IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH MUMBAI

BEFORE SHRI R.C. SHARMA, AM & SHRIRAMLAL NEGI, JM

ITA No.3327/Mum/2018
(**Assessment Year:2011-12**)

Vodafone India Ltd., Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400013.	Vs.	Principal Commissioner of Income Tax-8, Room No. 611, Aayakar Bhavan, M.K. Road, Mumbai, Maharastra, PIN-400020.
PAN: AAACH 5332 B		
Appellant)	..	**Respondent**)

Assessee by	Shri Salil Kapoor (AR)
Revenue by	Shri Parag Vyas (Special Counsel) (CIT-DR)
Date of Hearing	**03/03/2020**
Date of Pronouncement	**28/08/2020**

आदेश / O R D E R

PER R.C.SHARMA (A.M):

This is an appeal filed by the assessee against the order of the ld. Pr.CIT-8, Mumbai U/s 263 of the Income Tax Act, 1961 (in short, the Act) dated 28/03/2019 for the A.Y. 2011-12. The assessee has taken following grounds of appeal:

"1. On the facts and circumstances of the case and in law, the learned Principal Commissioner of Income Tax — 8, Mumbai (hereinafter referred to as the 'learned PCIT') has erred in initiating proceedings under section 263 of Income Tax Act, 1961 (`Act') by wrongly assuming jurisdiction under section 263 of the Act and hence, the order passed by the learned PCIT under section 263 of Act is bad in law and void ab-initio.

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2. *On the facts and circumstances of the case. and in law, the notice dated March 15, 2018 as well revisionary order dated March 28, 2018 passed under section 263 of the Act is time barred, since the only order which the learned PCIT could have revised was the draft assessment order for the subject AY, which being passed on March 31, 2015, could have been revised up-till March 31, 2017 alone.*

3. *Without prejudice to Grounds I and 2 above, on the facts and circumstances of the case and in law, the learned PCIT has erred in assuming jurisdiction and passing the revisionary order under section 263 of the Act since:*

   3.1. *The order passed by the learned AO under section 144C(13) read with section 143(3) of the Act for the subject AY is not an order exclusively passed by him, but passed by him under section 144C(13) of the Act in conformity with the directions issued by the Dispute Resolution Panel under section 144C(5) of the Act, and hence, cannot be revised under section 263 of the Act;*

   3.2. *The learned AO had not only made adequate inquires, but had also undertaken necessary verification basis the details/ documents sought from the Appellant during the course of assessment proceedings and taken one of the permissible views. Accordingly, the assessment order passed by learned AO is neither 'erroneous' nor 'prejudicial' to the interest of the revenue;*

   3.3. *The learned PCIT passed the revisionary order on the issues which have been clarified by various Circulars issued by Central Board of Direct Taxes (`CBDT') as well as binding judicial precedents (also submitted during the revisionary proceedings) leading to unwarranted litigation.*

   All Grounds henceforth are without prejudice to the above Grounds

4. *On the facts and in circumstance of the case and in law, the learned PCIT has erred in concluding that the order passed by the learned AO, accepting the depreciation claimed by the Appellant under section 32(1) of the Act on the right to use spectrum, is erroneous as well as prejudicial to the interest of the revenue and thereby, erred in directing the learned AO to amortize the appropriate expenditure incurred on acquiring the spectrum.*

5. *Without prejudice to the Ground No 3 above, on the facts and in circumstance of the case and in law, the learned PCIT has grossly erred in observing that since it is the Appellant's plea that spectrum is different from a telecom license, the Appellant should therefore neither be eligible to claim deduction under section 35ABB nor section 37 of the Act.*

6. *On the facts and in circumstance of the case and in law, the learned POT has erred in directing the learned AO to examine the expenses capitalized by the Appellant together with the costs incurred for acquiring the right to use 3G spectrum.*

7. *On the facts and in circumstance of the case and in law, the learned PCIT has erred in directing the learned AO to examine the customer-wise breakup of bad debts, thereby directly violating the principles enunciated by the Hon'ble Apex Court in the case of TRF Ltd v CIT 323 ITR 397 and Vijaya Bank v CIT (323 1TR 166), wherein it has been held that once the assessee has debited its profit and loss account and simultaneously reduced the amount from Sundry Debtors/loans and advances depicted in balance sheet at the close of the year, the assessee is entitled to deduction of such bad debts.*

All the above grounds are without prejudice to each other. The Appellant craves leave to add, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal.

The Appellant prays that appropriate relief be granted based on the said grounds of appeal and the facts and circumstances of the case."

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2. Rival contentions have been heard and record perused. Facts in brief are that the assessee is engaged in provision of wireless telecommunications services to individual and corporate customers in India. It is primarily engaged in providing telecommunication services to its customers/subscribers located in Mumbai circle. In addition to telecom services, the assessee also provides other services such as text messaging, wireless distribution of contents such as music, news and email to its customers. For the year under consideration, the assessee filed its return declaring loss of Rs. 235.15 crores, which was subsequently revised to Rs. 181.54 crores. The assessment was completed on 28/01/2016 vide order U/s 144C(13) read with Section 143(3) of the Act determining the total income of Rs. 308,62,72,670/-. Thereafter the ld. Pr.CIT invoked his power U/s 263 of the Act and observed that the assessee company had claimed depreciation amounting to Rs. 447,13,85,156/- at the rate of 25%/12.5% on spectrum fees paid considering it as intangible assets which was wrongly allowed as claimed u/s 32 of the Income Tax Act. The spectrum fee should have been amortized on pro rate basis over the period of license in force as per provisions of Section 35-AB of the I.T. Act, 1961. He further observed that the assessee company had claimed deduction of

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Rs.37,57,77,446 on account of Bad Debt which was allowed by the Assessing Officer. The assessee company has claimed deduction on account of bad debt is allowable if the amount of bad debt has been written off as irrecoverable in the accounts. The deduction claimed on account of bad debt directly in the computation of income should have been disallowed. As per section 36(1)(vii), the deductions shall be allowed in computing the income in respect of the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year. The ld. Pr.CIT has also stated that the assessee company has capitalized an amount of Rs. 35,22,38,00,000/- in the books of accounts whereas the amount capitalized for income tax purpose was Rs. 35,77,10,81,245/- for acquisition of 3G spectrum. Thus, the assessee has capitalized an excess amount of Rs. 54,72,81,245/- (35,77,10,81,245 - 35,22,38,00,000) for income-tax purpose on account of 3G spectrum and has claimed excess deduction on account of depreciation on this excess amount. As per ld CIT, these issues prima facie warranted disallowances on the facts and circumstances of the case, have not been done and the claims were allowed without proper examination. On the facts and circumstances of the case, it is clear that in respect of the

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aforesaid aspects, the order of the A.O. suffers from error within the meaning of Section 263 of the I.T. Act, 1961. This error has resulted in prejudice to the revenue within the meaning of Section 263 in as much as the claim of the assessee is allowed in excess and /or income of the assessee has been under assessed. Accordingly, in respect of the aforesaid aspects, provision of Section 263 of the Income Tax Act, 1961 were to be invoked. Therefore, a show cause notice was first issued on 15.11.2016 and a final show cause notice dated 15.03.2018 was issued covering the three issues which had come up for consideration in these proceedings.

3. With regard to claim of depreciation on spectrum, the ld. Pr.CIT held as under:

"6.9 The provisions of the Act allow depreciation u/s.32(1)(ii) on intangible assets being know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature. As already brought out earlier, the commercial / business rights are to be of similar nature to the know-how, patents, copyrights, trademarks, licenses, franchises. The provisions of section 35ABB apply specifically to payments made to obtain a license for acquiring a right to operate telecommunication services. So, in the case of a telecom license the specific provision would apply and not the general provision of the commercial rights in the nature of license covered u/s.32(1)(ii).

6.10 The assessee itself is claiming that the payment made for 3G Spectrum is not a license but only a right to use which is separate from the license. Once the payment is not a license or similar to a license it cannot be covered u/s.32(1)(ii) as already brought out in the earlier paras. If the payment for 3G Spectrum is not part of the license it will also not be covered u/s.35ABB which covers only payments for license. In such a case the payment made by the assessee will be a capital expenditure which cannot be allowed u/s.37 of the 1.T. Act, 1961."

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4. The very claim of depreciation on spectrum had been set aside in para 6 above. However, in the eventuality of the assessee's treatment and claim of depreciation being upheld by the courts/higher appellate authorities, one would then have to deal with depreciation claim again. The AO was, therefore, directed to examine the issue of costs capitalised while doing the set aside assessment on the issue of claim of depreciation on spectrum. The AO should examine the correct cost allocation and capitalization in the books so that no excess claim as mentioned at issue (ii) in para 2 supra is made or allowed while computing the income eventually in case the depreciation claim is upheld by higher appellate authorities.

5. With regard to bad debts written off, the ld. Pr.CIT has observed that the assessee company had claimed deduction of Rs. 37,57,77,446 on account of Bad Debt which was allowed by the Assessing Officer. The assessee company has claimed deduction on account of bad debt is allowable if the amount of bad debt has been written off as irrecoverable in the accounts. However, the deduction was claimed directly in the computation of income, therefore, should not have been allowed. As per section 36(1)(vii), the deductions shall be allowed in computing the income

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in respect of the amount of any bad debt or part thereof which is written off as irrecoverable in the accounts of the assessee for the previous year.

6. After considering the assessee's contention, the ld. Pr.CIT(A) has held as under:

"8.5.1 Essentially, the policy and method followed in writing of bad debts is under examination. It is to be understood that write off of the bad debts implies that firstly it has become bad (irrecoverable) and that it was actually written off. However, here the assessee has a practice of putting a 90 day limit and then classifying it as bad and writing off by way of provision for bad debts. It is also mentioned in the written submissions that legal cases are filed subsequently indicating perusal of such "bad" debts. Thus, it is not clear whether the debtor account is actually written off or it is "written off' by crediting the account with an equivalent amount from provision for bad debts since courts demand live debtor acct to pursue cases of recovery.

8.5.2 This issue is therefore set-aside with a direction to the Assessing Officer to examine by seeking details of customer wise break up of Rs.37 crores written off and see whether the individual accounts have also been written off for allowing the claim. The AO may give an opportunity to the assessee to produce the details of such account in soft copy by way of CD and go through the entire cycle of provisioning and write off individual debtor accounts by examining and test checking certain random debts."-

7. Against the above order of the ld. Pr.CIT U/s 263 of the Act, the assessee is in further appeal before the ITAT. It was argued by the ld. AR that the learned Principal Commissioner of Income-tax ['PCIT'] erred in assuming jurisdiction and initiating proceeding under section 263 of the Income-tax Act, 1961 ('Act') since the order passed by the Assessing Officer ('AO') was neither 'erroneous' nor 'prejudicial' to the interest of the revenue as the AO had not only made adequate inquiries, but had also undertaken necessary

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verification on basis the of the details sought from the assessee during the course of the assessment proceedings and had taken one of the permissible views. As regards maintainability of revisionary proceedings under section 263 of the Income Tax Act, 1961, reliance was placed on the following judicial pronouncements.

1. CIT vs AmritlalBhogilal& Co. 34 ITR 130 (SC)

2. CIT vs Smt. AnnapoornammaChandershekhar (2012) 17 Taxman. Com 120 (Karnataka H.C.)

3. Gabriel India Limited, 203 ITR 108 (Bombay H.C.)

4. CIT vs Nirav Modi, 390 ITR 292 (Bombay H.C.)

5. CIT vs Max India Ltd. 295 ITR 282 (SC)

6. Malabar Industrial Co. Ltd. vs CIT 243 ITR 83 (SC)

7. CIT vs Vodafone Essar South Ltd., 212 Taxman 184 (Delhi H.C. – affirmed by the Hon'ble Supreme Court in CC 9308/2013)

8. CIT vs Vodafone Essar South Ltd. (CC 9308/2012 – SC)

8. As per the ld. AR of the assesse the learned PCIT erred in concluding that depreciation amounting to INR 447,13,85,156 was not allowable under section 32(1)(ii) of the Act on the right to use 3G spectrum acquired by the assessee and erred in directing the AO to amortize this cost under section 35ABB of the Act. The ld. AR of the assessee further contended

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that the learned PCIT erred in directing the AO to examine the difference between the amount capitalized in the books (INR 35,22,38,00,000) and the amount considered for income tax purposes (INR 35,77,10,81,245) and disallow the claim of depreciation on such differential sum of INR 54,72,81,245. As per ld. AR of the assessee, the leaned PCIT erred in directing the AO to examine the customer wise break up of bad debts and verify whether individual accounts have been written off for allowing the claim of deduction of bad debts of INR 37,57,77,446.

9. As regards invocation of powers by the ld. PCIT under section 263 of the Act, the ld. AR of the assessee submitted that on basis of the disclosure made in the financial statement and tax audit report, the AO had conducted a detailed investigation of facts as also examined the additions of the right to use 3G spectrum to the fixed assets and allowability of depreciation thereon, which is manifest from the following:

(i) Notice dated January 14, 2015 issued by the AO *(refer page 82 of the paper book)* wherein in point 4 of the notice, the AO had specifically enquired about the working of addition to spectrum fees duly supported by evidence, as also, amortization of the spectrum fees.

(ii) Submission dated February 25, 2015 *(relevant page 99 of the paper book)* and March 27, 2015 *(relevant pages 151 and 152 of the paper book)* and March 30, 2015 *(relevant pages 155 and 156 of the paper book)* filed by the Appellant wherein details regarding acquisition of right to use 3G spectrum, the cost of such acquisition, additions made in the books of accounts, break-up of the cost for tax purposes, claim of depreciation under section 32(1)(ii) of the Act, copy of the 3G spectrum and BWA spectrum license, relevant approvals from DoT etc. were furnished.

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As regards allowability of depreciation on fees paid for acquisition of 3G spectrum, reliance was placed on the following judicial pronouncements:-

1. Idea Cellular Ltd. (ITA No.360/Mum/2016) [Mumbai Bench of the Tribunal]
2. Techno Shares and Stocks Ltd. 327 ITR 323 (SC)
3. CIT vs Smifs Securities Ltd, 348 ITR 302 (SC)

10. Inviting out attention to the order passed by the AO, the ld. AR of the assessee contended that the AO has conducted detailed enquiries during the course of the proceedings then change of opinion by merely reappraising evidence is not within the parameters of revisional jurisdiction under section 263 of the Act. Reliance in this regard was placed on the Jurisdictional High Court decision in the case of Gabriel India Limited (203 ITR 108).

11. With regard to the claim of bad debts, it was submitted that the assessee had written off the amounts of Bad Debts after expiry of 180 days since the debt had become irrecoverable. As regards allowability of bad debts written off, reliance was placed on following judicial pronouncements and CBDT Circulars.

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1. TRF Ltd. vs CIT, 190 Taxman 391 (SC)

2. Vijay Bank vs CIT, 323 ITR 166 (SC)

3. CIT vs Star Chemicals (Bombay) (P) Ltd. 313 ITR 126 (Bombay High Court)

4. Circular No. 12/2006 (F.No.279/Misc./140/2015-ITJ) dated May 30, 2016.

5. Circular No. 551 dated Jan. 23, 1990 issued by the CBDT.

12. On the other hand, the ld DR contended that the AO had not applied his mind to the application of Section 35ABB of the Act. The order of the AO is, therefore, prejudicial to the interest of the Revenue and Section 263 of the Act has been rightly invoked since after considering Explanation to Section 263 of the Act, the order was passed without making enquiries which should have been made.

13. Reliance was placed by the ld.DR in the case of Yuvraj Vs Union of India and Anr. (2009) 315 ITR 84 (Bom). Wherein Hon'ble Bombay High Court has held that where an issue as to whether income is to be treated as Capital Gain or Casual income is not decided, the same cannot be considered as a change of opinion and it cannot be said that the AO has applied his mind on the relevant issue. On similar lines, in the present case since the AO has not examined and applied his mind whether the provisions of Section 35ABB of the Act are applicable and has not made

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any inquiry in this regard. Section 263 of the Act has rightly been invoked. The details submitted by the assessee during assessment proceedings are not on allowability or /non applicability under section35ABB of the Act.. The ld. DR further contended that the decision of the Tribunal in the case of Idea Cellular Ltd. in ITA No. 360/Mum/2016 has not considered the amended section 263 of the Act.

14. As per ld. DR, the decisions relied upon by the ld. AR in the case of Gabriel India Ltd, 203 ITR 108 (Bom) and Malabar Industrial Co. Ltd. vs CIT , 243 ITR 83 (SC) are not applicable since there is no opinion formed by the AO on applicability of Section 35ABB of the Act. In fact, Malabar Industrial Co. Ltd. vs CIT (supra) supports the stand of Revenue.

15. With regard to applicability of Section 35ABB of the Act, the DR further contended that as per Wikipedia (Exhibit A page 4 of proposition on behalf of the Revenue) ‘’A Spectrum auction is a process whereby a Government uses an auction system to sell the rights (licenses) to transmit signals over specific bands of the electromagnetic spectrum and to assign scarce spectrum resources. Hence right to use Spectrum is nothing but

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right to transmit Radio Waves over relevant bands and is, therefore , a right to operate telecommunication services (band specific).

16. The ld. DR further submitted that when one time spectrum fee was sought to be levied by the Department of Telecom, existing holders of licences using the spectrum were given the option to surrender the licences if they did not want to pay the spectrum fees (See Communication from Department of Telecommunication Marked Exhibit B Page 5 of proposition on behalf of the Revenue). Hence it cannot be said that even if 3G Spectrum was not applied the telecommunication services could have been provided without payment of Spectrum charges. Also the words used in Section 35ABB are ‘’in respect of any expenditure, being in the nature of capital expenditure, incurred for acquiring any right to operate telecommunication services.” Hence acquisition of spectrum would be in the nature of acquisition of any right to operate telecommunication services (without higher band) and, therefore, squarely falls within the ambit of Section 35ABB of the Act. Section 35ABB being a special provision compared to Section 32 would have, preference over Section 32. Our attention was invited by the ld. DR to the Indian Telegraph Act, 1885, according to which the ‘’Central Government may grant a license, on such

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payments as it thinks fit any person to establish, maintain or work a telegraph within any part of India". As held by the Hon'ble Madras High Court in the case of Aircel Cellular Ltd. Vs Union of India and Ors reported in 2016, 6 MLJ 433, power to levy Spectrum fee is part of licence granted under section 4 of the Indian Telegraph Act, 1885 and, therefore, payment of Spectrum is expenditure for acquisition of any right to operate telecommunication services. This is also evidences by the communication from Ministry of Communication enclosed at page 7 of the written submissionsfiled on behalf of the Revenue.

17. The ld. DR also argued that provisions of Section 35ABA is inserted to the Act w.e.f. A.Y. 2017-18 and hence from A.Y. 2017-18 onwards only Section 35ABB would not be applicable to Spectrum payments. The Hon'ble Supreme Court of India in the case of Britania Industries Ltd. reported in 278 ITR 546 while dealing with specific provisions dealing with Guest House expenditure would have to be applied instead of the general provisions in Section30, 31 and 32.

18. Further arguing Spectrum Fees, the ld. DR argued that the assessee is confusing spectrum fees for grant Telecommunication License. Spectrum

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Fees are fees for acquisition of a right to transmit signals over specific bands (higher bands) and, therefore, squarely falls within the ambit of the Section 35ABB of the Act being in the nature of a right related to operating of telecommunication services. Section 35ABB being special provision would have preference over Section 32. As per ld. DR, the decision of Tribunal in the case of Idea Cellular Ltd in ITA No. 360/Mum2016,has not considered the above as the fact that without Spectrum (radio waves) there can be no provision of telecommunication service.

19. As regards invocation of power u/s 263 in relation to claim of bad debts and deduction u/s 36(1)(vii) of the Act is concerned, the ld. DR relied upon the reasoning given in the order u/s 263 of the Act.

20. In the Rejoinder to the arguments of the ld. DR, it was submitted by the ld. ARthat clause (a) of the Explanation 2 to Section 263 applies, if the order has been passed by the assessing officer without making enquiries or verification which a reasonable or prudent officer shall have carried out in the facts and circumstances of the case. In the present case, detailed enquiry and examination was made by the AO as regards the additions made to the fixed asset in relation to acquisition of right to use 3G

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spectrum. Hence, as the condition prescribed in clause (a) of the Explanation 2 has not been satisfied in the present case, the amended provision shall not be relevant in the instant case. Reliance in this regard is placed on the Hon'ble Mumbai Tribunal decision in the case of Shri Narayan Tatu Rane vs ITO Ward 27(1)(1) (ITA 2690 and 2691/Mum/2016).

21. As per ld. AR of the assessee Section 35ABA was inserted vide Finance Act 2016 w.e.f. April 1, 2016, ie, from AY 2017-18 and hence, the provisions of this section are not applicable to the year under consideration. Further, the amendment clearly suggests that the right to use spectrum is not covered by the provisions of section 35ABB of the Act. Hence, the Appellant had correctly claimed depreciation under section 32 of the Act, prior to insertion of section 35ABA under the statute.

22. We have considered the rival contentions and carefully gone through the order of the AO passed u/s 143(3) of the Act as well as order of the ld. CIT passed u/s 263 of the Act. We had also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited at Bar by the ld.AR and ld.DR during the course of hearing

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before us, in the context of factual matrix of the case. From the record, we found that the assessee filed its revised return of income on March 22, 2013, declaring a total loss of INR 1,81,54,14,487 under the normal provisions of the Act. In its return of income, theassessee had claimed depreciation amounting to INR 447,13,85,156 under section 32(1)(ii) on the right to use 3G spectrum by treating it as an intangible asset. Also, deduction of INR 37,57,77,446 was claimed in respect of the irrecoverable debts which were written off in the books of accounts.The return was selected for scrutiny. After examining the requisite disclosures made by the assessee in the financial statements, tax audit report, computation of income etc. regarding the claim of depreciation u/s 32(1)(ii) on the right to use 3G spectrum and bad debts, and after being satisfied with the explanation submitted by the assessee in response to the specific questions raised during the course of the assessment proceedings, the AO passed the assessment order allowing the aforesaid claims and making additions on other issues.Being aggrieved by the additions, the assessee filed its objections before the Dispute Resolution Panel-II, Mumbai ('DRP'). The objections were dealt by the DRP and directions under section 144C of the Act were issued wherein partial relief was given on some of the

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proposed disallowances. Subsequently, the AO passed the final assessment order dated January 28, 2016 raising the total disputed tax demand of INR 1,31,83,65,620. Against such final assessment order, an appeal was filed by the assessee before this Hon'ble Tribunal which is pending disposal. Subsequently, the ld. CIT initiated revisionary proceedings under section 263 of the Act and on the pretext of lack of enquiry and non-application of mind, the learned CIT passed the revisionary order dated March 28, 2018 wherein he directed the AO to:

- disallow the claim of depreciation on right to use 3G spectrum under section 32(1)(ii) as claimed by the assessee and amortize such expenditure u/s 35ABB of the Act;
- examine the correct cost allocation and capitalization in the books so that no excess claim is allowed; and
- examine the customer wise break up of bad debts and verify whether individual accounts have been written off for allowing the claim of deduction of bad debts.

Aggrieved by such order, the assessee has instituted this appeal before this Tribunal.

23. Regarding invocation of powers under section 263 of the Act with respect to claim of depreciation on the spectrum fees and allowability of depreciation under section 32(1)(ii) of the Act, we observed that the assessee had acquired the right to use 3G spectrum for providing

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telecommunication services and the same was installed and put to use during the FY relevant to subject AY. Disclosure relating to acquisition of the asset and amortization/ depreciation claim were made as under:

- *Schedule* 5 *(Page 6 of the paper book)* and 19 *(Page 14 of the paper book)* to the Financial Statements for the subject AY, which report the accounting treatment of such right to use 3G spectrum cost;

- *Appendix* – II to the Tax Audit Report *(Page 50 to 53 of the paperbook)* which provides the details of cost capitalized and tax treatment given to such right to use 3G spectrum.

Basis the disclosure made in the financial statement and tax audit report, the AO had made specific enquiries during the course of the assessment proceedings and requisite responses were filed.From the record, we found that during the course of the original assessment proceedings, the AO after perusing the basic data available in the Annual Accounts and the Tax Audit Report and after specifically calling for details / particulars from the assessee and after examining the issue had allowed the claim of the assessee vis-à-vis granting of depreciation on the cost of acquisition of the 3G Spectrum. Submissions dated February 25, 2015 (relevant page 99 of the paper book) and March 27, 2015 (relevant pages 151 and 152 of the paper book) and March 30, 2015 (relevant pages 155 and 156 of the paper

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book) were filed by the assessee wherein details regarding acquisition of right to use 3G spectrum, the cost of such acquisition, additions made in the books of accounts, break-up of the cost for tax purposes, claim of depreciation under section 32(1)(ii) of the Act, copy of the 3G spectrum and BWA spectrum license, relevant approvals from DOT, etc. were furnished during the course of the original assessment proceedings on the specific directions of the AO. We also observed that these details were called for by the AO vide Notice dated January 14, 2015 issued by the AO wherein in point 4 of the notice, the AO had specifically enquired about the working of addition to spectrum fees duly supported by evidence, as also, amortization of the spectrum fees. It is not understood, as to how can it be the case of the Revenue that, the AO while examining the issue and allowing the claim of depreciation vis-à-vis the amount in the question has not examined the provisions of section 35ABB of the Act.

24. Tested in light of the law laid down by the jurisdictional Bombay High Court in the case of Gabriel India Ltd. (203 ITR 108), it can be concluded that the invocation of powers u/s. 263 of the Act by the PCIT is incorrect and hence the impugned Order passed u/s. 263 of the Act ought to be struck down. Reliance placed by the Revenue on the Explanation to section

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263 of the Act is also incorrect in light of the fact that the said Explanation has not been invoked by the PCIT while passing the Order u/s. 263 and it is now a well settled law that Order passed u/s. 263 of the Act cannot be improved upon by the DR. Reliance in this regard is placed on the Hon'ble Mumbai Tribunal decision in the case of *Shri Narayan Tatu Rane vs ITO (ITA 2690 and 2691/Mum/2016).* We also observethat the Revenue is not disputing that a deduction ought to be allowed to the assessee vis-à-vis the payment in question. The only issue is whether the deduction is to be allowed thereon as depreciation u/s. 32 of the Act over a period of time, or whether the same has to spread over the years as per section 35ABB of the Act. Examined in light of the decision of the Supreme Court in the case of Excel Industries Ltd. (358 ITR 295) too, the invocation of section 263 of the Act ought to be struck down since this merely results in academic litigation.

25. With regard to argument of the ld. DR relying on the decision of Hon'be Bombay High Court that the AO has not examined the issue of applicability of the provisions of Section 35ABB of the Act, we observe that the AO had a specific query on the issue of cost of acquisition of the 3G Spectrum. After examining the requisite details and testing the same vis-à-

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vis the applicable provisions of the Act, the AO accepted the stand of the assessee and took a view that depreciation is allowable thereon. This clearly establishes the fact that the issue was examined by the AO and a view taken thereon after due application of mind. Since the AO took the view that the provisions of Section35ABB of the Act does not apply on the instant payments, no adjustment in respect thereof was made by the AO.

26. With regard to the contention of the ld. DR on the decision of Mumbai Bench in the case of Idea Cellular Ltd.in ITA No.360/Mum/2016, we observed that the decision of the Mumbai Bench of ITAT in the case of Idea Cellular Ltd. in ITA No. 360/Mum/2016 has been sought to be distinguished solely on the footing that the same does not consider the amended Section 263 of the Act. We observed that the said decision of the Mumbai Bench of the ITAT does not merely decide the ground of appeal raised on the applicability of the provisions of Section 263 of the Act but also decides that even on the merit of the case the payment in question is not covered by the provision of Section 35ABB of the Act and has upheld the allowability of depreciation u/s 32 of the Act.

27. We further observed that in the instant submissions filed by the Revenue, no particular submissions have been made on this aspect of the

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matter, thereby accepting that on the merits, the issue stands covered in favour of the assessee by the decision of the Mumbai Bench of the ITAT

28. We also observed that the issue as to how the decision of the Bombay HC in the case of Gabriel India Ltd. (203 ITR 108) and the Supreme Court in the case of Malabar Industrial Co. Ltd. (243 ITR 83) are applicable in similar fact set, has been accepted and acknowledged by the Mumbai Bench of the ITAT in the case of Idea Cellular Ltd. (ITA No. 360/Mum/2016).

29. Accordingly, we can safely conclude that on the merits of the issue, the Mumbai Bench of the ITAT in the case of Idea Cellular Ltd. (ITA No. 360/Mum/2016) has already held that the provisions of section 35ABB are not applicable on the cost of acquisition of the 3G Spectrum and no specific arguments have been made on the said decision of the ITAT on the merits of the issue by the Revenue.

30. This decision has also been followed by the ITAT in the case of Tata Teleservices Maharashtra Ltd.(ITA No. 3567/Mum/2016 and 4392/M/2017).

31. With regard to reliance of the ld. DR on the decision of Hon'ble Supreme Court in the case of Britania Industries Ltd.(278 ITR 546), we observe that the question before the Supreme Court in the said case was

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whether expenses towards rent, repairs, depreciation and maintenance of a building used as a guest house, was to be governed by the provisions of section 30 to 36 of the Act or whether the specific provisions of section 37(4) r.w.s. 37(3) and 37 (5) of the Act would be applicable. The Hon'ble Supreme Court held that the specific provisions would be applicable. In the instant case, the provision of section 35ABB of the Act, which is sought to be applied by the Revenue, do not specifically cover allowability of payments for cost of acquisition of the 3G Spectrum and hence the decision of the Supreme Court cannot be made applicable in the instant case. In fact a specific section viz., 35ABA has been brought on the statute books subsequently, by the Finance Act, 2016 with effect from 01 April 2017 (i.e. AY 2017-2018) on the issue of allowability of cost of acquisition of the 3G Spectrum. This amendment too clearly indicates that the provisions of section 35ABB of the Act cannot be made applicable thereon.

32. We also observe that if the argument of the Revenue that payment for spectrum was covered by Section 35ABB is to be accepted, it would render the provisions of Section 35ABA to be otiose to say the least and this too highlights the fallacy of the said argument. To sum up, we observed that Section 35ABA of the Act is specific to expenditure for

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obtaining right to use spectrum and not Section 35ABB of the Act. Accordingly, the decision of the Mumbai Bench of the ITAT in the case of Idea Cellular Ltd. (ITA No. 360/Mum/2016) and also the decision of Tata Teleservices Ltd. (ITA No. 3567/Mum/2016 and 4392/Mum/2017) cannot be faulted with and the same has to be followed.

33. In view of the above, we hold that this issue is squarely covered in favour of the assesseeby the decision of the Jurisdictional Bench of the Tribunal in the case of Idea Cellular Limited (ITA No. 360/Mum/2016) dated December 6, 2017. In this context, we highlight that the Tribunal in identical fact pattern for the same assessment year has not only upheld claim of depreciation on the 3G spectrum fees under section 32(1)(ii) of the Act treating the right to use 3G spectrum as an intangible asset, but has also quashed the revisionary proceedings initiated by the Revenue authorities. The key observations of the Hon'ble Tribunal are as under:

a. *On maintainability of revisionary proceedings under section 263 of the Act:*

The Hon'ble Tribunal categorically held that since the assessment order was passed after conducting a detailed enquiry and adopting one of the legally permissible view, the revisionary proceedings initiated on such issue has no legs to stand on and is thus liable to be quashed. Refer paras 13 to 16 of the order *(page no 19 to 25 of the order)*.

b. *On merits of allowability of depreciation claimed on 3G spectrum fees:*

The Hon'ble Tribunal observed that the telecom license and spectrum are

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independent of each other and 3G spectrum fee merely provides a right to use a particular frequency/spectrum while providing telecommunication services. The assessee has rightly claimed depreciation under section 32 of the Act and the provisions of section 35ABB of the Act are clearly not applicable. Refer paras 17 to 20 of the order *(page no 25 to 30 of the order)*.

It was further highlight that the Jurisdictional Tribunal in the case of Tata Teleservices Maharashtra Limited (ITA 3567/Mum/2016 and 4392/Mum/2017), for AYs 2011-12 and 2012-13, has followed the decision of Idea Cellular (supra) and directed the AO to allow the depreciation claim under section 32(1)(ii) of the Act in respect of the amount paid to DOT for purchase of 3G spectrum and quashed the order passed u/s 263 of the Act by the learned CIT.

34. With regard to the applicability of the above orders to the assesses case on invocation of power u/s 263 of the Act, we observe that AO had examined/ verified the cost of acquisition of the 3G spectrum and then allowed the claim of depreciation under section 32(1)(ii) of the Act, as claimed by theassessee, by treating this right as an intangible asset after due examination and application of mind.

35. We also observe that the AO had conducted enquiries during the course of proceedings, however, the ld. CIT merely change of opinion by reappraising evidence is not within the parameters of revisional jurisdiction u/s 263 as laid down by the Hon'ble Jurisdictional High Court in the case of

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Gabriel India Limited, 203 ITR 108. It is also well settled that where two views are possible and the AO has taken one of the possible views which might result in prejudice to the revenue, then also proceedings under section 263 of the Act cannot be initiated. Reliance in this regard is placed on the decisions of the Hon'ble Supreme Court in the case of Malabar Industrial Co. Ltd vs CIT (243 ITR 83).

36. With regard to spectrum fees so paid by the assessee, we observed that Spectrum fees is part of the license fees and they are not distinct or independent. There is a clear distinction between payment for 'use of spectrum' and the 'license to provide telecom services'. This is clear from the fact that any new telecom operator who wished to provide 3G services was separately required to obtain a Unified Access Services ('UAS')/ Cellular Mobile Telephone Service ('CMTS') license to provide the telecom services. Grant of 3G spectrum does not in itself entitle a company to provide telecom services unless a license has been granted to such company to provide telecom services. In fact, 3G spectrum cannot be granted to a bidder unless it has already obtained a UAS/CMTS license. The eligibility criteria to participate in the Auction is referred in the 3G Bidding document placed at *page 242 and 243 of the paper book)*.

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37. We also observe that provisions of Section 35 ABA was inserted by the Finance Act, 2016 w.e.f. 01-04-2016, hence the provision of this Section is not applicable to the year under consideration. We also observed that this amendment clearly suggests that right to use spectrum is not covered by the provisions of Section 35ABB of the Act. Accordingly, the assessee had correctly claimed depreciation u/s 32 of the Act prior to insertion of Section 35ABA under the statute.

38. With regard to invocation of powers under section 263 of the Act for declining the claim of bad debts and allowability of deduction under section 36(1)(vii) of the Act, we observe that the assessee had created a ProvisionofBadandDoubtfulDebtsof INR 32,23,50,209 [reflected in Schedule 17 of the Profit & Loss Account and simultaneously reduced such amount from 'Sundry Debtors' in Schedule 7 of the Balance Sheet. From such provision of bad and doubtful debts, the assessee had written off an amountof INR 37,57,77,446 as bad debts after expiry of period of 180 days since the debt had become irrecoverable. In response to the specific query of the AO regarding deductibility of the bad debts, the assessee filed submissions dated March 30, 2015 wherein details regarding the policy adopted by the assessee for treating any amount as bad debts and the

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process generally followed by the assessee for collection of the outstanding dues was outlined.

39. From the record, we also found that such debt was earlier accounted as income, and this fact is duly evidenced from clause 13 of the Tax Audit Report for the subject AY and also the accounting policies followed by VIL as reported in schedule 19 to the audited financial statement relevant for the subject AY.

40. From the order of the AO, we also found that during the course of the assessment proceedings, due enquiries regarding the allowability of bad debts was made by the AO in response to which a detailed submission was filed by theassessee vide its submission dated March 30, 2015. After considering the submissions of the assessee, the AO allowed the claim of bad debts in accordance with the provisions of the Act. Thus, as the claim has been allowed after proper examination and due application of mind, exercise of power under section 263 of the Act was bad in law. Similar to ground relating to depreciation claim on 3G spectrum, we place reliance on the Supreme Court ruling in case of Malabar Industrial (supra) and Jurisdictional High Court decision in the case of Gabriel India Ltd. (supra).

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41. We also observe that the issue with regard to deduction u/s 36(1)(vii) of the Act is no more res-integra and has been settled by the Hon'ble Apex Court in the case of *TRF Limited v CIT 190 Taxman 391* and *Vijay Bank 323 ITR 166*, wherein it has been held that if an assessee has written off debts in its books of accounts, then deduction under section 36(1)(vii) of the Act is necessarily to be given to the assessee. Reliance is also placed on the Circular No 12 of 2016 dated May 30, 2016 issued by the Central Board of Direct Taxes ('CBDT'), wherein it has been categorically mentioned that where an assessee writes off a debt as irrecoverable in books of account, such claim will be admissible under section 36(1)(vii) of the Act.

42. In view of our above observations and following the principles enunciated in the judicial precedents cited above, we quash the revisionary order passed by the PCIT, as being bad in law.

43 Before parting, it is noted that the order is being pronounced after ninety (90) days of the hearing. However, taking note of extraordinary situation in the light of the COVID-19 pandemic and lockdown, the period of lockdown days to be excluded. For coming to such a conclusion, we rely upon the decision of the Coordinate Bench of the Mumbai Tribunal in the

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case of DCIT vs JSW Limited in ITA No. 6264/Mum/2018 & 6103/Mum/2018, Assessment Year 2013-14, order dated 14th May, 2020. As a result, the appeal of assessee is allowed.

44. In the result, appeal of the assessee is allowed.

Order pronounced by listing the result on the Notice Board of the Bench under Rule 34(4) of the Appellate Tribunal Rules, 1963.

Sd/-	Sd/-
(RAM LAL NEGI)	(R.C. SHARMA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated 28/08/2020
*Mishra

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BYORDER,

(Asstt.Registrar)
ITAT, Mumbai

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