 80IA of the Act.

v) Further, the Appellant also submitted that as it is engaged in providing telecommunication services, it is governed by non-obstante section 80IA (2A), which is broader as compared to language used in section 80IA(1) which is the charging section for other eligible businesses. Hence, all revenues from the telecommunication business, direct or indirect, would qualify for deduction under Section 80IA of the Act."

10. The Commissioner of Income Tax (Appeals) held that the revenues received from sharing of cell-sites and cables was income directly and inextricably linked with the business income of the undertaking engaged in providing telecommunication services. The respondent-assessee had not leased the telecom infrastructure to third parties as ownership/tittle in the cell towers and the cable network had not been transferred to third parties. The third parties were allowed and permitted to use the telecommunication

network set up in the form of cables and cell towers on payment for use of the same. This amount received would be income generated from telecommunication services.

11. On appeal preferred by the Revenue, the said finding of the Commissioner of Income Tax (Appeals) has been affirmed by the Tribunal.

12. We do not see any good ground or reason to differ with the aforesaid findings. The expression "telecommunication services" as defined for the purpose of sub-section (2A) includes services of varied nature that can be provided to any person including those who are providing 'telecommunication services' to others. Expression 'telecommunication services' is in fact not defined by specific words except in case of domestic satellite service. 'Telecommunication service' has been referred to as by way of basic or cellular services, including radio paging, domestic satellite service, networking broadband network and internet services. As noticed above, it is not confined or restricted to end user service. Domestic satellite services would be business to business service.

13. Finding of the Assessing Officer that income from sharing fibre cables and cell-sites was income by way of leasing and hence not includable in revenue earned for computing profits from 'telecommunication service' was

farfetched and misconceived. The assets i.e. cell-sites and fibre cables were not transferred. Third parties wanting to avail the spare capacity were only allowed usage of the said facilities for consideration. Payments so made by the third parties were to avail and use the telecom infrastructure. It would qualify as payments received for availing 'telecommunication services' as is the case when a mobile phone user pays the respondent-assessee for availing the mobile telecom infrastructure. Income from 'telecommunication services' can be earned in different ways and manner.

14. In view of language of clause (ii) to sub-section (4) to Section 80IA, which states that for the purpose of the said clause an undertaking shall be treated as providing telecommunication services, if it is engaged in basic or cellular, including radio paging, domestic satellite services, network of trunking, broadband network, and internet services within the two dates, the income by the respondent-assessee from third parties who had availed of the telecommunication services, in the form of payments received by the respondent-assessee from third persons for using fibre cables and cell towers network qualifies for deduction under Section 80IA of the Act. This income or receipts have to be treated as income earned by the undertaking from 'telecommunication services'.

15. The respondent-assessee had also paid bank charges as cheques issued by some of the customers had been dishonoured. The cheque bounce charges were also levied to the customers but entire amount could not be recovered. The Assessing Officer held that late payment charges or cheque bouncing charges was in the nature of penalty and was not income derived from telecommunication business by referring to the judgments defining the scope and ambit of the expression "income derived from". We have already noted that the said expression is missing and is not the mandate of the legislature in sub-section (2A) to Section 80IA as held by the Delhi High Court in the case of ***Bharat Sanchar Nigam Limited*** (supra).

16. The Commissioner of Income Tax (Appeals) had held as under:-

> "8.5 **Decision** I have carefully perused the assessment order and the written submission filed by the ld. AR of the appellant. There are two components of this ground of appeal. One is related to cheque bounce charges and the other is late payment charges received by the appellant. For the sake of convenience, both components are discussed separately hereunder:
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> **8**.6.1 Cheque bounce charges:
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> The cheque bouncing charges are the charges which the bank levies from the appellant after the cheque, received from the customers, bounces after depositing the same in the bank account of the appellant. These charges are than recovered from the customer by the appellant. Therefore, these charges are in the nature of reimbursement or replenishment of the penal charges paid by the appellant to the bank. These charges are not linked

to the business of telecommunication of the appellant: Therefore, the cheque bounce charges recovered from the customers cannot be said to be derived from the telecommunication business of the appellant. The judgment of jurisdictional Gujarat High Court in the case of Nirma Industries Limited v. DCIT (supra) is not applicable in the present case as the facts are different and the issue involved in that case was the late payment charges received from the customers. However, the appellant has pointed out that he has incurred bank charges of Rs.32.2 million during the assessment year as against which the cheque bouncing charges recovered from the customer were Rs.7.22 million and, therefore, the cheque bounce charges should be adjusted from the bank charges paid by the customers. I am inclined to accept this, argument of the appellant as the cheque bouncing charges recovered from the customers are infact the charges that has been paid to the bank as penal charges. The A.O. is, therefore, directed to work out the deduction u/s. 80IA after reducing the cheque bounce charges from the bank charges..

8.6.2 Late payment charges:

The late payment charges are recovered from the customers for the delay in payment of telephone bills. These charges are in inextricably linked to the business of the appellant and are collected at the time of billing. These are, therefore, in the nature of trading receipt which is derived by the Appellant while rendering telecommunication services. I am, therefore, inclined to agree with the submissions made by the appellant. The appellant has rightly relied on the decision of jurisdictional Gujarat High Court in the case of Nirma Industries Limited Vs. DCIT [283 ITR 402]. It was held that interest charged on late payment by customers are in the nature of trading receipt and hence eligible for the deduction under section 80IA of the Act. The nature of charges received by the appellant are similar to the charges in the Nirma's case, Accordingly, it is held that the income, in respect of Late payment charges are in the

> nature of trading receipt and hence eligible for the deduction under section 80IA of the Act."

(The aforesaid portion has been quoted from the order passed by the Tribunal as some pages [in the appeal paper book] relating to the order of the Commissioner of Income Tax (Appeals) are missing.)

17. The aforesaid findings of the Commissioner of Income Tax (Appeals), as affirmed by the Tribunal, are correct and justified. It has been held that the late payment charges or cheque bounce charges were relatable and directly linked with the telecommunication business of the respondent-assessee. Further, as noted above, the expression "derived from" is not relevant for claim for computation of deduction under sub-section (2A) to Section 80IA of the Act as held by the Delhi High Court in the case of ***Bharat Sanchar Nigam Limited*** (supra).

18. In view of the aforesaid discussion, the two questions quoted above are answered in favour of the respondent-assessee and against the appellant-revenue. We uphold the finding of the Tribunal that income from sharing of fibre cables and cell-sites qualify for deduction under Section 80IA(2A) of the Act. Tribunal was also right and justified in upholding the reasoning and order of the Commissioner of Income Tax (Appeals) on cheques bouncing and late payment charges.

19. Appeals are dismissed, without any order as to costs.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 03, 2018
VKR