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

Decided on 23rd March, 2015

+ ITA 799/2014
COMMISSIONER OF INCOME TAX (CENTRAL)-III
..... Appellant

versus

MICROWAVE COMMUNICATIONS LTD.
..... Respondent

+ ITA 1738/2010
+ ITA 1739/2010
CIT
..... Appellant

versus

MICROWAVE COMMUNICATIONS LTD
..... Respondent

Presence : Ms. Suruchi Aggarwal, sr. standing counsel for the revenue
Ms. Poonam Ahuja and Mr. Rohit Kumar Gupta, Advs. for the
assessee

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

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Admit.
2. Ms. Poonam Ahuja, Advocate accepts notice.
3. With consent of the counsel the matter was finally heard.
4. The revenue urges that the interest on payment qua the license fee, could not be amortised in view of Section 35ABB of the Income Tax Act.

In other words, the question is whether the licence fee payable by telecom service providers to the Department of Telecommunications is to be treated as capital or revenue expenditure. It is not disputed that this issue was considered by Division Bench of this Court in judgment reported as *Commissioner of Income Tax V. Bharti Hexacom* (2014) 221 Taxman 323 (Del.). The findings of the said judgment and the operative directions are in the following terms :

“47. In view of the aforesaid findings, the substantial question mentioned above in item Nos.1 to 9 is answered in the following manner:

(i) The expenditure incurred towards licence fee is partly revenue and partly capital. Licence fee payable upto 31st July, 1999 should be treated as capital expenditure and licence fee on revenue sharing basis after 1st August, 1999 should be treated as revenue expenditure.

(ii) Capital expenditure will qualify for deduction as per Section 35ABB of the Act.

48. The appeal ITA No. 417/2013 by the Revenue in the case of Hutchison Essar Pvt. Ltd., pertains to the assessment year 1999-2000 i.e. year ending 31st March, 1999. It is for the period prior to the period 31st July, 1999. As per the discussion above, the licence fee payable on or before 31st July, 1999 should be treated as capital expenditure and the licence fee payable thereafter should be treated as revenue expenditure. In view of the aforesaid position, the question of law admitted for hearing in this appeal as recorded in the order dated 21st August, 2013, has to be answered in favour of the revenue and against the respondent assessee.

49. In ITA Nos.893/2010 and 1333/2010, an additional issue arises for consideration. This additional issue relates to interest on delayed payment of license fee and whether the same was capital or revenue expenditure. By order dated 18th September,

2012, the following substantial question of law was admitted for hearing and disposal:-

Whether the Tribunal fall into error in holding that the interest on the delayed payment of license fee also partook of the same nature as license fee and was deductible as revenue expenditure?

50. We are inclined to pass an order of remand on this question as we find that the facts on the said aspect are not lucid and clear. In the assessment-year 2000-01, the assessment year subject matters of ITA 893/2010 and 1333/2010 in the case of Bharti Cellular Ltd. and Bharti Telenet Ltd. now known as Bharti Infotel Ltd., the assessee had paid interest of Rs.1.75 crores and Rs.2.24 crores to the Department of Telecommunication for delayed payment of license fee. The Assessing Officer disallowed the said payments observing that these were on capital account. The assessment order records that no details had been furnished and the expenses pertained to prior period. The payment was considered to be capital in nature because the license fee was also capital expenditure.

51. Commissioner (Appeals) in the case of Bharti Cellular Ltd. (ITA 893/2010) held that interest paid was capital expenditure because license fee itself was capital in nature. The said opinion was followed by Commissioner (Appeals) in the case of Bharti Telenet Ltd., now known as Bharti Infotel Ltd. The answer to the question would depend upon the finding whether payment related to license fee payable period prior to 31st July, 1999 or was for the subsequent period. If interest paid was in respect of license fee payable for the period prior to 31st July, 1999, it will have to be capitalised. Similarly, if the interest was payable on license fee for the period post 31st July, 1999, it should be treated as revenue in nature/character. The contention that it was a prior period expense does not appeal to us and has to be rejected, as the interest was paid during the year in question.

52. Learned counsel for the assessee has submitted that there cannot be any factual dispute that this interest was paid to the

Department of Telecommunication on delayed payment of license fee under the 1999 policy and not on account of license fee payable for period prior to 31st July, 1999. We cannot from the facts on record, decipher the exact details as this aspect has not been examined by the tribunal. The tribunal has held that interest paid was revenue in nature because the license fee payable itself was revenue in nature, irrespective of fee payable prior to 31st July, 1999. We have held to the contrary. The said question of law, therefore, is answered in favour of the Revenue and against the respondent-assessee but with an order of remand to decide the controversy afresh keeping in view the observations made above.”

5. The questions of law urged by the revenue are therefore covered in terms of the above judgment which the Court follows. The matter is accordingly remitted to AO, who shall pass appropriate orders in the light of the directions contained in para 51 and 52 (extracted above). The question of law is decided in favour of the revenue. The appeals are partly allowed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

MARCH 23, 2015

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