IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 516 OF 2015

Commissioner of Income Tax-3 } Appellant
versus
M/s. Idea Cellular Ltd. } Respondent

Mr. A. R. Malhotra i/b. Ms. Padma Divakar for the appellant.

Mr. J. D. Mistri - Senior Advocate with Mr. P. C. Tripathi i/b. Mr. Atul K. Jasani for the respondent.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- SEPTEMBER 30, 2016

P.C. :-

1. This appeal of the Revenue challenges the order passed by the Income Tax Appellate Tribunal dated 13th May, 2014 in Income Tax Appeal Nos. 3260 and 3493 both of 2008 and for the assessment years 2001-02.

2. Mr. Malhotra fairly states that out of the four questions, pressed as substantial questions by the Revenue at pages 6 and 7 of the paper book, the questions (c) and (d) would not survive as they stand covered by a judgment and order delivered by this court in Income Tax Appeal No. 196 of 2014 and connected appeals.

3. Mr. Malhotra would submit that questions (a) and (b) at pages 6 and 7 are substantial questions of law.

4. In that, it is submitted that the assessee filed a return of income for the assessment year 2001-02 on 30th October, 2001 declaring a loss of Rs.133,91,49,737/-, which was determined by the assessing officer at a loss of Rs.75,04,02,061/- under section 143(3)(ii) of the Income Tax Act, 1961.

5. During the assessment proceedings, the assessing officer noted that the assessee claimed as a revenue expenditure a sum of Rs.3,94,75,619/- being the amount written off by the assessee in respect of expenses incurred on projects originally set up to put up cell sites, but later abandoned. These expenses were disallowed by the assessing officer as that was spent by the assessee on sites to bring into existence a new asset and new source of income and therefore, such expenditure was in the nature of capital expenditure.

6. Aggrieved by this order/disallowance, an appeal was preferred before the first appellate authority by the assessee. That also came to be dismissed and the Commissioner of Income Tax (Appeals) agreed with the assessing officer. Thereafter, the tribunal was approached and Mr. Malhotra would submit that in reversing the concurrent views, the tribunal committed an error

of law, which is apparent on the face of the record. It is the tribunal's finding, which is perverse to say the least. It is the stand of the assessee, which was culled out from a letter addressed by the assessee itself. Once that letter and other record was analysed to arrive at the eventual conclusion, then, the tribunal should not have interfered with it. The interference by the tribunal raises substantial questions of law.

7. On the other hand, Mr. Mistri learned senior counsel appearing for the assessee supported the view of the tribunal. It is submitted by him that the expenditure in question was incurred for setting up/construction of cell towers, which was abandoned due to unavoidable circumstances. The site was not found suitable. Therefore, the expenditure incurred for the purpose of existing business of the assessee came to be written off. The assessee is a cell company and providing cellular services even today. When it decides to erect new towers, it incurs expenses. Until such stage, as the site is declared unsuitable for the operation, these expenses have to be incurred and have been shown as such in the accounts. Mr. Mistri would submit that, therefore, the treatment in the account could not be faulted. He would submit that the tribunal has rightly come to the conclusion that the concurrent orders are not in accordance

with law. He would submit that all that the tribunal has gone by and applied are the settled tests and they are also to be found in the case of *Commissioner of Income Tax, Ranchi vs. Tata Robins Fraser Ltd.* in two Tax Appeal Nos. 3 to 8 of 2000(R) and 9 of 2001, decided on 12th September, 2012.

8. Mr. Mistri would, therefore, submit that the appeal be dismissed.

9. We have carefully perused the memo of the appeal. We have also perused the order of the assessing officer and that of the first appellate authority. Mr. Malhotra has elaborately taken us through these orders to submit that the assessing officer found from the record itself and particularly from a document, namely, a letter or response from the assessee that the purpose of the expenditure cannot be said to be other than bringing up a capital asset into existence. The fact that later on the site was not chosen for hoisting the tower is immaterial. However, we find that the tribunal applied the correct test. The tribunal found that there is no dispute that the expenditure in question was incurred for the purpose of construction of a cellular tower, but the project was then abandoned due to the reason that the site was not suitable. The reasons assigned by the assessing officer and the first appellate authority are unsustainable, according to the

tribunal for the simple reason that cellular towers were being erected for the purpose of assessee's own business of providing cellular services to the customers. The towers are meant for the business of providing cellular services. It is by utilising these towers that such services are provided. It is not an independent source of income. It is only to make the cellular services provided more efficient, convenient and profitable. When the towers are not exclusively meant for leasing out to third parties for earning the revenue, but used for transmission of telephone signals of assessee's own cellular services, then, it cannot be said that the towers, which are used for the assessee's own business, are new source of income. A cellular tower can be a new independent source of income, if it is erected exclusively for leasing out to the other operators. However, on facts, this was not the position and the tribunal, therefore, rightly concluded that in series of decisions, the High Courts and the Hon'ble Supreme Court of India has laid down the principle that if an expenditure is incurred for doing the business in a more convenient and profitable manner and has not resulted in bringing any new asset into existence, then, such expenditure is allowable business expenditure. In the present case, no new business was set up, but towers in addition to which were already set up were proposed at site, which project was later on abandoned.

10. We do not find that the tribunal has committed any perversity or applied incorrect principles to the given facts and circumstances. When the facts and circumstances are properly analysed and correct test is applied to decide the issue at hand, then, we do not think that questions (a) and (b), as pressed, are substantial questions of law. The appeal is devoid of merits and it is dismissed. There would be no order as to costs.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**