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

Judgment reserved on: 15.09.2023
Judgment pronounced on: 31.10.2023

\+ **ITA 89/2020**

PR. COMMISSIONER OF INCOME TAX -4,
NEW DELHI ..... Appellant

Through: Mr Zoheb Hossain, Sr. Standing Counsel with Mr Sanjeev Menon, Standing Counsel.

versus

INDUS TOWERS LTD. THROUGH ITS AUTHORIZED SIGNATORY MR. SANJAY WADHWA ..... Respondent

Through: Mr Rohit Jain with Mr Aniket D. Agrawal and Mr Saksham Singhal, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J.

1. In this appeal brought by revenue under Section 260A of the Income Tax Act, 1961 assailing order dated 07.06.2019 of the learned Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), passed in ITA No.2242/Del/2014 and CO No.1040/Del/2014, following four questions of law were proposed by the appellant:

> "*A. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition*

made by the Assessing Officer on account of disallowance of gratuity payments amounting to Rs.42,25,273/-?

B. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition of Rs. 123,75,65,807/- made on account of disallowance of interest on loan?

C. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition of Rs. 107,50,16,411/- made on account of disallowance of depreciation?

D. Whether on the facts and in the circumstances of the case and in law, the Hon'ble ITAT was justified in deleting the addition of Rs. 16,29,41,479/- made on account of disallowance of loan processing fee?"

2. After detailed hearing on 18.05.2023, we upheld the view taken by the learned Tribunal as regards the proposed question (A) and posted the matter for further hearing on the remaining proposed questions. The relevant part of order dated 18.05.2023 is extracted below:

> "*6. According to us, insofar as the proposed question A is concerned, it arises out of facts which are not in dispute. This is evident upon perusal of the relevant part of the impugned order passed by the Tribunal dated 07.06.2019 which reads as follows:*
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> > *"7. We have heard both the parties and perused all the relevant material available on record.* ***It is pertinent to note that at the time of incorporation, some of the employees from Bharti, Vodafone and Idea group companies were transferred to the assessee and were enrolled as full time employees.*** *The assessee was required to pay "ex-gratia/gratuity" amount in terms of the terms and conditions of appointment for such employees. Sample employment contracts, details of all the employees transferred from Bharti, Vodafone and idea group companies, period of employees' continuous service and the amount of gratuity paid were duly furnished before CIT(A). The CIT(A) called for the evidence produced by the assessee. In present case, gratuity was actually paid. The Ld. AR relied upon the decision of the Hon'ble Madras High Court in case of CIT vs. Premier Cotton Spg. Mills Ltd. (2003) 131 Taxman 79 (Mad.) wherein it was held that* ***if the entire amount is not allowable under Section 36(1)(v), the balance amount would necessarily have to be allowed as a business expenditure under Section 37 of the Act and also that***

> ***<u>Section 40A(7) of the Act has no application where there was an actual payment to an approved gratuity fund. Thus, Ground No.l of Revenue's appeal is dismissed</u>".***
>
> *[Emphasis is ours]*
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> *7. Clearly, the aforesaid would show that the Tribunal has returned a finding of fact that payments were made with regard to the employees who were moved/transferred from the joint venture companies.*
>
> *8. The Tribunal's view that even if the payments made towards gratuity to such employees was not allowable under Section 36(1)(v), the same would be allowable under Section 37 of the Income Tax Act, is, in our view, unimpeachable. The expenditure, was incurred, wholly and exclusively for the purposes of business concerning the respondent/assessee.*
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> *9. Insofar as the remaining proposed questions are concerned, list the matter on 15.09.2023."*

3. Accordingly, we heard learned counsel for both sides on the remaining issues qua the deletions of additions made on account of disallowance of interest on loan, disallowance of depreciation and disallowance of upfront loan processing fee. As elaborated hereafter, we are of the considered view that this appeal revolves mainly around findings of facts and there is no substantial question of law involved.

4. To begin with, the circumstances leading to this appeal, as reflected from record and as pleaded by the appellant/revenue in the Memo of Appeal are succinctly recapitulated as follows.

4.1 The respondent/assessee, a Public Limited Company was incorporated in the year 2007 as a joint venture Company of Bharti Infratel Limited, Vodafone Essar Limited and Aditya Birla Telecom Limited with its main object being to share the telecom infrastructure amongst various telecom service providers in 16 telecom circles through 93,723 telecom sites, out of which 79,239 telecom sites were under indefeasible rights to use on 01.01.2009 and the remaining 14,484 sites

were built and personalized by the respondent/assessee on its own during the financial year concerning the subject Assessment Year.

4.2 On 30.09.2009 the assessee filed its return of income, thereby declaring total loss of Rs.452,16,70,660/- which was revised and the declared loss was pegged at Rs.611,62,44,502/- including unabsorbed depreciation of Rs.525,17,02,779/-.

4.3 Case of the respondent/assessee having been selected for scrutiny assessment, notice under Section 143(2) of the Act was issued to it. The Assessing Officer passed Assessment Order dated 19.08.2011, thereby declaring the total loss of the respondent/assessee as Rs.292,27,98,604/- as against the claimed loss of Rs.611,62,44,502/-. Broadly speaking, on the issues now under consideration before this court, the findings delivered by the Assessing Officer were to the following effect.

4.3.1 During the relevant financial year, utilizing the interest bearing borrowed funds, the respondent/assessee claimed to have started constructing 14,484 towers, by which time it had taken few towers on lease from Bharti Airtel, Vodafone and Idea, and the construction of new towers was merely a part of the existing concern acquiring assets to expand the same business, so the interest component on the borrowed funds could only be capitalized i.e. added to the cost of the assets but could not be claimed for deduction as revenue expenditure under Section 36 of the Act. The Assessing Officer was of the view that all towers erected by the respondent/assessee might not have been put to use, therefore, in respect of the towers that in his opinion were not put to use

prior to 31.03.2009, the interest expense for the fund borrowed were to be capitalized.

4.3.2 Since despite repeated directions, the respondent/assessee failed to submit the tower-wise details, it was also not entitled to claim depreciation in respect of 50% of towers. As regards depreciation also, the Assessing Officer was of the view that not all towers erected by the respondent/assessee might have been put to use, so on estimated basis, depreciation qua 50% of towers could be allowed.

4.3.3 Since the respondent/assessee, claiming an amount of Rs.20.75 crore towards the upfront loan processing fees as revenue expenditure had debited only Rs.4,45,38,521/- in its profit & loss account and had amortized the loan processing fees over the period of loan, the deduction allowable to the respondent/assessee had to be restricted to Rs.4,45,38,521/- for the current year with the liberty to claim disallowance in the subsequent years based on accounting treatment.

4.4 The appeal filed by the respondent/assessee was disposed of vide order dated 31.01.2014 of the Commissioner Income Tax (Appeals) holding as follows.

4.4.1 As regards the interest on loan and the depreciation, the Assessing Officer was not in possession of any adverse evidence while holding that the respondent/assessee had not put to use 50% of the towers erected by it for the purposes of its business, so the ad-hoc assumption in that regard was not sustainable. The additional evidence admitted by CIT(A) showed

tower-wise details of the dates on which certificate of "ready for active installation" (RFAI) of towers was issued by an independent third party engineer as well as the service tax returns for the period ending September, 2008 and the period ending March, 2009 in respect of the towers erected by the respondent/assessee, so in view of the judgment of this Court in the case of ***Capital Bus Services vs CIT***, 125 ITR 404, claim of the respondent/assessee with regard to the interest on the loan as well as the claimed depreciation were allowable as deduction.

4.4.2 Since the loan processing fee was admittedly incurred for borrowing funds to be utilized for acquisition of capital assets, entire amount instead of $1/5^{th}$ thereof should have been capitalized. The decision of the Assessing Officer, treating the loan processing fee as deferred revenue expense was not in accordance with law. Besides, the Assessing Officer by mistake took the loan processing fee as Rs.20.75 crore as against Rs.21.875 crore and accordingly made lesser amount of disallowance.

4.5 The above mentioned order dated 31.01.2014 of the CIT(A) was challenged by both sides in appeal before the learned Tribunal, which allowed appeal of the respondent/assessee and dismissed the appeal of the appellant/revenue, holding that so far as interest on loan and depreciation are concerned, there was no infirmity in the decision of the CIT(A); that so far as the disallowance of loan processing fee is concerned, the respondent/assessee had paid one time upfront processing fees of Rs.21,87,50,000/- and the entire amount of loan processing fees was claimed as revenue expenditure, though amortized for accounting

purposes over the period of respective loan by debiting an amount of Rs.4,45,38,521/- to its profit & loss account based on number of years for which loan was used in the subject Assessment Year and since funding is required in business from time to time, these expenses are regular business expenses, so claim of the respondent/assessee qua loan processing fee in its entirety was allowable.

5. Hence the present appeal.

6. As mentioned above, the issue of gratuity having already been resolved vide order dated 18.05.2023, presently the appeal revolves around the claim of the respondent/assessee for deduction of the depreciation as well as the interest and the processing fee on the loan.

6.1 Learned counsel for appellant/revenue contended that the impugned order of the learned Tribunal is not sustainable in the eyes of law since despite repeated directions, the respondent/assessee did not submit details of the newly constructed towers; that proviso to Section 36(1)(iii) of the Act clearly stipulates that the interest component on borrowed capital for the purposes of business cannot be claimed as deduction; that the respondent/assessee itself having amortized the expenses on loan processing fee, findings of the learned Tribunal in that regard are not sustainable; and that the learned Tribunal failed to appreciate that the loan taken by the respondent/assessee was to procure assets and not for routine business, so the same cannot be claimed as revenue expenditure under Section 37 of the Act.

6.2 *Per contra*, learned counsel for respondent/assessee supported the impugned order and contended that the appeal is completely devoid of merit in view of the judicial pronouncements in the cases reported as ***CIT vs Gujarat Guardian Ltd.***, [2009] 177 Taxman 454 (Del); ***CIT vs Bharti Telenet Ltd.***, ITA Nos.1110/2011 (Del); ***Taparia Tools Ltd. vs JCIT***, 372 ITR 605 (SC); ***PCIT vs Param Dairy Ltd.***, [ITA 50/2022; decided on 15.03.2022] (Del.); ***PCIT vs Bhadani Financiers Pvt. Ltd.***, 2021 SCC Online Delhi 4430; ***Capital Bus Services Pvt. Ltd. vs CIT*** [1980] 123 ITR 404 (Delhi); and ***Commissioner of Income Tax -IV New Delhi vs Insilco Ltd.***, (2010) 320 ITR 322 (Delhi).

7. The undisputed legal position as culled out of the above quoted judicial precedents is as follows. In view of the provisions under Section 43B(d) of the Income Tax Act, any sum payable by the assessee as interest on any loan from any financial institution shall be allowed as deduction to the assessee in the year in which the same is paid irrespective of the provisions in which the liability to pay such sum is incurred by the assessee according to the method of accounting regularly applied by the assessee. Where the assessee, following the mercantile system of accounting claims in the return of income deduction of upfront interest charges paid during the relevant financial year and the said upfront interest payment is shown by the assessee in accounts as deferred revenue expenditure to be written off over a period of number of years, the assessee would be entitled to deduction of the full amount in the Assessment Year in which it is paid. As per Section 36 of the Act, any amount on account of interest paid becomes an admissible deduction if the interest was paid on the capital borrowed by the assessee for the

purposes of business or profession. While examining the issue of depreciation, the expression "used for the purposes of business or profession" in the provision under Section 32 of the Act has to be construed widely by including in it not only those cases where the buildings, machinery, plant etc are actively employed but also those cases where there is, what may be described as a passive user of the same in the business because of various reasons including that a machinery may well depreciate even where it is not used in the business and even due to non-user and being kept idle.

8. In the present case, as regards the claims of depreciation and interest on loan, the Assessing Officer observed that the respondent/ assessee had failed to submit tower wise details, so the respondent/ assessee would be entitled to the said claim only to the extent of 50%; and that qua the loan processing fee, since the same had been amortized over the period of loan, the deduction could be allowed only to the extent of amount debited for the concerned financial year with liberty to claim disallowance in subsequent years.

8.1 In first appeal, the CIT(A) rejected the view of the Assessing Officer as regards restriction of claim towards depreciation and interest to the extent of 50% for the reason that there was no objective criteria or material before the Assessing Officer. Placing reliance on the documentary evidence, including RFAI certificate issued by third party engineer and the service tax returns in respect of the towers, adduced at the appellate stage, the CIT(A) allowed full claim of the respondent/assessee as regards interest and depreciation towards

deduction. As regards the upfront loan processing fee, CIT(A) observed that since the loan processing fee was admittedly incurred for funds to be utilized for acquisition of capital assets, entire amount instead of $1/5^{th}$ thereof should have been capitalized and the Assessing Officer by mistake took the loan processing fee as Rs.20.75 crores as against Rs.21.875 crores, so accordingly additional disallowance was allowable @ 15% p.a. on the aggregate amount of disallowance.

8.2 The learned Tribunal while allowing the appeal of the respondent/assessee and dismissing the appeal of the appellant/revenue held that as regards the interest on loan and depreciation, there was no infirmity in the decision of the CIT(A), but as regards disallowance of upfront loan processing fee, though the same was amortized for accounting purposes over a period of time in the profit and loss account, the same in its entirety was allowable as deduction because funding is required in business from time to time and these are regular business expenses.

9. On the basis of material available on record, the learned Tribunal arrived at factual findings to the following effect. Construction of towers began in April, 2008 whereas the Indefeasible Right to Use (IRU) Agreement was executed on 01.01.2009, therefore, the Assessing Officer was factually incorrect in observing that the respondent/assessee commenced business through lease of towers under IRU Agreement. A telecom site is ready to use even before the suppliers of various material are paid, hence no loan needs to be drawn when the site is under construction. The respondent/assessee had filed relevant evidence before

the revenue authorities with regard to the expenses related to loan and there is no adverse finding to the effect that the said expenses were not utilized for business, therefore, the respondent/assessee rightly claimed the same as revenue expenses.

10. To recapitulate, the Assessing Officer had proceeded in the absence of the requisite material pertaining to the tower-wise details and the said material was provided subsequently at the first appellate stage and on the basis thereof the learned Tribunal passed the impugned order.

11. The issue pertaining to the depreciation and the interest on loan is similar to the issue of payment of upfront fee towards loan processing charges in the sense that the Assessing Officer opted to truncate the said charges proportionally for the reason that not all the towers might have been put to use as the tower-wise details had not been furnished and that the respondent/assessee had amortized loan processing fee over a period of time in its profit & loss account. On these aspects, the above cited judicial precedents clearly fortify the view taken by the learned Tribunal.

12. The towers which were constructed subsequent to commencement of business of the respondent/assessee were so constructed admittedly during the year relevant to the subject Assessment Year. As laid down in the above cited judicial precedents, the expression "used for the purposes of the business" in Section 32(1) of the Act has to be construed liberally so as to include even passive user of the subject machinery (*towers in the present case*). It is nobody's case that the profits earned by the respondent/assessee had no nexus with the towers in question. Therefore,

we find no infirmity in the view taken by the learned Tribunal on the basis of factual matrix, thereby allowing the amount of depreciation concerning the said towers to be deducted.

13. In view of the legal position discussed above, we have no hesitation to reiterate that it being undisputed that the loan in question was raised by the respondent/assessee only for the purposes of its business, merely because the loan processing charges though paid upfront but amortized over a period of five years, solely to be in consonance with the mercantile system of accounting, deduction of the entire charges in lump sum in the year in which the same were paid could not be denied to the respondent/assessee. On this aspect also we find no infirmity in the view taken by the learned Tribunal in the impugned order.

14. In view of the aforesaid, we find no substantial question of law in this appeal to be answered by us. Accordingly, the appeal is closed.

(GIRISH KATHPALIA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

OCTOBER 31, 2023
nn/as