

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO.6996 OF 2010

The Commissioner of Income Tax-5, Mumbai,
Aayakar Bhavan, M.K.Road,
Mumbai-400-20. ..Appellant.

v.

M/s. Evergrowth Telecom Ltd.,
Essar House, K.K.Marg,
Mahalaxmi, Mumbai 400 034. ..Respondent.

Mr. Vimal Gupta, Senior Advocate with Ms. Padma Divakar for the
Appellant.

Mr. P.J. Pardiwalla, Senior Advocate with Atul K. Jasani for the
Respondent.

**CORAM : J.P. DEVADHAR AND
M.S. SANKLECHA, JJ.**

DATE : 17TH DECEMBER, 2012

JUDGMENT (PER M.S.SANKLECHA, J.):

This appeal by the revenue under Section 260A of the
Income Tax Act ("the Act") challenges the order dated 9/9/2009 of
the Income Tax Appellate Tribunal (Tribunal) relating to the
assessment year 1998-99.

2) Being aggrieved by the order dated 9/9/2009, the

revenue has formulated the following questions of law for the consideration of this Court:

A) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in holding that license fees paid by the assessee company to its holding company amounting to Rs.115,09,09,090/- is an allowable expenditure u/s. 37(1) of the Income Tax Act even though the assessee company had itself amortized the said license fee for a period of ten years in its Books of Account and further Section 35ABB of the Income Tax Act was applicable to such payment as license fee?

B) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in holding that prior period expenses towards PSTN charges amounting to Rs.72,46,725/-and dealers commission amounting to Rs.88,12,972/- were allowable as revenue expenditure ion the year under appeal?

C) Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in holding that foreign travel expenses amounting to Rs.12,63,615/- was allowable as revenue expenditure even though such expenditure was incurred for imparting training to officials which was a benefit of an enduring nature and thus capital expenditure in nature?

3) The respondent was appointed as an operator by M/s. J. T. Mobiles Limited for providing Cellular Mobile service in

Punjab Circle after M/s. J.T. Mobiles Ltd. received a Telecoms License from 10 years from the Government of India to provide Cellular Mobile Service. In its return of income filed for assessment year 1998-99 the respondent had declared a loss of Rs.151 crores. The aforesaid loss was declared inter alia after claiming the following deduction as expenditure:

- (i) Rs.115 crores being the operating fees paid to M/s. J.T. Mobiles Ltd. under Section 37(1) of the Act;
- (ii) Rs.72.46 crores being expenses for PSTN charges and Rs.95.35lacs being expenses on account of commission and
- (iii) Rs.12.63 lacs being expenditure on foreign travel.

4) Regarding Question (A):

(a) The Assessing officer by an order dated 20/2/2001 disallowed expenses of Rs.115 crores claimed as license operating fee on the ground that such expenses are not allowable in one year but has to be amortized over the life of the license in view of Section 35ABB of the Act. Further, it was held that expenses were incurred for a right to operate a telecommunication service and thus is not allowable as a revenue expenditure but

the same has to be amortized to the extent of the license fee attributable for the year under consideration. For this support was drawn from the fact that in its books of accounts the respondent had written off of an amount of Rs.115 crores by amortizing it over a period of 10 years. In support of the above, the assessment order drew support from the fact that the respondent had in its books of account has written off only Rs.47.46crores during the year under consideration.

b) In an appeal filed by the respondent-assessee, the Commissioner of Income Tax (Appeals) by his order dated 7/6/2007 allowed the appeal on the basis of the order of the Tribunal dated 29/3/2007 for the assessment year 1997-98 wherein the entire amount paid as operating license fee by the respondent to M/s. J. T. Mobiles Ltd. was allowed as an expenditure under Section 37(1) of the Act.

c) In the appeal filed by the appellant-revenue, the Tribunal by its order dated 9/9/2009 upheld the order of the Commissioner of Income Tax (Appeals) dated 7/6/2007 following its own decision dated 29/3/2007 for assessment year 1997-98. Thus, the entire expenditure of Rs.115crores paid as operating

license fee was allowed as revenue expenditure under Section 37(1) of the Act.

d) Mr. Vimal Gupta, Senior Counsel appearing for the revenue in support of the appeal submits that an amount of Rs.115crores cannot be allowed as revenue expenditure under Section 37(1) of the Act inasmuch as in its books of account the respondent-assessee has amortized the entire expenditure for a period of 10 years and had written off only Rs.47.46 crores during the year under consideration. Therefore, the deduction of expenditure of Rs.47.46 crores as allowed by the Assessing Officer can only be allowed as revenue expenditure for the assessment year 1998-99. As against the above, Mr. Percy Pardiwala, Senior Counsel for the respondent-assessee relied upon the order of the Tribunal dated 29/3/2007 and submits that for the earlier years i. e. assessment year 1997-98 the Tribunal has allowed the entire amount paid as operating license fee to M/s. J.T. Mobiles Limited under Section 37(1) of the Act. Further, the order dated 29/3/2007 of the Tribunal has been accepted by the revenue and no appeal there from has been preferred by the revenue. Further, he submits that the license fee actually paid by

the respondent assessee to M/s. J.T. Mobiles Limited is in the nature of operating fee which is payable yearly. Therefore the payment not being a capital expenditure is allowable expenditure under Section 37(1) of the Act.

e) We have considered the submissions. We find that amount of Rs.115crores paid by the respondent-assessee to M/s. J.T. Mobiles Limited as operating license fee for the year under consideration. Consequently, no enduring benefit is received by the respondent-assessee so as to spread the expenditure beyond the period of one year in which the expenditure is incurred. In such a case, there can be no amortization of the expenditure over a period of 10 years. Further, Section 35ABB of the Act would have no application in the present case but would apply in respect of the license fee paid by M/s. J.T. Mobiles Ltd. The fact that the respondent-assessee had in its books of accounts spread the expenditure of Rs.115crores over a period of 10 years and only debited amount of Rs.47.46crores as expenditure during the year under consideration would not change the nature of the expenditure for the purpose of determining to allow ability of the expenditure for income tax purpose. It is well settled that the

treatment given in the books of account would not by itself determine the taxability of the item. Further, the Tribunal in the present case has merely followed its earlier order dated 29/3/2007 for the assessment year 1997-98 which appears to have been accepted by the department as no appeal there from has been preferred by the revenue. In view of the above, we find that no substantial question of law arises with regard to question (A).

5) Regarding question (B):

a) The respondent assessee had sought a deduction on account of expenses incurred of Rs.72.46lacs as PSTN charges and Rs.95.35 lacs as dealer's commission. The Assessing officer by order dated 20/2/2001 disallowed both these expenses on the ground that they were expenses incurred prior to the date of commercial launch of service i. e. 12/1/1998. Therefore, the expenses being incurred during the pre-operative period are not admissible as deduction and added the same to respondent's income.

b) In appeal, the Commissioner of Income Tax (Appeals) by order dated 7/6/2007 held that the aforesaid expenses are not

pre-operating expenses as the appellant had set up its business much before the commercial launch on 12/1/1998. This is evident from the fact that it had started marketing its services, appointing dealers, accepting deposits from subscribers much before the commercial launch. The aforesaid expenses were incurred after setting up of business and allowable as permissible deductions. However, the deduction on account of dealer's commission was restricted to Rs.88.12lacs under Section 37(1) of the Act.

c) Being aggrieved the revenue carried the matter in appeal to the Tribunal. By order dated 9/9/2009 the Tribunal held that for the assessment year 1997-98, the Tribunal had upheld the order of the Commissioner of Income Tax (Appeals) allowing expenses as operating charges and dealers commission even when the same were incurred prior to the date of commercial launch. The Tribunal therefore rejected the appeal of the revenue and upheld the order dated 7/6/2007 of Commissioner of Income Tax (Appeals).

d) It is an admitted position that the order of the Tribunal dated 29/3/2007 for the assessment year 1997-98 allowed expenses on account of PSTN charges and dealers commission

incurred prior to commencement date. This order of the Tribunal for assessment year 1997-98 was accepted by the revenue as no appeal there from is filed by the revenue. Further any expenditure incurred after setting up of a business and before the commencement of business is allowable as a deduction under Section 37(1) of the Act. The issue whether the expenditure has been incurred for purposes of business is an issue of fact and two authorities under the Act have rendered a finding of fact that expenses incurred on account of PSTN charges and dealer's commission are incurred for purposes of business and allowable under Section 37(1) of the Act. In view of the above, we find that no substantial question of law arises with regard to question (B).

6) Regarding question (C):-

a) The respondent-assessee had claimed in its return of income deduction of Rs.12.63lacs on account of foreign travel expenses incurred by the respondent-assessee for its employees. The assessing Officer by order dated 20/2/2001 disallowed the expenditure holding it to be a capital expenditure as it resulted in enduring benefit to the respondent.

b) On appeal, the Commissioner of Income Tax (Appeals) by order dated 07/06/2007 held that foreign travel of the officers did not give rise to any benefit of an enduring nature but enabled efficient running of its business and therefore was revenue in nature. Thus the deduction on account of expenses on account of foreign travel was allowed as claimed by the respondent.

c) On further appeal by the appellant-revenue, the Tribunal by its order dated 9/9/2009 held that from the facts on record the amount spent on foreign travel resulted in efficient running of the business and hence allowable as a revenue expenditure.

d) We find no fault with the order of the Tribunal which upheld the finding of Commissioner of Income Tax (Appeals). The issue whether the amount spent on traveling has resulted in an enduring benefit for the respondent-assessee or not is a question of fact and two authorities under the Act i. e. Commissioner of Income Tax (Appeals) and the Tribunal on examination of the facts concluded that the expenses incurred do not give rise to any enduring benefits but only enables the respondent-assessee to efficiently run its business so as to

achieve higher profits. In view of the above, we find that no substantial question of law arises with regard to question (C) as it is a finding of fact and this finding is neither perverse or arbitrary.

12) In view of the above, the questions A, B, and C formulated by the appellant revenue are dismissed as they do not give rise to any substantial question of law for consideration by this Court.

13) The appeal is dismissed with no order as to costs.

(M.S.SANKLECHA, J.)

(J.P. DEVADHAR, J.)