

IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'B', NEW DELHI

BEFORE

SH. I.C.SUDHIR, JM ANDSH. PRASHANT MAHARISHI, AM

ITA No. 1316/Del/2011

A.Y. 2006-07

Digital Radio (Delhi) Broadcasting Ltd. C/o. O.P. Sapra & Associates, C-763, New Friends Colony New Delhi		ACIT Circle-10(1) New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7864B		

ITA No. 1720/Del/2011

A.Y. 2006-07

ACIT Circle-10(1) New Delhi		Digital Radio (Delhi) Broadcasting Ltd. 401, Dakha House, 18/17, WEA Karol Bagh New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7864B		

ITA No. 1317/Del/2011

A.Y. 2006-07

Digital Radio (Kolkata) Broadcasting Ltd. C/o. O.P. Sapra & Associates, C-763, New Friends Colony New Delhi		ACIT Circle-10(1) New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7863G		

ITA No. 1721/Del/2011

A. Y. 2006-07

ACIT Circle-10(1) New Delhi		Digital Radio (Kolkata) Broadcasting Ltd. 401, Dakha House, 18/17, WEA Karol Bagh New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7863G		

ITA No. 5081/Del/2011

A.Y. 2006-07

Digital Radio (Mumbai) Broadcasting Ltd. C/o. O.P. Sapra & Associates, C-763, New Friends Colony New Delhi		ACIT Circle-10(1) New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7871C		

ITA No. 4364/Del/2011

A. Y. 2006-07

DCIT Circle-10(1) New Delhi		Digital Radio (Mumbai) Broadcasting Ltd. 401, Dakha House, 18/17, WEA Karol Bagh New Delhi
(APPELLANT)		(RESPONDENT)
PAN No. AABCR7871C		

Appellant by : Sh. Sanjiv Sapra, CA, Sh. O.P. Sapra

Respondent by : Sh. A.K.Saroha, CIT., DR

Date of Hearing :06.10.2015

Date of Pronouncement :24.11.2015

ORDER

Per Prashant Maharishi, AM:

01. Captioned group of these six appeals are preferred by assessee and revenue regarding allowability of license fee u/s 35ABB of The Income Tax Act(in short the 'Act') paid by assessee under Phase-I of the license granted to them by GOI, amongst other grounds as under :-

SR No	Assessee	Amount of license fees remaining unallowed under Phase-I (INR)
1	Digital Radio (Delhi) Broadcasting limited ITA No 1316/Del/2011 by Assessee and ITA No 1720/Del/2011 by revenue	Rs. 12,65,82,440/-
2	Digital Radio (Mumbai) Broadcasting limited ITA No 5081/Del/2011 by Assessee and ITA No 4364/Del/2011 by revenue	Rs. 26,37,65,421/-
3	Digital Radio (Kolkata) Broadcasting limited ITA No 1317/Del/2011 by Assessee and ITA No 1721/Del/2011 by revenue	Rs. 1,77,65,995/-

02. As the facts and the circumstances of all these six appeals are identical except the amount involved, we dispose them off by this common order and for the sake of simplicity discuss facts and circumstances in appeal no. ITA No.1316 /Del/2012 & ITA No 1720 / Del/2012 for AY 2006-07 preferred by assessee and Revenue respectively.
03. Briefly stated the facts are that assessee companies are engaged in the business of FM radio broadcasting for which they were awarded license from the Ministry of Information and Broadcasting, Government of India for operation of F M radio station in respective cities. Successfully participating in the auction held in March, 2000 it entered in to a licences agreement dated 27/10/2000 with Ministry of Information and Broadcasting. Tenure of that license was for a period of 10 years. License fee was fixed for the first year at Rs 7,12,50,000 and subsequently there is an escalation clause of 15 % every year during the term of license. Such licenses were made operational from

29/04/2003,i.e. A Y 2004-05. As the F M radio industry was suffering from high amount of fixed license fees, Government of India came out with a new policy document dated 13.7.2005 for expansion of F M radio Broadcasting services through private agencies known as Phase – II . As per this policy, government opened up fresh bidding through closed tenders system for allotment of additional or new F M Broadcasting License in various geographies. For metro cities, new eligible applicants were invited under this phase for a fresh period of 10 years. Existing broadcasters in metro cities were not entitled to participate in these fresh bids but they were given an option as under :-

- a. Migrate to Phase – II policy regime with fresh term of 10 years provided they had operationalised their FM channels and paid off all license fees dues of Phase –I license up to the cut-off date of 1st April 2005 and were not in default of any other license conditions till the date of migration to phase – II.
- b. Continue to remain under Phase – I policy regime
- c. Surrender their FM channel under Phase -I license in order to exit.

04. In phase –II license regime, the fee structure was changed from phase –I. In Phase –II the fixed fee structure was done away with and one time Entry Fees (OTEF) system was introduced. Accordingly New applicant was required to bid a price towards one time entry fee and the highest bidder equal to the number of new license to be issued in each of the metro station were declared as successful bidders. Reserve OTEF limits for each of the city was kept at 25 % of the highest valid bid in that city and all the bids below the reserve limits were rejected summarily. The One time entry fee is the charge / fee for the new successful bidder for a period of 10 years with effect from 1.4.2005. Over and above OTEF each successful bidder is also required to pay an annual license fees on revenue sharing basis @ 4 % of gross revenue for the year or 10 % of the OTEF for the concerned city, whichever is higher. On exercise of option given to the exiting broadcasters to migrate to phase – II , they were required to pay one time entry fee which is equal to average of all successful bids received under phase – II in that city.

05. All these assessee on migration to phase – II paid one time entry fee and accordingly got a new grant of permission agreement executed with the ministry of Information and broadcasting. Then they moved to revenue sharing model of phase –II for a fresh period of 10 years with effect from 1.04.2005.

06. For AY 2006-07 the assessee claimed following deduction for license fee expenditure:-

I. For phase –I Rs.12,65,82,440/-

- a. Assessee paid Rs 7,12,50,000/- as license fee for phase – I up to Ay 2003-04 out of which Rs 71,25,000/- was claimed as deduction for AY 2004-05 and 2005-06. Therefore total deduction allowed to them out of Rs 7,12,50,000/- is of Rs 1,42,50,000/-. Balance amount of Rs 5,70,00,000/- was claimed as deduction in A.Y. 2006-07.

- b. Assessee further paid Rs 5,46,25,000/- in AY 2005-06, out of which sum of Rs 60,69,444/- was claimed and allowed in AY 2005-06 and the balance amount of Rs 4,85,55,556/- was claimed during the year.
- c. Assessee further paid a sum of Rs 2,10,26,684/- in AY 2006-07 was claimed during the year.

II. For Phase – II Rs. 3,00,80,222/-

- a) Rs 2,22,25,222/- u/s 35ABB being 1/10th of the migration fees of Rs 22,22,52,249/- as paid over the period of 10 years as per license term.
- b) Rs. 78,55,000/- u/s 37 (1) of the act being the annual license fee expenditure incurred by the assessee.

07. There is no dispute about the claim of deduction of assessee of Rs 3,00,80,222/- paid under phase – II of the licensing terms and same was allowed to the assessee as deduction by AO. However, claim of deduction as listed above pertaining to Phase- I of Rs. 12,65,82,440/- was disallowed by the AO holding that same is a capital loss as the license was not transferred as required u/s 35ABB (2) of the act.
08. Aggrieved by order of AO, assessee preferred appeal before CIT (A) and who in turn rejected claim of deduction of whole of Rs 12,65,82,440/- in A. Y. 2006-07 holding that as there is no transfer as per section 35ABB (2) of the act. However he was of the view that as it is migration of license of assessee from Phase-I to phase –II of the licensing policy for F M radios, remaining unallowed expenditure of Rs 16,65,82,440/- u/s 35ABB becomes part and parcel of the licensing fee payable for phase- II and same shall be added to the license fee of phase – II, hence he granted deduction of Rs 1,26,58,244/- being 1/10th of Rs 12,65,82,440/-.
09. Being aggrieved with the order of CIT (A), Assessee has preferred this appeal raising the following grounds :-
1. *That on the facts and in the circumstance of the case , the authorities below had erred on facts and under the law in disallowing deduction of Rs.11,39,24,196/- out of Rs 12,65,82,440/- towards the license fee as claimed by the appellant during the year under consideration.*

Various observations made by the Ld.AO in impugned assessment order and by the ld. CIT (A) in his appellate order are either

incorrect or untenable. The LD. CIT (A) had not demonstrated in his appellate order as to how the case laws cited by the appellant were distinguishable. he is also incorrect in holding that section 35ABB (2) of the IT Act has no application and that the expenditure of Rs 12,65,82,440/- needs to be allowed over 10 new year's term of phase – II license regimes starting from assessment year 2006-07 thereby allowing deduction of Rs 1,26,58,244/- only.

2. *That without prejudice to ground no 1 above, the authorities below ought to have allowed depreciation on the entire amount of Rs 12,65,82,440/- @ 25 % per annum.*
 3. *The interest income as declared at Rs 38,41,383/- ought to have been assessed as business income and not under the head “ income from other sources”*
10. Revenue being aggrieved with the order of CIT (A) has risen following grounds of appeal.
1. *On the facts and circumstances of the case and in law, ld. CIT (A) has erred in allowing Rs. 1,26,58,244/- being 1/10th of the total license fees claimed u/s 35ABB of the Act.*
 2. *On the facts and circumstances of the case and in law, the ld. CIT (A) has erred in directing the AO to verify the record and allow carry forward of unabsorbed depreciation / business loss as per law.*
11. We take up the ground no 1 of appeal of assessee and revenue together as both are linked to the issue of allowability of license fee paid under phase- I.
12. Before us LD AR of the assessee submitted as under :-
- (i) That such license fee expenditure of Rs.26,37,65,421/- as paid under Phase -I license regime is allowable in full during the year under consideration in accordance with sub-section (2) of section 35ABB, For this he relied on the provision of section 35ABB(2) and also the notification issued by the Govt, of India Notification No. 39 dated 9th January, 2004,whereby under the proviso to clause (k) of sub-section (1) of section 2 of the TRAI Act, 1997 as amended, the scope of the expression telecommunication services was increased to include the broadcasting services and cable services also. Based on such Notification, the licence fee expenditure as earlier claimed by the Appellant u/s 37 of I.T. Act had been recomputed and is being allowed u/s 35ABB on proportionate basis over the term of the licence period since assessment year 2004-05 onwards. The word ‘transfer’ is not defined in section 35ABB and accordingly, he submitted that it should be looked elsewhere in the Income Tax Act. For this he relied on the definition of “transfer” u/s 2 (47) of and for definition of capital assets u/s 2 (14) of the Act. Further he submitted that Section 35ABB specifically deals with expenditure for obtaining license to operate telecommunication services and accordingly, the license as obtained by the Assessee for operating FM radio station was clearly a “capital asset” and therefore, such wide definition of transfer given in sub-clauses (i) and/or (ii) of section 2(47) read with Explanation 2, which deals with capital assets (like

licence) will apply to the facts of Assessee's case. He further submitted that as assessee had opted to migrate to revenue sharing Phase - II policy regime, whereby it had relinquished its rights in capital asset, which stood extinguished or had parted with capital asset or interest in such capital asset i.e. fixed fee Phase-I license as issued vide agreement dated 27/10/2000 in exchange for a new license called Grant of permission Agreement (GOPA) dated 02/03/2007 under Phase -II which was made effective w.e.f. 01/04/2005. According to him such relinquishment/ extinguishment/exchange/ parting of asset or rights therein in capital asset in any manner whatsoever clearly amounted to "transfer" as per the definition of transfer u/s 2(47) read with Explanation 2. For this proposition, reliance is placed on various case laws as cited before the CIT (A). Therefore his first argument was that there is transfer of license due to migration from phase - I to phase -II of the policy and provision of sub section 2 of section 35ABB should apply. As there is no consideration received the full amount of amount outstanding shall be allowed as deduction to the assessee.

- (ii) Even if it is presumed (though not admitted) that the definition of "transfer" u/s 2(47) is not applicable to section 35ABB, then he pressed to look at the ordinary/common meaning of the word 'migrate' and 'transfer'. As per the dictionary meaning of these words both these words are synonyms. Hence, from this angle also, migration of license from Phase - I regime to Phase - II license regime is to be considered as transfer of license and therefore, the Assessee's case is covered under sub-section (2) of section 35ABB.
- (iii) If Assessee had opted to surrender its Phase - I license instead of migrating to Phase - II license, then the remaining unallowed license fee expenditure of Rs.26,37,65,421/- relating to Phase - I license would have been allowed to the assessee during the year under consideration in accordance with section 35ABB(1) of I.T. Act even if the 'Assessee had made a bid for and obtained a new Phase -II licence for the same city. By opting for and migrating from Phase - I to Phase - II licence, the case of the Assessee is not different from the above mentioned situation and therefore, the entire remaining unallowed license fee expenditure pertaining to Phase - I licence deserves to be allowed during the year under consideration itself and not over the next 10 years period which is applicable to the new Phase - II licence.
- (iv) Without prejudice to the above, if it is held that it is not a case of 'transfer' of license because the Phase -I license had come to an end when the Assessee opted to migrate to Phase -II license, in that situation also license fee expenditure of Rs. 26,37,65,421/- deserves to be allowed in full during the year under consideration in accordance with provisions of sub-section (1) of section 35ABB of I.T. Act according to which any capital expenditure actually

incurred by an assessee on the acquisition of any right to operate telecom services is to be allowed as a deduction in equal installments over the period for which the license remains in force. He submitted a chart showing year-wise payment of license fee, its allowability as per the Dept, and the amount remaining unallowed during the year.

- (v) In Assessee's case, it is a fact that Phase-1 license remained in force or was valid till 1st April, 2005 which was the cut-off date for migration to Phase- II license as is evident from first two paras of Govt, of India's letter dated 21/12/2005 placed at pages 53 - 55 of the paper book. Further, Phase - II license dated 2nd March, 2007 as per copy placed at pages 61 - 76 of the paper book was completely a new license as per Phase -II policy terms and was made effective from 1st April, 2005 for a fresh period of 10 years . For this he relied on clause 4 of new agreement. Salient differences between the two types of licenses under Phase - I and Phase - II regimes are also emphasised at page 79 of the paper book. Moreover, fact that in order to become eligible to migrate and obtain Phase - II license, the Assessee was first required to clear off and pay all its dues under the Phase-1 license as applicable till cut-off date of 1st April, 2005 and then further pay a One Time Entry Fee (OTEF) equal to average of all successful bids received from new bidders under Phase - II for the city of Mumbai. This clearly demonstrates that Phase - I license remained in force or was valid till 1st April, 2005 only. The AO had also recorded this finding of fact at page 7 of his order by observing as under:

“Rather; as a result of assessee migrating to Phase -II regime, the earlier licence agreement has come to an end”.

Moreover, the clearance of Phase -I license fees dues was not only a precondition for migrating to Phase -II license regime but was also a precondition for the other option of surrendering the Phase -I license. Hence, the Ld. CIT(A) findings that payment of arrears of Phase -I license fee is to be considered as part and parcel of migration fee is not based on the factual position because such payment of arrears of Rs.26,37,65,421/- can at no stage be considered to be a payment under Phase -II license regime.

- (vi) In view of the above, the entire remaining unallowed licence fee expenditure of Rs.26,37,65,421/- under Phase - I licence as actually paid deserves to be allowed in full during the year under consideration as per sub-section (1) of section 35ABB since the term of such license had come to an end on 1st April, 2005.
- (vii) Section 35ABB was explained vide Departmental Circular 763 dated 18th February, 1998 placed at page 80 of the paper book according to which, this section was introduced to give a fillip to the telecom sector and therefore, any capital expenditure actually incurred by an assessee on the acquisition of any

right to operate telecom services is to be allowed as a deduction in equal instalments over the period for which the license remains in force. It was further provided that where a license is transferred and the proceeds of the transfer are less than the expenditure remaining unallowed, a deduction equal to the expenditure remaining unallowed as reduced by the proceeds of transfer is to be allowed as expenditure in the previous year in which the license has been transferred. Such Departmental Circular is binding and deserves to be followed. In this connection, reliance is placed on various judgments as cited before CIT (A) also cited before us which are mentioned at pages 6 & 7 of the paper book.

Therefore in nutshell his argument was that the claim of license fee paid remaining unallowed is allowable u/s 35ABB (2) as there is a transfer of capital assets. Alternatively he submitted that as the license term of phase –I has ended so full amount should be allowed u/s 35ABB (1) itself.

13. Ld. DR. on the other hand submitted as under :-
- a. That licensee fee is a just a permission and it is not capital assets of the assessee, hence there is no transfer of capital assets. He further submitted that license is also not a property as per definition of section 2 (14) (a) of the income tax act hence claim of assessee u/s 35ABB (2) fails. He relied on the definition of ‘property’ as per legal dictionary.
 - b. He further submitted that migration of assessee license from phase –I to phase II is not a transfer as envisaged u/s 2 (47) of the Income Tax act and even otherwise definition of transfer provided u/s 2 (47) of the Income tax act cannot be imported u/s 35ABB (2) of the act. Further he submitted that for transfer there has to be two person i.e. one transferor and another transferee and in this case transferee is absent and hence it cannot be called transfer u/s 2 (47) of the act.

In nutshell his argument was that the claim of the assessee for license fee remaining unallowed cannot be allowed either u/s 35ABB (1) or (2) of the act.

14. We have carefully considered the rival submission as well as the orders of lower authorities. There is no dispute on the allowability of license fee paid by the assessee under PHASE –II of policy on migration form phase I to Phase- II. Dispute relates on amount remaining unallowed in the hands of the assessee paid for license under Phase –I on migration. AO has disallowed the same holding that it is a capital loss and there is not transfer as envisaged u/s 35ABB (2) of the act. CIT (A) has upheld both the contention of AO however he has increased the amount of license fees paid under phase –II with the amount remaining unallowed in the hands of assessee for fees paid for Phase –I and granted the deduction on such amount over the new term of ten years of license in phase –II.

15. Provision of section 35ABB are as under :-

Expenditure for obtaining licence to operate telecommunication services.

35ABB.

(1) In respect of any expenditure, being in the nature of capital expenditure, incurred for acquiring any right to operate telecommunication services [either before the commencement of the business to operate telecommunication services or thereafter at any time during any previous year] and for which payment has actually been made to obtain a licence, there shall, subject to and in accordance with the provisions of this section, be allowed for each of the relevant previous years, a deduction equal to the appropriate fraction of the amount of such expenditure.

(2) *Explanation.*—For the purposes of this section,—

⁷¹(i) "relevant previous years" means,—

(A) in a case where the licence fee is actually paid before the commencement of the business to operate telecommunication services, the previous years beginning with the previous year in which such business commenced;

(B) in any other case, the previous years beginning with the previous year in which the licence fee is actually paid, and the subsequent previous year or years during which the licence, for which the fee is paid, shall be in force;]

(ii) "appropriate fraction" means the fraction the numerator of which is one and the denominator of which is the total number of the relevant previous years;

(iii) "Payment has actually been made" means the actual payment of expenditure irrespective of the previous year in which the liability for the expenditure was incurred according to the method of accounting regularly employed by the assessee.

(2) Where the licence is transferred and the proceeds of the transfer (so far as they consist of capital sums) are less than the expenditure incurred remaining unallowed, a deduction equal to such expenditure remaining

unallowed, as reduced by the proceeds of the transfer, shall be allowed in respect of the previous year in which the licence is transferred.

(3) Where the whole or any part of the licence is transferred and the proceeds of the transfer (so far as they consist of capital sums) exceed the amount of the expenditure incurred remaining unallowed, so much of the excess as does not exceed the difference between the expenditure incurred to obtain the licence and the amount of such expenditure remaining unallowed shall be chargeable to income-tax as profits and gains of the business in the previous year in which the licence has been transferred.

Explanation.—where the licence is transferred in a previous year in which the business is no longer in existence, the provisions of this sub-section shall apply as if the business is in existence in that previous year.

(4) Where the whole or any part of the licence is transferred and the proceeds of the transfer (so far as they consist of capital sums) are not less than the amount of expenditure incurred remaining unallowed, no deduction for such expenditure shall be allowed under sub-section (1) in respect of the previous year in which the licence is transferred or in respect of any subsequent previous year or years.

(5) Where a part of the licence is transferred in a previous year and sub-section (3) does not apply, the deduction to be allowed under sub-section (1) for expenditure incurred remaining unallowed shall be arrived at by—

- (a) subtracting the proceeds of transfer (so far as they consist of capital sums) from the expenditure remaining unallowed; and
- (b) dividing the remainder by the number of relevant previous years which have not expired at the beginning of the previous year during which the licence is transferred.

(6) Where, in a scheme of amalgamation, the amalgamating company sells or otherwise transfers the licence to the amalgamated company (being an Indian company),—

- (i) the provisions of sub-sections (2), (3) and (4) shall not apply in the case of the amalgamating company; and
- (ii) the provisions of this section shall, as far as may be, apply to the amalgamated company as they would have applied to the amalga-mating company if the latter had not transferred the licence.]

⁷²[(7) Where, in a scheme of demerger, the demerged company sells or otherwise transfers the licence to the resulting company (being an Indian company),—

- (i) the provisions of sub-sections (2), (3) and (4) shall not apply in the case of the demerged company; and
- (ii) the provisions of this section shall, as far as may be, apply to the resulting company as they would have applied to the demerged company if the latter had not transferred the licence.]

⁷³[(8) Where a deduction for any previous year under sub-section (1) is claimed and allowed in respect of any expenditure referred to in that sub-section, no deduction shall be allowed under sub-section (1) of [section 32](#) for the same previous year or any subsequent previous year.]

16. On reading of above provision as enumerated the following proposition emerges.

- a) According to section 35ABB any capital expenditure incurred for acquiring any right to operate telecommunication services shall be eligible for deduction. Such capital expenditure can be incurred before commencement of business or after commencement of business. Payment has to be actually made for obtaining such license. Then such expenditure is allowed as a deduction over the period for which the license remains effective. If the expenditure is incurred before the commencement of business, then deduction starts from the year of commencement of the business. Such expenditure is allowed for the remaining time for which the license remains effective.
- b) According to sub section (2) if whole of license is transferred where proceeds are less than the expenditure remaining unallowed, expenditure remaining unallowed as reduced by the amount of sale proceeds is allowed as a deduction in the year of transfer. Where proceeds are more than the expenditure remaining unallowed amount of sale proceeds or amount of expenditure incurred to obtaining license (whichever is less) as reduced by the expenditure remaining unallowed shall be taxable as business profits in the year of transfer, whether business exists or not in that year. If the sale proceeds is more than the expenditure incurred to obtain license, then such excess is taxable as Capital Gain under Section 45.

- c) As per sub section (3) In case part of the license is transferred Where proceeds are less than the expenditure remaining unallowed, In this case the deduction allowed under this section for remaining period will be calculated as expenditure remaining unallowed less sale proceeds)/No. of years remaining for effectiveness of license. Where proceeds are more than the expenditure remaining unallowed Amount of sale proceeds or amount of expenditure incurred to obtaining license (whichever is less) as reduced by the expenditure remaining unallowed shall be taxable as business profits in the year of transfer, whether business exists or not in that year. If the sale proceeds is more than the expenditure incurred to obtain license, then such excess is taxable as Capital Gain under Section 45.
- d) In case of amalgamation or demerger, provisions apply to amalgamated/demerged company as they would apply to amalgamating/demerging company.
- e) If deduction is allowed for any previous year under sub section (1), no deduction shall be allowed of such sum in that previous year or subsequent previous year u/s 32) (1) of the act.
17. License fee paid under phase – I is governed by the provision of the License agreement entered in to between Government of India and assessee on 27th October 2000. The copy of same is placed at paper book page no 21 to 42. Salient conditions of the agreement are as under :-
- a) License is granted on non-exclusive basis for the period of 10 years. The licensor reserves the right to increase the numbers of centres and number of channels available at a particular centre in future date without assigning any reason.
- b) **License is a non-transferable. The licensee shall not grant a sub license or lease the channel / broadcast service in whole or in part.**
- c) **The licensor shall not either directly or indirectly assign or transfer its rights in any manner whatsoever under this agreement to any other party.**
- d) The licensor can terminate the license of the licensee in case of default in payments of any license fee or on breach of any terms and conditions contained in this agreement.
18. To examine the claim of the assessee and revenue it is necessary to look in to the Migration policy containing terms and conditions of such

migration from phase - I to phase- II As per communication dated 13.07.2005 this policy was announced which contained following salient features of migration.

"POLICY ON EXPANSION OF FM RADIO BROADCASTING SERVICES THROUGH PRIVATE AGENCIES (PHASE-II).

New Delhi.

Dated: 13th July, 2005.

The Government of India, Ministry of Information & Broadcasting has formulated a policy on expansion of FM radio broadcasting services through private agencies (Phase-II). As in the Phase-I policy, the objectives of Phase-II shall be to attract private agencies to supplement and complement the efforts of All India Radio by operationalizing radio stations that provide programmes with local content and relevance, improve the quality of fidelity in reception and generation, encouraging participation by local talent and generating employment. The salient features of the Policy are given below:

1. Process of granting permission:

1.1 Permission shall be granted on the basis of One-Time Entry Fees (OTEF) quoted by the bidders (Closed Tender System). The Ministry of I&B would separately issue detailed tender notice in due course enabling the interested parties to participate.

2. Eligibility Process:

2.1 The process of granting permission for new participants under Phase 2 shall consist of two rounds. The first round shall be for pre-qualification and only applicants qualifying in accordance with prescribed eligibility criteria given at item no. 3 below will proceed to the next round for making financial bids for specific channels in different cities.

2.2 Participants of Phase 1, who exercise their option to be considered for Phase 2, including those licensees who are eligible for automatic migration for channels already operationalised by them, shall be eligible to be considered for the pre-qualification round for fresh tendering under Phase 2, subject to their fulfilling the prescribed eligibility criteria.

MIGRATION TO PHASE 2.

1. Licensees of Phase-I, who have actually operationalized their channels would be given the option to migrate to Phase 2 Policy Regime. They will have to exercise their initial option by the prescribed date to automatically migrate to Phase 2 Policy regimes in accordance with the terms and conditions of migration or continue under Phase 1 or surrender their licenses with one month's notice.

2. In the event of surrender of channels, Government may include the surrendered channels for allotment under the Phase-II policy regime.

3. Automatic migration shall be considered for only those license holders of Phase 1 who have actually operationalised their channels, provided they have paid all their dues from the due date (after allowing for certain condonation of delay in the case of Delhi, Kolkata and Chennai due to problems of co-location) up to the cut-off date, and are not in default of any other license conditions till the date of migration to Phase 2.

4. The cut-off date for automatic migration to Phase 2 shall be taken as April 1, 2005. All payments made by operationalised license holders of Phase 1 in excess of amounts due till the cut-off date, shall be given credit and adjusted against their One-time Entry Fee (OTEF) for Phase 2.

5. Each operationalised license holder of Phase 1, who is eligible for automatic migration, shall pay OTEF amount equal to the average of all successful bids received under Phase 2 in that city. In the event of no successful bid in the city, such OTEF amount shall be equal to the average of all successful bids received in that category of cities in that region. In the event of no successful bid in any metro city, such OTEF amount shall be equal to the average of all successful bids received in all the four metro cities.

6. On exercising its option to automatically migrate to Phase 2, and payment of the OTEF within the prescribed period, each eligible operationalised license holder of Phase 1 shall be issued a fresh permission with the same terms and conditions as for successful bidders of Phase 2.

7. If any of the operationalised license holders of Phase 1, who is eligible and opting for automatic migration to Phase 2, fails to deposit the OTEF or sign the Grant of Permission Agreement within prescribed period, its automatic migration to Phase 2 shall stand cancelled and it shall be governed by the terms and conditions of its original license under Phase 1 Policy regime, as modified from time to time.

8. In the event of any operationalised license holder of Phase 1 declining to opt for automatic migration, it shall continue to be governed by the terms and conditions of its original license under Phase 1 Policy regime, as modified from time to time.

9. In the event of opting to close down its radio station, an operationalised license holder of Phase 1 shall give a notice of termination with a minimum period of one month at the end of which the Ministry of Information & Broadcasting may cancel its license and permit it to close down the station, and may allocate the frequency so released to the next highest eligible bidder under Phase 2.”

19. Now first we examine claim of assessee u/s 35ABB (2) of the Income tax act. According to that section if
- a. Whole of license is transferred where proceeds are less than the expenditure remaining unallowed, expenditure remaining unallowed as reduced by the amount of sale proceeds is allowed as a deduction in the year of transfer.
 - b. Where proceeds are more than the expenditure remaining unallowed amount of sale proceeds or amount of expenditure incurred to obtaining license (whichever is less) as reduced by the expenditure remaining unallowed shall be taxable as business profits in the year of transfer, whether business exists or not in that year.
 - c. If the sale proceeds is more than the expenditure incurred to obtain license, then such excess is taxable as Capital Gain under Section 45.
20. Therefore according to us, this section postulates following necessary ingredient:
- a. There should be a transfer of the License already granted.

- b. There should be proceeds of the transfer
21. Before coming to the first condition of section 35ABB(2), we hold that license is a capital asset in view of the decision of Honourable Delhi high court in CIT V Bharti Hexacom Limited ITA no 1336 of 2010 dated 19/12/2013 where in it is held that license is a capital asset. Now we come to the first condition of 35ABB (2) which provides that there should be transfer of the license. We have carefully seen the agreement dated 27th October 2000 between GOI and the assessee. According to Article 4 of Schedule C containing terms and conditions provides as under:-

Article -4

PROHIBITION OF CERTAIN ACTIVITIES

4.1 The License is non-transferable. The License shall not grant a sub-license or lease the channel /broadcast services in whole or in part.

4.3 The License shall not either directly or indirectly assign or transfer its rights in any manner whatsoever under this agreement to any other party or enter in to any agreement for sub license and/ or partnership relating to any subject matter of the license to any third party either in whole or in part. Any violation of the terms shall be construed as breach of the License Agreement and License of the Licensee shall be terminated immediately.

22. Plea of the assessee that as the License is capital asset and same is migrated to Phase – II, it is transfer within the meaning of section 2 (47) of the Income tax Act looks attractive but on deeper examinations it fails the test of provision of section 35ABB(2) of the act. On reading of the above clauses of the agreement, it is apparent that assessee does not have any authority to transfer the license under this agreement. Further assignment of any rights is also prohibited. Secondly, there is no ‘proceeds’ of transfer as this is just an option exercised by assessee to migrate to phase – II. As the assessee is precluded from transferring the license as well as the transfer of any right contained in the license, according to us, there is no transfer of license. According to letter dated 21 December 2005 issued by GOI also mentioned clearly in para no 2 that license of operationalised channels shall be considered to migration in phase –II provided they have paid all their dues from due dates up to cut off date and are not in default of any other license condition till the date of migration to phase –II. The cut of date for automatic migration was set at April 1, 2005. As it is submitted that assessee has paid all their dues in terms of that letter they were entitled for automatic migration from phase-I to phase –II. Further according to the new policy better terms and conditions are offered to the existing operators by migration from phase-I to phase –II. Further looking to the agreement entered in to by assessee and GOI for phase- I and Phase-II, there is no substantial change in the terms and conditions except that License fee payments has changed from ‘Fixed fee basis’ to ‘revenue sharing basis’ and duration of payment. Further On exercising its option to automatically migrate to Phase 2, and payment of the OTEF within the prescribed period, each eligible operationalised license holder of Phase 1

shall be issued a fresh permission with the same terms and conditions as for successful bidders of Phase-II. Therefore according to us, it is not transfer of license but it is the same license where terms and conditions of payments as well as other conditions are modified. Hence accordingly, there is no transfer of license made by assessee but it is same license for the same city with modified terms and conditions. Needless to say that as there is only changes in the terms and conditions of the existing license, there is no question of any 'proceeds' of the transfer as envisaged u/s 35ABB (2) of the act. We are also not persuaded to the argument of AR of the assessee meaning of words 'Migrate' and transfer' should be perused in ordinary sense and they are synonymous because of the reason that agreement itself prevents assessee from transferring license or any rights there in and set of policies of government are allowing it to migrate to different methodology of payment of fees to government.

23. Before us also Assessee has relied up on several judgments of various courts as under :-
- a. CIT V Narang dairy products 219 ITR 478 (SC)
 - b. Smt Anand bala Bhushan V CIT (All) 214 ITR 144
 - c. CIT V AR Damodar Murlidhar & co 119 ITR 583 (Mad)
 - d. Mangalore electric supply Co ltd V CIT 113 ITR 655 (SC)
 - e. Kartikey Sarabhai V CIT 228 ITR 163 (SC)

We have perused all those decision and we are of the view that none of them applies to the facts of the case of the assessee. In all the above cases there was transfer of assets from one person to another and there is a receipt of consideration for such transfer. In none of the cases it was the facts that the assets was non-transferrable as in the case of the assessee. Therefore the reliance placed up on them is unjustified.

24. Hence in view of prohibition to transfer the original license, we reject the claim of the assessee for deduction of the whole sum of Rs 12,65,82,440/- paid under Phase-I of the license u/s 35ABB (2) of the Act and confirm the order of CIT (A) on this count.
25. Now we proceed to examine claim of the assessee u/s 35ABB (1) of the act. According to section 35ABB (1)
- a. any capital expenditure incurred for acquiring any right to operate telecommunication services shall be eligible for deduction.
 - b. Such capital expenditure can be incurred before commencement of business or after commencement of business.
 - c. Payment has to be actually made for obtaining such license.
 - d. Then such expenditure is allowed as a deduction over the period for which the license remains effective.
 - e. If the expenditure is incurred before the commencement of business, then deduction starts from the year of commencement of the business.

- f. Such expenditure is allowed for the remaining time for which the license remains in force.
26. According to the migration policy the new license shall commence with effect from 1-4.2005 with following three options:-
- a. Migrate to Phase – II policy regime with fresh term of 10 years provided they had operationalised their FM channels and paid off all license fees dues of Phase –I license up to the cut-off date of 1st April 2005² and were not in default of any other license conditions till the date of migration to phase – II.
 - b. Continue to remain under Phase – I policy regime
 - c. Surrender their FM channel under Phase -I license in order to exit.

Accordingly assessee has exercised option to migrate to Phase –II and not to continue under phase –I policy. As per chart submitted by the assessee showing difference between the Phase- I and Phase II, there are change in the payments terms which has become from fixed payment regime to revenue sharing regime, in the conditions pertaining to shareholding, conditions for appointment of directors, hiring of broadcasting equipment's etc. As we have already held that migration of license of assessee from phase -I to phase –II is just modification of terms and conditions of the license and these modification cannot be said that old license granted to assessee in phase -I has ceased or not in force. Therefore we are unable to persuade ourselves that the terms of licence granted in Phase- I has come to an end. In our view terms and conditions of license has been modified in above manner and tenure of the same is also extended and license granted in Phase -II is not independent of license granted to assessee in Phase-I. Therefore the claim of the assessee for deduction of above sum u/s 35ABB (1) is also not correct.

27. Now the issue arises that whether the amount of unallowed capital expenses paid by the assessee under phase –I policy is a capital loss or whether such a sum is allowable to the assessee. According to us as the amount paid by the assessee in phase –I by virtue of which it has got right for automatic migration to PHASE –II is not capital loss incurred by the assessee but assessee is eligible for deduction of the same u/s 35ABB (1) over the remaining life of license modified by PHASE –II policies. Before CIT (A) also assessee submitted that the unallowed expenditure paid under phase –I shall be deserves to be allowed equally over the remaining period of 10 years being the tenure as applicable under Phase-II. Assessee himself contended that full payments of license fee including the arrears under phase –I was precondition imposed by the GOI hence such directly unallowed expenditure are linked with the migration to phase –II. Ld. CIT (A) has dealt with this issue as under :-

“5.7 I have carefully considered the assessment order and the submissions made by the ld. AR. It is not in dispute that the appellant was entitled to claim license fee expenditure as actually paid under Phase-I license regime on proportionate basis over the 10 year license fee term commencing from A.Y. 2004-05 as per section 35ABB of I.T. Act, as allowed by the AO vide assessment order for 2004-05. The issue for consideration therefore is the allowability of the remaining license fee expenditure of Rs. 12,65,82,440/- as paid during the A.Ys. 2004-05 and 2005-06 under Phase-I license regime. The appellant has claimed the above amount for deduction in full as revenue expenditure u/s 35ABB of the Act basing on the cut-off date of 01.04.2005 for migration to Phase-II license regime. The AO has disallowed the same by treating it as a capital loss. On careful examination, I find that the migration of license from Phase-I license regime to Phase – II license regime does not per-se amount to ‘transfer’ of license by the appellant as required under sub-section (2) of section 35ABB of I.T. Act in order to justify the appellant’s claim for allowing the remaining entire license fee expenditure of Rs. 12,65,82,440/- under Phase-I license regime during A.Y 2006-07 itself. In this case, I find that while migrating from Phase-I license regime to Phase – II license regime, there was no transfer of license from the appellant to any other party. The case laws as cited by the ld. AR vide its submissions dated 18.11.2010 are distinguishable on facts as such cases deal with definition of ‘transfer’ of a capital asset u/s 2(47) of the Act which includes exchange or relinquishment of the asset or extinguishment of any rights therein. What we are concerned here in this case is not ‘transfer’ within the meaning of section 2(47) of the Act, but under section 35ABB of the Act which is entirely different in context and application as it relates to amortization of expenses. Accordingly, I find that section 35ABB(2) has no application to the facts of appellant’s case, and hence the appellant’s claim for deduction of the entire remaining license fee expenditure of Rs. 12,65,82,440/- during this year is rejected.

5.8 However, from the Govt. Policy document dated 13.07.2005 as pointed by the ld. AR, it is found that the FM licensees in Metro cities were eligible to opt for migration to Phase-II license only if they had paid all their license fee dues under Phase-I license regime as were applicable till the cut-off date of 01.04.2005. In this connection, relevant portion under the heading “Migration to Phase 2” from such Policy document dated 13.07.2005 are reproduced as under:

“Automatic migration shall be considered for only those license holders of Phase-I who have admittedly operationalised their channels, provided they have paid all their dues from the due date (after allowing for certain condonation of delay in the case of Delhi, Kolkata and Chennai due to problems of co-location) up to the cut-off date, and are not in default of any other license conditions till the date of migration to Phase 2.

The cut-off date for automatic migration to Phase 2 shall be taken as April 1, 2005. All payments made by operationalised license holders of Phase 1 in excess of amounts due till the cut-off-date, shall be given credit and adjusted against their One Time Entry Fee (OTEF) for Phase 1”.

Further, copy of letter dated 21.12.05 as issued by the Ministry of Information and Broadcasting to the appellant also clearly vide para 4 specifies the amounts due and payable by the appellant under Phase-I license fee regime and vide para 5 states as under:

“It may please be noted that option to migrate to Phase II Policy Regime would be considered valid only after all amount due up to cut off date are received in the Government account. On exercising your option to automatic migration to Phase II, and payment of OTEF within prescribed period, you shall be required to sign a fresh Grant of Permission Agreement with Government on the same Terms and Conditions as for the successful Bidders of Phase II”.

In other words, payment of license fee dues under Phase I license regime was made a recondition by the Govt, in order to permit the appellant to migrate to Phase -II license regime.

5.9 In view of the above, the remaining expenditure on account of Fixed License Fee as actually incurred by the appellant under Phase -I license regime becomes part and parcel of all the payments as made in order to become eligible for obtaining Phase-II license. As OTEF (migration fee) of Rs. 22,22,52,219/- has been accepted by the AO to be allowed over the 10 year term of Phase -II license under sub-section (1) of section 35ABB, on the same basis, I am of the view that the remaining expenditure of Rs. 12,65,82,440/- as incurred by the appellant under Phase -I license also needs to be allowed over the new 10 year term under Phase - II license regime starting from A.Y. 2006-07 in accordance with section 35ABB(1) of I.T. Act read with CBDT's Circular 763 dated 18.12.1998.

5.10 I find that the above issue is similar to the issue of allowability of license fee on migration from Fixed License Fee regime to Revenue Sharing regime in case of telecom companies as per the policy of the Department of Telecommunication, Govt. Of India. In this regard, in the case of RPG Cellcom Ltd. (presently known as Idea Cellular Ltd.) pertaining to this charge, the assessee was granted a license during FY 1995-96 by the Department of Telecommunications, Govt, of India for a period of 10 years for operating telecommunications services. For acquiring the above license, the appellant had paid a fixed license fee during financial years 1995-96 to 1999-2000. The business actually commenced in the month of February 1997. The assessee claimed deduction on account of the above license fee in its return of income from AY 1997-98 to 1999-2000 as per the provisions of section 35ABB by amortizing the license fee over 10 years which was allowed by the Department in all the years. Subsequently the Department of Telecommunications, Govt, of India vide its letter no. 842-47/2000-VAS(Vol. IV) dated 05.10.2000 extended the period of above license from 10 years to 20 years and confirmed migration from Fixed » License Fee regime to Revenue Sharing regime w.e.f. 01.08.1999 in view of the New Telecom Policy-99. Accordingly, the assessee recalculated the amortization of license fee over 20 years and in the return of income from AY 2001-02, the assessee claimed the amortization by taking into account the unexpired period of the license fee of 16 years (out of total 20 years) and claimed that deduction u/s 35ABB accordingly. The said deduction u/s 35ABB as claimed by the appellant in its return of income as per the new calculation from AY 2001-02 onwards has been allowed by the Department in all the years.

5.11 Accordingly, the appellant is entitled to Rs. 1,26,58,244/- being 1/10th of Rs. 12,65,82,440/- as deductible expenditure u/s 35ABB during the year under consideration i.e. A.Y. 2006-07. This ground of appeal is disposed off accordingly.”

We have also carefully perused the reason given by CIT (A) for allowing the deduction of fees paid by assessee under PHASE –I over the remaining life of the license granted under PHASE-II of the regime. We do not find any infirmity in the finding as well as reasoning given by CIT (A) as in substance the reason canvassed by CIT (A) are similar to what we have propounded in our order. In view of this we confirm the order of CIT (A) in granting deduction of Rs. 1,26,58,244/- being 1/10th of Rs. 12,65,82,440/- being fees paid by assessee in Phase –I as deductible expenditure u/s 35ABB(1) during the year under consideration i.e. A.Y. 2006-07. In result ground no 1 of the appeal of the assessee is dismissed.

28. Assessee has raised alternative ground of allowance of depreciation u/s 32(i) (ii) on the amount of license fees. Contention of the assessee was that if the license fee expenditure of Rs. 26,37,65,421/- is not considered to be allowable in full during the year under consideration as per section 35ABB, then alternative submission as also taken up before CIT(A) deserves to be considered according to which section 32(i)(ii) of I.T. Act recognizes licenses as an intangible asset on which depreciation is to be allowed as prescribed

under the Income-tax Rules which prescribes the rate of 25% as per Rule 5 of Appendix I (Part B).

29. We have carefully considered the rival contention on this issue and we are of the view that provision of section 35ABB(8) which provides that Where a deduction for any previous year under sub-section (1) is claimed and allowed in respect of any expenditure referred to in that sub-section, no deduction shall be allowed under sub-section (1) of section 32 for the same previous year or any subsequent previous year. Further as held by is in deciding the issue of allowability of claim of the assessee u/s 35ABB (1) wherein we have allowed the claim of the assessee on proportionate basis from remaining years of license, the claim of the assessee cannot be accepted. Hence we reject ground no. 2 of the appeal of assessee.
30. Ground No 3 of the appeal of assessee is against interest income as declared at Rs 38,41,383/- ought to have been assessed as business income and not under the head "income from other sources. Before us LD AR submitted that part of the income of the interest is earned because of the amount was necessarily required to be kept by the assessee under lien of issuing bank guarantee to the Ministry of Information and Broadcasting. Ld. DR submitted that bank interest is chargeable to tax in the hands of the assessee under the head of 'other sources' only.
31. We have considered the rival submission as well as o the orders of lower authorities on the issue. Before CIT (A) the details of such interest income was not furnished by AR of the assessee and same was no such details have been furnished before us. In the assessment order also, AO has not mentioned the reason for changing the head of bank interest income from "Business Income "offered by assessee to 'income from other sources'. Therefore in the interest of justice we set aside this ground of appeal of the assessee back to the file of AO to decide the same on merit after affording reasonable opportunity of hearing to assessee. Therefore ground no 3 of the appeal of the assessee is allowed for statistical purposes.
32. In the result appeal of the assessee in ITA No 1316 &1317/Del/2011 and ITA No 5081/Del/2011 are partly allowed as directed above.
33. Coming to the appeal of the revenue against the order of CIT (A) raising ground no 1 of the appeal that on the facts and circumstances of the case and in law, ld. CIT (A) has erred in allowing Rs. 1,26,58,244/- being 1/10th of the total license fees claimed u/s 35ABB of the Act. In view of our fining in ground no 1 of the appeal of the assessee we have decided this issue and confirmed findings of CIT (A) regarding allowability of license fee paid by assessee in Phase -I. Accordingly we dismiss ground no 1 of the appeal of revenue.
34. Ground No. 2 of Revenue's Appeal is against the on the facts and circumstances of the case and in law, the ld. CIT (A) has erred in directing the AO to verify the record and allow carry forward of unabsorbed depreciation /

business loss as per law. Assesse submitted before CIT (A) that it has only carried forward of unabsorbed depreciation of previous years of Rs. 9796408/- and Rs 12521695/- of unabsorbed Business loss as per assessment order for AY 2004-05. Against this CT (A) has granted a direction to AO verify the record and allow carry forward of unabsorbed business loss and depreciation in accordance with the law. We do not find any infirmity in the order of CIT (A) and therefore reject ground no. 2 of the revenue' appeal.

35. In the result appeal of the revenue in ITA 1720 & 1721 /Del/2011 and 4364/Del/2011 are dismissed.

(Order Pronounced on 24/11/2015)

-Sd/-
(I.C.Sudhir)
JUDICIAL MEMBER

-Sd/-
(Prashant Maharishi)
ACCOUNTANT MEMBER

Dated: 24 /11/2015

B. Rukhaiyar

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(Appeals)
- 5.DR: ITAT

ASSISTANT REGISTRAR