IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C' : NEW DELHI

BEFORE SHRI C.L.SETHI, JM AND SHRI K.D.RANJAN, AM

ITA No.770/Del/2006
Assessment Year : 2004-05

M/s Mahanagar Telephone Nigam Limited, Jeevan Bharti Building, Tower 1, 12th Floor, 124, Connaught Place, New Delhi. PAN No.AAACM0828R.	Vs.	Addl.Commissioner of Income Tax, Range-4, New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Ved Jain and Shri V.Mohan, CAs.
Respondent by : Smt.Shyama S.Bansia, CIT-DR

ORDER

PER C.L.SETHI, JM :

The assessee is in appeal against the order dated 30.12.2005 passed by learned CIT(A) in the matter of assessment made u/s 143(3) dated 21.2.2005 by the AO for the AY 2004-05.

2. In this case, the Committee on Disputes has permitted the assessee to pursue the issue regarding disallowance of claim u/s 80IA and additions made u/s 43B for employees' contribution towards GPF, before Tribunal in view of questions of facts and law involved vide minutes of the meeting of the Committee circulated vide letter dated 10th September, 2008.

3. Ground No.1 is general in nature and needs no adjudication as no arguments were placed in this behalf.

4. Ground No.2 is directed against CIT(A)'s order in confirming the action of the AO in not allowing deduction u/s 80IA of the Act claimed by the assessee as a telecom service provider.

5. The assessee is a public sector undertaking incorporated on 28.2.1986. It is engaged in providing basic telephone services in metro cities as also cellular and other value added telecommunication services. In the return of income, the assessee claimed deduction u/s 80IA(4C) of the Act being 30% of income from services/operations. The assessee had given a note alongwith the returns of income in support of its aforesaid claim. It was noted by the AO that claim of the assessee u/s 80IA was disallowed in the earlier years and both CIT(A) and ITAT had confirmed the addition on this account. The AO further noted that the assessee company had claimed this deduction for the first time in AY 1996-97 which was not allowed and CIT(A) confirmed the AO's order. On a further appeal before the Tribunal , the Tribunal dismissed the assessee's claim. Accordingly, the AO disallowed the assessee's claim after following the ITAT's order in assessee's own case.

6. On an appeal, the learned CIT(A) confirmed the AO's order in the light of the fact that ITAT in earlier years dismissed the assessee's appeal on this issue. The learned CIT(A) further observed that ITAT Delhi Bench 'B' had even rejected the assessee's claim for the AY 2001-02. The learned CIT(A) reproduced para 5 of the Tribunal's order dated 11.10.2004 for the AY 2001-02. The CIT(A), therefore, dismissed the assessee's ground.

7. Hence, the assessee is in further appeal before us.

8. In the course of hearing of this appeal, the learned counsel for the assessee has submitted that in AY 1998-99, 1999-2000, 2000-01 and 2005-06, the Tribunal set aside the issue relating to the claim of deduction u/s 80IA for fresh adjudication by the AO vide order dated 3.2.2006. The learned counsel for the assessee further pointed out

that the Hon'ble Delhi High Court vide its order dated 15.12.2006 set aside the very issue of deduction u/s 80IA to the file of the AO for taking a decision afresh. He further contended that AO thereafter readjudicated the issue for all the aforesaid assessment years and after examining the facts and evidences upheld the eligibility of the assessee for claiming exemption u/s 80IA of the Act. The AO vide its order dated 29.12.2006 allowed the deduction u/s 80IA on proportionate basis in the ratio of the exchanges as against full exemption claimed by the assessee. The appeal filed by the assessee against the AO's order for allowing only proportionate exemption has been decided by the Tribunal vide its order dated 11.3.2010 pertaining to the AY 1998-99, 1999-2000, 2000-01, 2001-02 & 2005-06 by directing the AO to allow 75% of the income to be eligible for deduction u/s 80IA of the Act. It was further pointed out that AO's order allowing proportionate exemption u/s 80IA happened to be a subject matter of the revision u/s 263 by the Commissioner of Income Tax, who after issuing a show cause notice u/s 263 of the Act and after hearing the assessee, upheld the eligibility of the assessee in respect of exemption u/s 80IA vide its order dated 26.2.2008. He, therefore, submitted that the issue is squarely covered by the orders of the earlier years.

9. The learned DR, on the other hand, submitted that assessee's claim of exemption u/s 80IA(4C) is no more applicable in the AY 2004-05 and thus, the necessary instructions and directions may be given to the AO to decide the matter as per law.

10. In reply, the learned counsel for the assessee has submitted that the provisions contained in old provision of Section 80IA(4C) are now incorporated in 80IA, sub-section (4) clause (ii) and, therefore, the assessee is entitled to deduction u/s 80IA(4)(ii) in the light of the Tribunal's earlier order.

11. We have heard both the parties and perused the material on record. We have perused the Tribunal's order dated 11.3.2010 pertaining to the AY 1998-99, 1999-2000, 2000-01, 2001-02 & 2005-06. In those years, the matter was re-examined by the AO after the matter being restored by the Tribunal to him, and in the fresh assessment, the AO allowed proportionate deduction u/s 80IA to the assessee. Therefore, the issue involved in all these appeals was with regard to quantum of deduction u/s 80IA of the Act. In the first round, the assessee's claim of deduction u/s 80IA was rejected. However, while framing the fresh assessment in the second round, the AO has accepted the position that the assessee is eligible to claim deduction, but he restricted the claim in terms of total telephone exchanges set up by the assessee. On the quantum of deduction, the Tribunal has taken the view as under vide paragraph 36 of its order:-

> "36. A plain reading of the above Section makes it clear that unlike provisions of sub-section 2 of Section 80IA in respect of industrial undertaking which imposes a condition that it should be a new undertaking and that it should not be formed by splitting up or reconstruction of a business already in existence nor there is any condition that it should not be formed by transfer to a new business of machinery or plant previously used for any purpose. After analyzing all these eligibility criteria, the AO has reached to the conclusion that assessee is eligible for deduction u/s 80IA u/s 4C of the IT Act. Now, we have to see whether AO was justified in restricting claim of deduction with reference to exchanges installed after 1995. It is pertinent to mention here that deduction u/s 80IA is to be computed on the profits of the eligible business and not on the basis of amount invested in plant & machinery in the form of telephone exchanges. Therefore, the profit accruing from telecommunication services is required to be taken into account while granting claim of deduction u/s 80IA. In this regard, we found that after 1995, there is a complete revolution in telecommunication industry and old exchanges if any had been totally revamped. It was not merely addition of the new exchanges but there was entire change in the set up, technology, instruments and equipments. The exchanges which were earlier operating on old technology whereby there was use of big cross bar

exchanges with large telephone instruments of dialing numbers mechanically by rotating the dial. Since this technology has been totally abandoned and revamped, replacing the old, most of the income generated is attributable to such new technology exchanges. Merely on the number of old exchanges which were not in operation at all or had undergone totally revamped, income cannot be attributable to such old exchanges, we found that the new technology and the new exchanges made possible a multitude of new intelligent network services which are like cellular services, virtually calling card services, premium rate services, ISDN, calling line identification, call forward on busy and free lines, credit card payment scheme, tele-mart interactive voice response services, directory on CD-Rom etc. Various add on services such as Datacom, Inet, DID PABX, voice mail, Radio paging and ISDN has been started after 1.4.1995. In addition to this phone plus facilities like dynamic locking, call waiting/call transfer, hot lines etc. has been extended to valued customers. Further in order to minimize human re-interface, important operator based special services have been automated with IVRS (Interactive Voice Response Systems). We also found that the assessee MTNL started providing several other advanced and other add on services such as virtual card/account card calling, free phone, virtual private network, premium rate service, telewaiting etc. A new technique named DLC (digital loop carrier system) has also been established. Thus, 1995 onwards the assessee's industry has underwent a tremendous revolution resulting from the possibilities opened up by automatic self operated exchanges. This was not a change or modification but introduction of totally different facilities. It has inducted de novo systems and technology in place of outmode and antiquated system and technology. In view of the above discussion, it is crystal clear that merely on the basis of attributing the income in the ratio of telephone exchanges not proper, but we have to see the various services rendered by MTNL after 1995 which were actually generating income. Since the deduction is to be allowed in respect of income generated by all these facilities, we are required to compute deduction as per these host of services being rendered by MTNL. The lower authorities have also nowhere declined the very fact of old exchanges totally being revamped, most of which were non-operating and under discarded position. As the income generated through so many services being rendered by the new exchanges which is eligible for claim of deduction u/s 80IA, we cannot restrict the claim in respect of the nominal

> income if any generated out of the old exchanges. Keeping in view the totality of facts and circumstances of the case, we direct the AO to attribute 75% (seventy five percent) of the income from various services enumerated above as having been carried out only by virtue of new exchanges having been installed. 25% of the income may be attributed to the old exchanges. Accordingly, the matter is restored back to the file of the AO for recomputing the claim of deduction u/s 80IA with reference to 75% of the income being eligible for deduction, whereas balance 25% is not eligible for deduction in all the years under consideration. We direct accordingly."

12. Respectfully following the aforesaid Tribunal's order, we restore the matter back to the file of the AO for computing the assessee's claim of deduction u/s 80IA in the light of the order of the Tribunal passed in earlier years. The AO shall provide reasonable opportunity of being heard to the assessee before determining the quantum of deduction u/s 80IA of the Act. The AO shall take into account the new provisions contained in Section 80IA(4)(ii) applicable to the present AY 2004-05 while deciding the issue. We order accordingly.

13. Ground No.3 relating to the disallowance u/s 43B with regard to non-deposit of employees' contribution towards GPF was not pressed for by the learned counsel for the assessee. Hence, the same stands dismissed.

14. In the result, the appeal filed by the assessee is partly allowed in the manner indicated above.

Decision pronounced in the open Court on 21st April, 2011.

Sd/-	Sd/-
(K.D.RANJAN)	**(C.L.SETHI)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 21.04.2011.
VK.

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar