IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "F" : MUMBAI

BEFORE SHRI H.L. KARWA, PRESIDENT
AND
SHRI N.K.BILLAIYA, ACCOUNTANT MEMBER

ITA.No.3062/Mum/2003
Assessment Year 1998-1999

TATA Communications Ltd. (formerly Videsh Sanchar Nigam Limited) Mumbai – 400 001 **PAN AAACV2808C**	vs.	JCIT, S.R. 1 Mumbai.
(Appellant)		(Respondent)

ITA.No.3438/Mum/2003
Assessment Year 1998-1999

DCIT, Circle 1 (3) Mumbai – 20.	vs.	TATA Communications Ltd. (formerly Videsh Sanchar Nigam Limited) Mumbai – 400 001 **PAN AAACV2808C**
(Appellant)		(Respondent)

For Assessee : Shri Dinesh Vyas & Shri Rajuvakharia
For Revenue : Shri A.P.Singh (CIT/DR)

Date of Hearing : 22-11-2012
Date of pronouncement : 05-12-2012

ORDER

PER N.K.BILLAIYA, A.M.

These cross-appeals by the Revenue and the Assessee are directed against the very same Order of the CIT(A)-24, Mumbai dated 17-2-2003 pertaining to the assessment year 1998-99. As both these appeals were heard

together, they are being disposed of with this common order for the sake of convenience and brevity.

2. **ITA.No.3062/Mum/2003** :- Assessee has raised 4 substantive grounds of appeal. Ground No.1 relates to the claim made under section 80IA of the Act in respect of new undertakings commissioned after 1-4-1995. Counsel for the assessee fairly conceded that the issue involved in this ground have been held against the assessee's own case for the assessment years 1996-97 and 1997-98. That being the fact of the matter, ground No.1 is dismissed.

3. Ground No.2 relates to the disallowance of deduction claimed under section 35D of the Act in respect of amortization of preliminary expenses. Counsel for the assessee pointed out that the claim of the assessee has been allowed by the Revenue from assessment year 2000-2001 by which the Revenue has taken the view that assessment year 2000-2001 is the first year of eligibility. On that view of the matter, the issue involved in this ground of appeal become otiose and the Counsel fairly submitted that he is not pressing this ground of appeal. Ground No.2 is accordingly dismissed.

3. Ground No.3 relates to the disallowance of deduction claimed under section 37 (1) of the Act in respect of provisions of salaries. During the course of scrutiny assessment proceedings, the Assessing Officer observed that the assessee has debited a provision of Rs.40.71 lakhs on account of arrears of salary. It was submitted by the assessee that salaries of the employees are revised every 5 years. As the assessee is the Public Sector Undertaking (PSU), the revision of salary depend upon the decision of the Government. It was further explained that the Government set-up a Commission for revision of pay scales of PSUs and the said Commission submitted its report in June, 1999. The Assessing Officer was of the opinion that the assessee has created a provision in the books during the previous year which pertains to arrears of salary from January, 1997 till March, 1999. The Assessing Officer further observed that the liability was not determinable during the previous year, it

was determinable and actually arose in June 1999. When the Commission submitted its report. As assessee's previous year ended on 31.3.1998, the assessee has nowhere of knowing the recommendation of the Commission. The Assessing Officer finally concluded that the assessee is entitled to claim expenditure on actual payment and accordingly, disallowed Rs.40.71 lakhs. The assessee agitated this matter before the CIT(A) and reiterated that assessee being a PSU the salaries were being paid to the employees as prescribed by the Department of Public Enterprise (DPE). The DPE revised salaries of the employees once in 5 years. Accordingly, employees of the assessee company were due for pay revision w.e.f. 1st January, 1997. It was further explained that pending finalization of pay scales by DPE, provisions were made by the assessee based on the best estimate possible. It was further pointed out that DPE had finally prescribed the revised pay scales during June, 1999. The CIT(A), after considering the facts and the submissions came to the conclusion that the liability to pay salary of Rs.40.71 lakhs has not crystalised during the previous year relevant to the assessment year under consideration. The CIT(A) concurred with the views of the Assessing Officer and confirmed the disallowance of Rs.40.71 lakhs.

4. Aggrieved by this finding of the CIT(A), the assessee is in appeal before us. Counsel for the assessee drew our attention to the decision of National Mineral Development Corporation Ltd. vs. JCIT 98 ITD 278 (Hyd.). Referring to this case, the Counsel submitted that in this case also the assessee is a PSU and drawing our attention to the decision of the Tribunal, the Counsel submitted that the Tribunal has allowed the claim of provision of salary on the basis of impending pay revision. The Counsel further relied upon the decision of the CIT vs. Kerala State Financial Enterprise Ltd. 12 DTR 290 (Ker.), Western Coal Fields Ltd. 124 TTJ 659 (Nagpur) Bench and IBP Company Ltd. vs. ACIT 78 TTJ 158 (Kol.). The learned Counsel pointed out that all these cases are of the assessees' who are PSUs.

5. Per Contra, the learned D.R. relied upon the findings of the lower authorities.

6. We have considered the rival submissions and perused the Orders of the lower authorities and also gone through the judicial decisions cited by the Counsel for the assessee. It is not in dispute that salary and wages accrue daily, weekly, fortnightly or monthly as per the contract of the employment. This is so as services is rendered in praesenti, the liability of the employer to compensate the employees for the services rendered also accrues in praesenti. A perusal of the Orders of the lower authorities show that what is actually in dispute is the quantification of compensation. As the assessee is a PSU, the pay revision depends upon the decision of the Government. As the personnel department of the assessee had knowledge of dealing with such pay hikes in the past, the assessee can estimate the quantum of such enhanced liability. The liability was certain and it was just a matter of time when it would arise. What was not certain is, over the quantum of pay high. Assessee took the most prudent decision of making provision of salaries at Rs.40.71 lakhs. It is also seen that what was provided by the assessee is only 40% of the actual pay hike proposed by the DPE. It is also to be seen that the contract with the employees expired on 31.12.1996 and the assessee has made a provision only for the period of January to March, 1998. The Revenue authorities have disallowed the claim only on the basis that the Commission submitted its report in June, 1999. In our considerate view, what is important is not the date of signing the agreement nor the date of approval granted by the DPE, what is important is the effective date of commencement and on that note we find that the liability is accrued during the year under consideration. It is also to be noted that the provision for salary was not a contingent liability. It was in respect of the outcome of the decision of the DPE. For this proposition, we draw the support from the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers vs. CIT 245 ITR 428 wherein the Hon'ble Supreme Court has held that :

> *"if a business liability has definite origin in the accounting year, the deduction should be allowed although the liability may have to be quantified and discharged at a future date. What should be certain is the incurring of the liability. It should also be estimated with reasonable certainty though the actual quantification may not be possible. If these requirements are satisfied, the liability is not a contingent one. The liability is in praesenti though it will be discharged at a future date, it does not make any difference if the future date on which the liability shall have to be discharged is not certain."*

As facts and circumstances of the present case are identical with the ratio laid down by the Hon'ble Supreme Court, respectfully following the findings of the Hon'ble Supreme Court and also the decisions relied upon by the assessee, we direct the Assessing Officer to allow the claim of deduction of provision for salary of Rs.40.71 lakhs as the services rendered are in presentee. Ground No.3 is accordingly allowed.

7. Ground No.4 relates to the disallowance of deduction claimed in respect of provision of OFC charges of Rs.8,44,12,000/-. During the course of assessment proceedings, the Assessing Officer noted that the assessee has debited the provision amounting of Rs.9,32,12,000/- on account of payment to DOT towards maintenance charges of the Mumbai-Delhi Optical Fibre Link. The provisions so made, were as follows :

F.Y. 1995-96 & 1996-97	Rs.8,44,12,000/-
F.Y. 1997-98	Rs. 88,00,000/-

7.1. The Assessing Officer was of the view that the amount of Rs. 88 lakhs only pertain to the year under consideration and allowed the same. For the provision relating to the assessment year 1995-96 and 1997-98, the Assessing

Officer was of the view that these pertain to the prior period expenses and therefore, provisions for earlier years, cannot be allowed even against an ascertained liability.

7.2. The assessee agitated this matter before the CIT(A), but without any success. It was argued before the CIT(A) that the bill for the above period i.e., starting from Financial Year 1995-96 to 1997-98 was received during the previous year. It was also explained that the Board of Directors of the assessee-company were not in favour of making the entire payment and some negotiations are under way with DOT. The CIT(A), agreed with the findings of the Assessing Officer and confirmed the disallowance.

8. Before us, the learned Counsel for the assessee drew our attention to page 31 of the paper book and submitted that it is the demand note received from the Department of Telecommunication (DOT). The Counsel pointed out that the charges for the two block period 1995-96 is Rs. 2.88 crores and the charges for six block period 1996-97 is at Rs.8.64 crores and the total demand raised by the DOT comes to Rs.11.52 cores. It was further pointed out by the Counsel that out of this liability of Rs.11.52 crores, the Board of Directors of the assessee-company have objected and the negotiations were on with the DOT and according to the prudence of the assessee, the liability would come to Rs.8,44,12,000/-. Drawing our attention to the decision of the Tribunal in assessee's own case for assessment year 1997-98 in ITA.3061/Mum/2003, the Counsel pointed out that in that decision the Tribunal followed the decision of Hon'ble Gujarat High Court in the case of Sourashtra Cement and Chemical Industries Ltd. vs. CIT 213 ITR 523 wherein the Hon'ble High Court held that merely because expenses relate to a transaction of an earlier year, it does not become a liability payable in the earlier year unless it can be said that the liability was determined and crystallized in the year in question on the basis of maintaining accounts on mercantile basis. As the facts of the present case are identical with the ratio laid down by the Gujarat High Court, we have no hesitation in following the findings of the Hon'ble Gujarat High Court on the

facts of the present case. A similar issue came up for hearing before the Hon'ble Kolkata High Court in the case of Satna Stone & Lime Company vs. CIT 192 ITR 478 wherein the assessee received a bill sent by the Railways in May, 1997 and in such circumstances, the Hon'ble High Court of Kolkata held that though charges pertain to a period of November, 1963 to December, 1973, deduction was admissible for assessment year 1996-97. Applying the proposition laid down in the afore cited two cases to the facts of the present case, we hold that the bill of the DOT was received during the current financial year which means that the expenditure crystallized during the year under consideration. The Assessing Officer is accordingly directed to allow the claim of deduction of provision of OFT charges with the extent of Rs.8,44,12,000/-. Ground No.4 is allowed.

9. In the result, appeal of the assessee is partly allowed.

10. <u>ITA.No.3438/Mum/2003 :-</u> Revenue has raised two grounds of appeal. Ground No.1 relates to the direction of the CIT(A) to allow depreciation to Rs.5,32,73,618/- on new earth stations at Ernakulam and Jalandhar. Revenue alleges that the same have not been put to use for business purpose. The issue finds place at page 2 para 2 of the assessment order. During the course of the assessment proceedings, the Assessing Officer noticed that the assessee has claimed depreciation on two earth stations at Ernakulam and Jalandhar. It was the claim of the assessee that these earth stations commenced operation during the month of March, 1998 and therefore, assessee claimed 50% of the eligible depreciation as the assets were used for less than 180 days. The Assessing Officer sought details from the assessee in respect of the claim of depreciation. The assessee filed copies of the minutes of the meetings held with the supplier, test and acceptance certificates and statement of pay minutes received or transmitted through these earth stations as proof of commission. It was explained to the Assessing Officer that earth station at Ernakulam was procured under contract dated 28th January, 1997 from NEC Corporation, Japan. The assessee received the equipment in the later part of the year 1997.

On 27-3-1998 there was a meeting with the representative of the assessee and the NEC Corporation regarding the commission of the earth stations. The Assessing Officer observed that from the minutes of the Board of Directors the equipment had been set up on 27-3-1998 but there were certain defects noticed which the supplier was asked to resolved. The minutes on 27th March, 1998 mentioned 5 defects or omissions in the systems which had to be set right. The Assessing Officer further observed that on 17th June, 1998 as per the acceptance certificate, two parts held till to be replaced. Another acceptance certificate from the General Manager dated 22nd July, 1998 was filed by the assessee to substantiate its claim that the switch was open for commercial traffic on 31st March, 1998. Similar was the situation with the earth station at Jalandhar for which the Assessing Officer observed that though the certificate stating the equipment was installed on 28-3-1998 , has been signed dated 20-05-1998. The Assessing Officer was of the opinion that these earth stations were never became functional in the month of March, 1998 but came into operation only subsequently. Therefore, the claim of the depreciation by the assessee is not allowable. The assessee admittedly claimed the depreciation only on the basis of trial runs. However, the Assessing Officer was of the opinion that during the trial runs also the equipment was still not complete and the supplier had been told to attend the defects pointed out. The Assessing Officer rejected the claim of the assessee that the depreciation should be allowed on the trial run of the equipment. The Assessing Officer was of the view that the equipment was only tested in the month of March, 1998 and came to the conclusion that the assessee has not put the assets at Ernakulam and Jalandhar stations to use for the purpose of its business. The Assessing Officer accordingly disallowed the claim of depreciation aggregating to Rs.5,32,73,618/-.

11. When the matter was agitated before the CIT(A), it was once again explained by the assessee that depreciation has been claimed only on the basis of trial run. The assessee placed reliance on the decision of the Hon'ble Gujarat

High Court in the case of ACIT vs. Ashima Syntex Ltd. 231 ITR 133. After considering the facts and the submissions of the assessee, the CIT(A) was convinced that the assessee has successfully test run the earth station at Ernakulam and Jalandhar on 27-3-1998, directed the Assessing Officer to allow the depreciation on these assets as claimed by the assessee.

12. Before us the D.R. supporting the findings of the Assessing Officer placed reliance on the decision of the Hon'ble Bombay High Court Nagpur Bench in the case of Dinesh Kumar Gulabchand Agrawal vs. CIT 267 ITR 768 and pointed out that in this case the Hon'ble High Court declined to allow depreciation on vehicle kept ready for use but not actually used. The learned D.R. further relied upon the decision of the Tribunal Mumbai 'A' Bench in the case of ACIT vs. Rishiroop Polymers (P) Ltd. 102 ITD 128. In that case there was a lock-out in the factory which resulted in temporary closure of manufacturing activity but the assessee-company was not closed down. On those facts, the depreciation was not allowed.

13. Per Contra, learned Counsel for the assessee submitted the copy of the commissioning of Ernakulam gate-way dated 31st March, 1998 and pointed out that in this letter it has been specifically mentioned that Ernakulam gate-way has been successfully commissioned on 31st March, 1998. With the first traffic having put through Abu Dabi both ways. It is the say of the Counsel that the depreciation has been claimed because the assets has been put to trial run. Placing reliance on the decision of the Hon'ble jurisdictional High Court of Bombay in Income Tax Appeal No. 70 of 2003 in the case of CIT vs. Wockhardt Ltd. wherein the question before the Hon'ble High Court was whether on the facts and circumstances of the case the Tribunal was right in law in upholding the Order of the CIT(A) inter alia, allowing depreciation on I.V.Fluid at Waluj ignoring the fact that commercial production has not started during the relevant year. The Hon'ble High Court answered this question in favour of the assessee holding that there is a finding of fact that during the relevant period, a trial run has been taken and that being so, the depreciation would be

allowable. The Counsel further placed reliance on the decision of the Tribunal, Mumbai "F" Bench in the case of Arlabs Ltd. vs. DCIT 5 SOT 749 (Mum.) wherein the Tribunal has held that where trial production or trial running of plant and machinery entails actual use of plant and machinery for business purposes and therefore, depreciation is allowable as per provisions of law.

14. We have considered the rival submissions and perused the Orders of the lower authorities and the judicial decisions relied upon by the rival parties. A perusal of the assessment record show that the assessee has never claimed depreciation on these two earth stations on the ground that they have been used for commercial purposes. The claim of the assessee is based on the trial run of the equipments before putting them for commercial use. We find that the documents which were submitted before the lower authorities clearly show that the assets were put to test run before the close of the financial year under consideration. In the case of ACIT vs. Ashima Syntex Ltd. (supra), the Hon'ble High Court has clearly laid down the ratio that on trial run of machinery assessee is entitled to depreciation. A perusal of Section 32 show that in respect of depreciation of assets owned, wholly or partly, by the assessee and used for the purposes of the business or profession depreciation shall be allowed. Second Proviso provides that where an asset referred to in clause (i) or clause (ii) or clause (iia) as the case may be, is acquired by the assessee during the previous year is **put to use** for the purposes of business or profession for a period of less than 180 days in that previous year, the deduction under this sub-section in respect of such asset shall be restricted to 50% of the amount calculated at the percentage prescribed for an asset. Considering the above legal position and facts of the present case, it is not in dispute that the assets had been acquired by the assessee during the previous year and is **put to use** for the purposes of business or profession and as the assets have been put to use for less than 180 days, the assessee has rightly claimed depreciation @ 50% of the allowable rate of depreciation. The case laws relied upon by the learned D.R. do not fit on the facts of the present case. In the case of Dinesh

Kumar Gulabchand Agrawal the Hon'ble jurisdictional High Court declined to allow depreciation on the ground that the word "used" in section 32 denotes actual use for the purposes of business and not merely ready for use. **In the present case, the assets were actually put to use even though it may be only for trial run.** In the second decision relied upon by the D.R. in the case of ACIT vs. Rishiroop Polymers (P.) Ltd., in this case the assets were not in use meaning thereby, that the assets were in a state of "no use". In the present case the assets were actually put to use in the form of trial run.

15. Considering all these facts in totality , in the light of decision relied upon by the assessee, we have no hesitation to hold that the assessee is entitled for depreciation and the CIT(A) has rightly directed the Assessing Officer to allow depreciation. In that view of the matter, we do not find any reason to interfere with the findings of the CIT(A). Ground No.1 of Revenue's appeal is dismissed.

16. Ground No.2 relates to the direction of the CIT(A) to allow depreciation of Rs.9,92,18,603/- on the ownership of Flag Project, which according to the Revenue, is not entitled to depreciation as per the prevailing provisions of the I.T. Act. The issue has been elaborately discussed by the Assessing Officer at page 6, para 6 of the assessment order. During the course of scrutiny assessment proceedings, the assessee was asked to state whether depreciation was claimed on the rights obtained in the FLAG Project to which the assessee responded vide letter dated 15-1-2001 and explained that the entire expenditure incurred for acquiring capacity in the FLAG under sea cable have been capitalized under the head "Plant and Machinery" and depreciation has been claimed on the same. It was explained that FLAG Limited is a body corporate incorporated in Bermuda. FLAG laid a cable system from which the requisite capacities have been acquired by various carriers across the globe. Pursuant to capacity, sales agreement entered into between the Flag Limited and other tele-communication entities world-over and one of them is being VSNL (assessee). It was further explained that the duration of the agreement is for 25 years. **It was further explained that under the scheme of the Flag**

Project each signatory is treated as a deemed owner of the cable to the extent of the capacity owned by it. The assessee provided documentary evidence in respect of its claim. The submissions made by the assessee did not find favour from the Assessing Officer who was of the opinion that the provisions of section 32 of the Act for the year under consideration provided for depreciation in the case of building, machinery, plant etc., being tangible assets. Further, knowhow patents commercial rights etc., of intangible nature are allowed depreciation only if they have been acquired on or after 1st April, 1998. The Assessing Officer was of the opinion that what the assessee has acquired is only a right in the cable system and as the right to use has been acquired before the 1st day of April, 1998 therefore, the assessee is not eligible for depreciation under the existing provisions of Section 32. The depreciation claimed by the assessee amounting to Rs.9,92,18,603/- was disallowed.

17. The assessee agitated this matter before the CIT(A) and submitted that the assignable capacity in pursuant to Flag agreement determines the voting interest. The capacity is owned by the signatories in common un-divided shares. The system is jointly operated and maintained by the signatory. It was further pointed out to the CIT(A) that under Article 13.2 of the agreement, FLAG is to convey the interest in the assignable capacity by way of sale of ownership, grant of indefeasible right of user as the matter agreed upon. It was also explained that each signatory can transfer its capacity to another body in the subject country. In view of these facts, the assessee perceived itself as the owner of the segment purchased from FLAG and has claimed depreciation on the same. It was explained that the FLAG cable is a fibre optic cable in which the assessee has purchased certain capacity which would allow it to use it for transmission, data etc.,

18. After considering the facts in totality, the CIT(A) observed that the Assessing Officer has disallowed the depreciation on the ground that the assessee is not a complete owner of the asset which is in the form of cable net work and owned by a consortium of number of operators and what the

assessee owns is only a certain right over the asset. The CIT(A) pointed out that the words "wholly" or "partly" have been inserted in Section 32 with effect from 14.4.1997 and as such, the assessee is eligible to claim depreciation on the cable net work even though the entire net work is not owned by it. The CIT(A) concluded that the assessee is clearly entitled to claim the depreciation and directed the Assessing Officer to allow depreciation accordingly.

19. Before us, the learned D.R. supporting the findings of the Assessing Officer and reiterated that the assessee has claimed depreciation on the right to use the capacity allocated to it by Flag Project and that being an intangible right, the depreciation is allowable only if the intangible assets are procured on or after 1st day of March, 1998. That being not the facts of the present case, the assessee is not entitled to depreciation.

20. Per Contra, the Counsel reiterated that the assessee has acquired part ownership of the optical fibre cable pursuant to the capacity sales agreement entered into between Flag Limited and other Telecommunication entities world-over. As Section 32 itself provides that the assessee can be part owner also for the claim of the depreciation, the Counsel further drew our attention to the decision of the Tribunal in assessee's own case for assessment year 1997-98 in ITA. No. 3061/Mum/2003 and submitted that a similar issue came up for adjudication before the Tribunal vide ground No.5 wherein the depreciation on indefeasible right to use under sea cables was in dispute. In that case, the Tribunal at page-5 para 17 thus held:

> "learned D.R. was not able to factually contradict that the claim of the assessee , that it is the Member of the International Consortium that owned the cables , and that it is a part owner with the right to transfer it's share to other and also a right to share the sale proceed on de-commissioning of the system in proportion to the rights held by it. When these facts are not in dispute, we have no hesitation in upholding the

Order of the first appellate authority in dismissing ground No.5 of the Revenue."

21. We have heard the rival submissions, perused the Orders of the lower authorities and also the Order of the Tribunal in assessee's own case in ITA. No. 3062/Mum/2003. The facts of the present case are identical with the facts before the Tribunal in assessment year 1997-98 and as no new facts have been brought on record which may persuade us to take a different view, Respectfully following the findings of the Tribunal in assessee's own case in ITA.3062/Mum/2003 (supra), we have no hesitation in confirming the findings of the CIT(A). Ground No.2 is accordingly dismissed.

22. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on 05-12-2012.

Sd/-	**Sd/-**
(H L KARWA)	**(N.K.BILLAIYA)**
PRESIDENT	**ACCOUNTANT MEMBER**

Mumbai, Date 05th December, 2012
VBP/-
Copy to

1. TATA Communications Ltd., (formerly Videsh Sanchar Nigam Limited), Videsh Sanchar Bhavan, Mahatma Gandhi Road, Fort, Mumbai – 400 001 **PAN AAACV2808C**
2. JCIT, S.R. 1, Aayakar Bhavan, 5th Floor, Maharshi Karve Road, Mumbai – 400 020.
3. CIT(A)-XXIV, C-12, R.No.408, Pratyakshakar Bhavan, Bandra-Kurla Complex, Bandra East, Mumbai – 51.
4. CIT, City-1, Mumbai
5. DR "F" Bench
6. Guard File

(True Copy) By Order

Asst. Registrar, I.T.AT. Mumbai Benches
MUMBAI.