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

Date of decision: 18th December, 2012

\+ ITA 1395/2006

\+ ITA 1656/2010

M/S BHARTI TELEVENTURES LTD. ..... Appellant

Through: Mr. Kaanan Kapoor, Advocate.

versus

ADDL./JT.COMMISSIONER OF INCOME TAX ..... Respondent

Through: Ms. Suruchi Aggarwal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

S. RAVINDRA BHAT, J: (OPEN COURT)

The present appeals are directed against a common order of Income Tax Appellate Tribunal dated 10.03.2006 in cross-appeals filed before the Tribunal. The questions of law sought to be urged are: -

(i) Whether the Tribunal fell into error in holding that ₹1,35,05,869/- paid by the assessee as installation expenditure by the assessee was capital in nature and has to be treated as such in assessment proceedings?

(ii) Whether the Tribunal fell into error in holding that the software expenses to the extent of ₹2,69,35,669/- incurred by the assessee were capital in nature?

(iii) *Whether the Tribunal was justified in disallowing the right of all the sum of ₹2,33,76,671/- crores as bed debt has business loss?*"

2. The assessee inter alia engages itself in the promotion and establishing telecom services and allied activities, including mobile and cellular services. Pursuant to its main object it leased to M/s. Bharti Telenet certain plant and machinery. Bharti

Telenet had obtained licence for the purpose of providing cellular services in Himachal Pradesh. The lease arrangement entered into between the assessee and Bharti Telenet was scrutinized. The assessing officer noticed that the cost of plant and machinery given on lease by the assessee was ₹10,57,25,094/- which was reflected in the balance sheet of the assessee under the head "plant and machinery given on lease". That apart the assessee had incurred an expenditure to the tune of ₹1,35,05,869/- towards installation of these plant and machinery; in addition to it had incurred a sum of ₹2,69,35,669/- towards software expenses. The assessee claimed the installation expenses as a deduction, debiting it to the profit and loss account. The software expenses on the other hand were treated in the accounts as deferred revenue expenditure and a sum of ₹15,05,446/- was written off in the previous order. In the computation of income accompanying the return the software expenses of ₹2,69,35,669/- were claimed as a deduction. The assessing officer disallowed both these amounts. The assessee carried the matter unsuccessfully in appeal. As far as the first issue i.e. installation expenses were concerned. The CIT (Appeals) confirmed the assessing officer's order holding that the expenditure fell properly in the capital field. The Tribunal confirmed the same.

3. Learned counsel for the appellant urges that the expenditure on installation of ₹1,35,05,869/- did not confer any capital advantage. He argued that since no enduring benefit ensued as a result of this expenditure and a separate lease rental was obtained from the M/s. Bharti Telenet, the expenditure towards installation had to be considered in the light of the decisions which laid down the test as to whether commercially, they conferred any advantage. In support of the submissions learned counsel relied upon the decisions of the Supreme Court reported as *CIT v. Associated Cement Company Ltd*. (1988) 172 ITR 257 (SC) wherein the Supreme Court held as under: -

"*.....nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more effectively or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future.*"

Similarly counsel also relied upon the decision in *Empire Jute Co. Ltd. v. CIT*, (1980) 124 ITR 1 (SC) wherein the Court held as follows: -

"*There may be cases where expenditure, even if incurred for obtaining advantage, of enduring benefit, may, none-the-less, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an assesses that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably white leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future.*"

4. Learned counsel emphasised and highlighted the fact that expenditure incurred in this case was one-time and at the site of the lessee which was an important aspect that escaped the notice of both the authorities below. It was urged that at the end of the lease period the equipment had to be dismantled and it had to be reassembled and such expenditure had to be spent time and again and it properly fell in the revenue and not in the capital field. Learned counsel for the revenue resisted the submissions and stated that no substantial question of law arises and that the expenditure incurred for installation of the plant and machinery was intrinsically connected with the plant and machinery. The counsel in other words stated that the machinery was incapable of use

without being installed. The installation cost, therefore was part of "actual cost" that went into the setting up of the machinery and in turn had to be treated as capital expenditure. Therefore, it was rightly disallowed by the lower authorities.

5. This Court has considered the submissions made on behalf of the assessee. The test of "enduring benefit" which was perceived as the true and applicable test to judge whether an expenditure fell in capital field has been, over the years, considered as a self-limiting one. The Courts have held that a proper approach has to be adopted and in doing so the nature of the advantage in a commercial sense and whether it falls properly in the capital field in a commercial sense has to be considered (refer judgment of *Associated Cement Companies Ltd.* and *Empire Jute Co. Ltd.*, etc.) In the present extent, however, this Court recalls the judgment of the Supreme Court in *Challapalli Sugars Ltd. v. CIT*, (1975) 98 ITR 167. The Court there had occasion to consider whether an expenditure necessary to bring an asset into existence and to put it in working condition was capital or revenue. The Court held that expenditure necessary to bring into existence and to put the assets in a working condition would be capital in nature. In case money is borrowed by a newly started company, the interest incurred prior to the commencing of production would be part of the actual cost of the plant and machinery. It was noted that the accepted rule of accountancy for determining the cost of fixed assets is to include all expenditure necessary to bring such assets into existence and put them in working condition. Therefore, the test "*all expenditure necessary to bring such aspects into existence and to put them in a working condition*" is a determinative test for installation and other charges needed to effectuate the working condition of the leased equipment. In this case clearly the authorities have applied the test and held the expenditure in question (₹1,35,05,869/-) to be properly falling in the capital field. We see no reason to differ with them. The Tribunal's reasoning is unexceptionable. Its order needs no interference and the first

substantial question of law is answered in favour of the revenue and against the assessee.

6. The second issue concerns software expenses to the tune of ₹2,69,35,669/-. The assessee's contention herein is that this was a pre-design software and not customized to suit its particular requirements. Learned counsel highlighted the fact that the lower authorities particularly the Tribunal were influenced by the consideration that a composite amount was charged for such software in the lease arrangement. It was submitted that whether such charges were an integral part of financing should not obscure the real nature of the software for which again the test is whether it would fall in the revenue filed. Counsel in this regard relied upon the license agreement entered between the assessee and M/s. UB Vest (Usha Bethron Ltd.) whereby the latter agreed to license its software. The assessee's claim was noticed by the Tribunal who extracted it in the following terms: -

> "*The hardware equipment supplied by Erricson are BSCs (Base Station Control) and MSC (Master Station Control). The BSCs comprises of towers and call receiving and recording equipments, whereas MSC comprises of equipments controlling the BSCs. These are the primary equipments for managing the cellular services in the region of Himachal Pradesh.*
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> *The software required for updating and accounting of cellular phone calls is independent of the functioning of hardware equipments. In absence of the software acquired, a large number of manpower would have been deployed to monitor each BSCs and MSCs. This would have resulted in delayed informations, for accounting and billing of cellular services.*
>
> *The software supplied by Erricson was to carry out the following functions: -*
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> *(i) Collect online information in regard to CDRs (i.e. Call detection records) at BSC;*

(ii) Compiling of the CDRs online at MSC in regard to CD House received at each BSC.

The software supplied from UB Vest, Calcutta, are required for functioning of online rating of the CDRs collect from MSC and financial accounting of the company.

On account of being independent nature to the equipment, Erricson have raised separate bills for software supplied. The software are independent of the hardware equipments functioning and relates to financial accounting and billing."

7. After the submissions were made and the impugned order was passed, the appellant apparently moved a miscellaneous application for correction/ rectification which was allowed by the Tribunal but without any change in the result. The assessee underlined the fact that the software lease was not an integral part of the lease. It was submitted that the Tribunal despite the rectification did not reverse the order. Counsel highlighted the fact that the software in this case was general and only modified in a limited manner to suit the end user. It was urged that the software had no pecuniary features so as to cater to the hardware that had been leased to M/s. Bharti Telenet. The counsel, therefore, submitted that to treat the expenditure incurred by the assessee in this regard as capital in nature was erroneous.

8. This Court notices that the lower authorities and the Tribunal had the benefit of considering all the documents which included the lease agreement with Bharti Telenet and the license agreement dated 11.11.1996 whereby the assessee secured license to exploit the software, provided it procured hardware as per agreed specification and also complied with order by the lessor UB Vest. The software as well as hardware were made an integral part of the arrangement. The software apparently caters to the hardware. In this case, it is necessary for the kind of software to cater to diverse activities such as billing regarding user and analyzing such like activities to promote speed and efficiency. That the parties chose to have a composite arrangement is one

factor which the Tribunal was entitled to take into consideration. The Tribunal in our opinion correctly held that the test to discern whether the expenditure incurred by the assessee in this regard was capital or revenue did not in any manner differ from the content or character which were applicable while considering issue No.1. This Court finds no reason to differ from the Tribunal; there is certainly no reason to interfere with the Tribunal and accordingly the second question is answered in favour of the revenue and against the assessee.

9. The third question which the assessee sought to urge is with regard to the amount of ₹2,33,76,761/- which it had claimed to write off as bad debt and alternatively as a business loss. The submissions in this regard were that the assessee was also engaged in the business of lending money through inter-corporate deposits in the course of such business which generated substantial interest during the assessment years. Certain amounts could not be recovered and were treated as bad debt. The assessee wrote off the unrecoverable amount and claimed it to be treated as bad debt.

10. Counsel for the assessee had urged that the Tribunal fell into error in holding that the memorandum of association of the assessee could not bind the income tax authorities which had to discern what was its real and true business. Counsel emphasised the fact that the term "business" is wide. He relied upon the decisions in *Krishna Prasad & Co. Ltd. v. CIT*, (1955) 27 ITR 49 (SC); *CIT v. Tamil Nadu Dairy Development Corporation Ltd.*, (1955) 216 ITR 535 (Mad.), wherein the Madras High Court held as under: -

> "*The term 'business' is a word of very wide, though by no means determinate, scope. It has rightly been observed in judicial decisions of high authority that it is neither practicable nor desirable to make any attempt at de-limiting the ambit of its connotation. Each case has to be determined with reference to the particular kind of activity and occupation of the person concerned. Though ordinarily 'business' implies a continuous activity in carrying on a particular trade or*

avocation, it may also include an activity which may be called, 'quiescent'."

11. In *CIT v. Motilal Haribhai Spinning and Weaving Co. Ltd.*, (1978) 113 ITR 173 (Guj.), it was held as under: -

"*In Oriental Investment Co. Ltd. v. Commissioner of Income Tax, (1957) 32 ITR 664 (SC), it was observed that merely because the company had within its objects the dealing in investment in shares does not give to it the characteristics of a dealer in shares. But if other circumstances are proved, it may be a relevant circumstance for the purpose of determining the nature of activities of an assessee. It would thus appear that for the purpose of judging whether the transactions in advances of monies were in the nature of business or investment, the Tribunal was entitled to rely upon the objects clauses along with other circumstances and to arrive at the conclusion that it did.*"

This Court has considered the submissions. The Tribunal held as follows on this issue: -

"*Though it is true that Memorandum and Articles of Association of the company is not conclusive on the question whether activities of a company amounts to carrying on the question whether activities of a company amounts to carrying on of business, but it shows sufficiently the intention of the assessee to pursue certain main objects. The frequency of the activity is sought to be highlighted as giving rise to a continuous and organized activity. We have already noticed that it is the first year of business operation of the company and it cannot be said that it was a continuous activity carried out in a normal organized manner. As held by the assessing officer, the main activity of the assessee company was the business of promoting, establishing telecom services. By no stretch of imagination can it be said that the assessee was engaged in the business of money lending. Since the business of the assessee was not that of money lending, it cannot be said that the sum in question represents money lent in the ordinary course of the business of money lending carried on by the assessee. Therefore, the claim of the assessee did not fall within the parameters of provisions of section 36(1)(vii) read with section 36(2) of the Act. The alternative claim of the assessee that the sum in question should be allowed as a*

deduction as a business loss cannot also be accepted, since the sum in question was not incurred as expenditure in the ordinary course of business of the assessee. The sum in question has, therefore, to be considered as a capital loss and the assessee was not entitled to claim the same as deduction. It may also be mentioned here that everything associated or connected with the business cannot be said to be incidental thereto. It is not enough if there is some close proximity of the deposit to the business carried on by the assessee, as such but it should also be an integral part of the carrying on of the business. For the reasons stated above, we are of the view that the disallowance made by the assessing officer was proper and the CIT (Appeals) was justified in confirming the order of the assessing officer. We may also clarify that the CIT (Appeals)'s observations that the claim of the assessee was pre-mature is without any basis and we have already discussed the reasons for our conclusions. The third ground of appeal of the assessee is accordingly dismiss."

12. While it is true that the term 'business' is of wide connotation, the true and applicable test in the opinion of this Court was articulated in *Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT*, (1997) 227 ITR 172, which reads as under: -

"*The basic proposition that has to be borne in mind in this case is that it is possible for a company to have six different sources of income, each one of which will be chargeable to income-tax. Profits and gains of business or profession is only one of the heads under which the company's income is liable to be assessed to tax. If a company has not commenced business, there cannot be any question of assessment of its profits and gains of business. That does not mean that until and unless the company commences its business, its income from any other source will not be taxed. If the company, even before it commences business, invests the surplus funds in its hands for purchase of land or house property and later sells it at profit, the gain made by the company will be assessable under the head "Capital gains". Similarly, if a company purchases a rented house and gets rent, such rent will be assessable to tax under section 22 as income from house property. Likewise, a company may have income from other sources. It may buy shares and get dividends. Such dividends will be taxable under section 56 of the Act. The company may also, as in this case, keep the surplus funds in short-term deposits in order to earn interest. Such interest will be chargeable under section 56 of the Act.*"

13. In this case the Commissioner (Appeals) formed the opinion that the claim was premature and held against the assessee. The findings are that its core or main business is telecom ventures. The lower authorities have held that the assessee efficiently utilised its funds by keeping them in inter-corporate deposits. That would not amount to carrying on a business. The interest was assessed, rightly, under the head "income from other sources". The inter-corporate deposit was not a trade debt or part of any money-lending business.

This Court is satisfied that there is no error in the findings recorded by the Tribunal on this. The third question is also answered in favour of the Revenue and against the assessee. For the above reasons the appeal fails and is dismissed without any order as to costs.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

DECEMBER 18, 2012
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