IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

I.T.A. No.7541/DEL/2017
Assessment Year: 2014-15

Telenor (India) Communications Pvt. Ltd., New Delhi.	v.	ACIT, Circle-25(1), New Delhi.
TAN/PAN: AAECT 1511C		
(Appellant)		(Respondent)

Appellant by:	Shri G.S. Agarwal, Sr. Adv. &n Shri K.M. Gutpa, Adv..		
Respondent by:	Shri S.S. Rans, CIT(DR)		
Date of hearing:	29	08	2018
Date of pronouncement:	26	11	2018

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid appeal has been filed by the appellant assessee against impugned order dated, 30.11.2017, passed by Ld. CIT (Appeals)-23, New Delhi for the quantum of assessment passed u/ 143(3) for the Y 2014-15.

2. In the aforesaid appeal, the appellant has raised as many as eight grounds of appeal, however the said grounds relates mainly to the two additions made and sustained of sums of Rs.

1558.57 crore made on account of short term capital gain; and of Rs. 220.80 crore on account of unearned revenue for the AY 2014-15.

3. Since, the major controversy involved in this appeal pertains to an addition made of Rs 1558.57 crores, by way of short term capital gains, we consider it appropriate to consider and adjudicate the said controversy first. The background and facts in brief leading to making of an addition of the aforesaid sum by way of short term capital gains are being recapitulated here as under:

3.1 The assessee company was incorporated on 24.02.2012 as, "M/s Telewings Communications Services Pvt. Ltd." which is a part of Telenor Group. The appellant was engaged in the business of providing telecommunication services. The assessee is a subsidiary of Telenor South which held 74% of shareholding of in the assessee company. The appellant and M/s Unitech Wireless (Tamilnadu) Private Limited are group companies of the foreign parent company namely, Telenor ASA (in which Government of Norway held majority shares) ('Telenor Group'). M/s Unitech Wireless (Tamilnadu) Private Limited (herein after referred to as 'UW'), an Indian company, was engaged in the business of providing telecom services in India. It had been stated that the majority shares of UW were held by Telenor Group which is a Norway based company engaged in the telecommunication business. In the year 2008, "UW" and its affiliates had been granted 22 unified access service licenses ('UASL') by Department of Telecommunications ('DoT') in 22 circles against a payment of

one-time non-refundable entry fee of Rs. 1658.57 crores. In respect to the licenses as aforesaid granted, agreements had been entered between UW and its affiliate companies on one hand and President of India (acting through DoT) on the other hand. The licenses had been granted as per Indian Telegraph Act, 1885 in 22 circles were for a period of 20 years.

3.2 Thereafter, the Hon'ble Supreme Court of India in a Public Interest Litigation, vide its judgment dated 02.02.2012 quashed all of the 122 licenses granted by the Government of India in 2008, including 22 licenses as had been granted to UW. The Apex Court, however, by its subsequent orders, had allowed the operation of such licenses till February 15, 2013 by passing interim orders in the interest of subscribers/customers and directed TRAI to make recommendations for the grant of fresh licenses and allocation of spectrum in 2G Band in 22 service areas by auction as was done in allocation of spectrum in 3G band. It had further directed the Central Government to consider the recommendations of TRAI and take appropriate action within next one month and fresh licenses be granted by auction.

3.3 After the licenses were quashed, the Telenor Group participated in the fresh auction initiated as per the directions of Hon'ble Supreme Court through its affiliate, the appellant company, which had been incorporated on 24.2.2012. In pursuance to the directions issued by the Apex Court dated 02.02.2012, the Government of India, through DoT issued a public Notice Inviting Applications (NIA) for the grant of fresh licenses to eligible telecom operators through an auction. In the

aforesaid auction, the appellant participated and became successful bidder when its bid amount was accepted in 6 circles for an adequate consideration of Rs. 4018 crores. On being successful bidder, it claimed a set off of Rs 1657.58 crores which represented the sum paid by UW for obtaining licenses in 22 circles as non-refundable entry fee in the year 2008. The appellant thus made a claim of a set-off of the said sum. This set-off was made in view of a response to a query no. 74 published by the Government of India on 12.10.2012 in respect of the fresh auction so initiated. The query and response thereto as placed before us in the paper book and also extensively referred to is extracted here below:-

Query	**Response**
The original entry level Pan India license fee of Rs. 1506.82 crore (along with interest from the date of payment of such license fee) which was paid for acquiring the licenses, which are quashed by the Hon'ble Supreme Court for no reason attributable to a licensee, should be allowed to be set off against the earnest money required to be paid for participating in the new auction and against the successful bid amount in the event of a successful bid. In the event there would be any shortfall in the money required to be paid by xxx on successful bid and the license fee	A set off is allowed against the Earnest Money and the payment due in the event of spectrum being won in this auction. The total amount of such set off shall be limited to the total entry fee paid by the entity for all its licenses which have been quashed by the Supreme Court. No interest will be due on this amount.

Query	Response
already paid to you in respect of the quashed 21 UASL, xxx shall obviously pay such additionally.	

3.4 It was pointed out before us that, earlier to the fresh auction, the appellant and Telenor Group also addressed several letters to DoT seeking clarification in respect of the transfer of business of UW to the appellant and also seeking a set-off of non-refundable entry fees paid by UW to the appellant, in the event of the appellant being successful in obtaining the licenses under the fresh auction. On 05.11.2012, DOT in response, modifying its earlier clarification dated 12.10.2012, observed that group companies are eligible to participate in auction and would be considered for transfer of the business of cancelled licensees, if they become successful in obtaining licenses under fresh auction. The relevant extract of the aforesaid communication was as under:

> *"Upon completion of transfer of business from a holder of quashed license to a winning bidder in accordance with extant law, the response to query No. 23 will be applicable to the transfer to such winning bidder provided that holder of quashed License and winning bidder are controlled by a common entity with not less than 26% shareholding in both entities directly or indirectly, provided that such transfer is in accordance with law and in line of Supreme Court Order in 2G case"*

3.5 On 14.11.2012, the Appellant Company participated online in the fresh auction and became successful in obtaining spectrum licenses in respect of six circles for an aggregate consideration of Rs. 4018.20 crores. Pursuant to such an auction, the appellant was to make an upfront payment of Rs. 1326.03 crores by 01.12.2012 to DoT in respect of such six spectrum licenses and the remaining sum was to be paid subsequently in instalments. The appellant by its letter dated 23.11.2012 requested DoT to set-off of non-refundable one-time entry fee of Rs. 1658.57 crores paid by UW against the upfront fee so payable and adjust the balance amount against the subsequent instalments. However, there had been no response from DoT on the aforesaid request made by the appellant. The appellant however made a payment of on 01.12.12012 of upfront fee of Rs. 1326.03 crores, under protest with a request to DoT, to allow the set off of the entry fee paid by UW and refund of the excess amount to appellant. After obtaining the licenses under fresh auction, appellant however entered into two agreements on 06.12.2012 with UW for acquiring the business of UW as a going concern, i.e., (i) Business Transfer Agreement (BTA); and (ii) Actionable Claim Agreement. Under the business transfer agreement, the appellant acquired the entire right, risk and interest of UW in its business as a going concern, other than "excluded assets" and "excluded liabilities". "Excluded Assets and liabilities" were defined in the BTA. 'Excluded assets' did not include all the UASLs etc. which were either incapable of being transferred or which may be transferred with consent, but such

consent had not been received on or before the completion date. The relevant extract of the agreement was as under:

> *"(a) All the UASLs, ILD license, NLD license and any other statutory license acquired by the seller in the due course of business which are either (i) incapable of being transferred, or (ii) which may be transferred with consent, but such consent has not been received on or before the Completion Date.*
>
> *(b) Spectrum allotted to the seller by the DoT in each circle;*
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> ***
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> *(e) all causes of action (including counterclaims) and defences against third parties relating to any of the Excluded Assets or the Excluded Liabilities as well as any books, records and privileged information relating exclusively thereto (the Excluded Claims)."*

3.6 The appellant, as noted above had also entered into another agreement namely, "Actionable claim agreement", wherein UW had agreed to transfer actionable claims, i.e. including the set off of the license fee, which in principle, was expected to be allowed by DoT to cancelled license holder entities who acquired licenses in the fresh auction conducted in November 2012. The queries of the appellant to DoT with respect to the eligibility of the set off of license fee remain unanswered by DoT and thus, in the preamble to the actionable claim agreement, the same has been recorded by the parties. Relevant extract form the preamble to the actionable claim agreement reads as under:-

> "(D) The DoT has in the document entitled queries and responses dated 12 October, 2012 to the Notice Inviting Applications dated 28 September, 2012 (NIA), permitted a

set off of the license fee paid by entities whose UASLs stand quashed pursuant to the Supreme Court Orders, against the earnest money and the payments due in the event of spectrum being won in the recently concluded 2G auction (Spectrum Auction). Further, the DoT has, by way of an amendment dated 18 October, 2012 to the NIA, prescribed the format in which details of the license fee paid by entities whose UASLs stand quashed are to be specified in the application form for participating in the Spectrum Auction.

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(F) Unitech Wireless did not participate in the Spectrum Auction and will have no future operations effective 18 January 2013 as a result of which Unitech Wireless will not be able to claim the benefit of the set off of License Fee which has been permitted by the DoT. Further, the business of Unitech Wireless to be transferred to Telewings as a result of which Telewings will be entitled to claim set off of the License Fee against payments being made it to the DoT (Set Off). The parties have agreed that Telewings shall pay fair consideration, which has been computed on an arm's length basis to Unitech Wireless for facilitating such entitlement and the parities. Therefore, wish to execute this agreement to record the terms thereof"

3.7 Under the actionable claim agreement, UW transferred all the rights, claims, demands, cause of action or all other rights against the DoT (including the payment of license fee) to the Appellant. The relevant part of the agreement reads as under:-

"All claims judgments, demands, lawsuits, causes of action, choses in action, rights of recovery and other rights of Unitech Wireless, whether arising under tort or contract, arising under or in connection with all warranties and representations , implied or express, all actions , indemnities and guarantees against the DoT relating to the grant by the DoT of the UASLs to Unitech Wireless and the payment of the License Fee for the UASLs granted to Unitech Wireless by the DoT in 2008 shall together constitute Actionable"

3.8 The consideration for transfer of such actionable claim had been agreed at 50% of the amount of set off allowed to appellant. It was also stated in the said agreement that, if the DoT rejects or fails to provide its approval on the set off of license fee to the appellant by 18.01.2013, the Actionable Claims shall be transferred back to UW and the agreement shall expire. On 06.12.2012, the appellant intimated the DoT about the execution of the BTA and Actionable claim agreements and requested DOT to grant an approval for the implementation of business transfer and also to allow a set-off of entry fee paid by UW to the appellant it being successor-in-interest of UW. On 11.11.2013, DoT addressed a letter directing the appellant and UW to provide an indemnity bond and undertakings for approval of business transfer agreement. The DoT specifically sought an undertaking by the aforesaid communication that, with respect to licenses quashed by the order of Hon'ble Supreme Court, all the dues of DoT would be paid and cleared in terms the licenses and all undischarged liabilities of UW shall be discharged / paid by the appellant. Both the parties, as had been directed, furnished the

undertakings and the indemnity bonds as per the directions of DoT and on 27.11.2013, DoT granted the approval for transfer of UW business to appellant. DoT, however, did not respond in respect of the set off of licenses fee paid by UW.

3.9 One important fact as which is quite pertinent is that, parties having given their undertakings as aforesaid, both the parties decided to revive the actionable claim agreement, which had expired since DoT had not allowed the set off of license fee to appellant. The parties amended the actionable claim agreement by way of a letter dated 30.12.2013 on account of additional liabilities assumed by the Appellant and duly recorded the same. Pursuant to the same, the consideration for transfer of actionable claim was reduced to partially offset the additional liabilities assumed by the appellant. Under the revised agreement, the consideration was modified as 50% of the amount of set off allowed or Rs. 100 crores whichever is less.

3.10 On 31.03.2014, after protracted communications between the appellant and DOT, Ministry of Communication and IT, it was intimated to the appellant that the entry fee paid by M/s Unitech Wireless (Tamilnadu) Pvt. Ltd. has been set off against the payable bid amount for winning spectrum by M/s. Telewings Communications Services Private Limited. The appellant in its books of accounts prepared under the Companies Act had reflected the amount of set off as a capital reserve. However, for the purposes of computing income under the Income tax Act, the amount by which the license fee had been set off had been reduced from the cost of licenses allotted to it. On the said

reduced cost, the appellant had claimed depreciation. One of the appellant's submission both before the Ld. Assessing Officer as well as before the Ld. CIT (A) was that, by the amount of set off, the license fee payable by it stood reduced which had reduced the cost of licenses. The appellant further contended that the set off was allowed to it not because it had any right in it but on the principle of equal restitution when the Government took a policy decision. This contention of the assessee had been supported by **"*Report No. 55 of 2015*" of the Comptroller and Auditor General of India** which had been tabled before both the Houses of Parliament. In the said report, it was submitted before us that in the said report CAG had itself held that M/s Telewings Communications Services Private Limited had no right on set-off from the earlier licence paid which was cancelled by the Hon'ble Supreme Court. The appellant's alternative submission before the AO was, the amount of set off was a capital receipt since the set off allowed, was in the nature of concession and had not resulted by way of independent business transaction.

4. The learned AO however held that on the execution of business transfer agreement, does not give rise to a taxable event during the year in the hands of the assessee company but execution of the actionable claim agreement gave a rise to a taxable event. He held, that the appellant had acquired all the rights, title, risk and interest of UW against DoT by entering into an actionable claim agreement which included a right of set off of the entry fee of Rs. 1658.57 crores, which sum had been paid by UW to DoT for acquiring 22 licenses in the year 2008 against the

payment to be made to DoT for acquiring spectrum in an auction conducted in November 2012. It was held by him that any right acquired under the agreement constitutes a 'capital asset' within the meaning of section 2(14) of the Act. He thus held that the appellant company had acquired a right to set off of the entry fee paid of Rs. 1658.57 crores, by UW to DoT, against any payment to be made by it upon its being successful bidder in the auction conducted in November 2012. He further held that the aforesaid capital asset, i.e., right had been acquired by the appellant on 06.12.2012 for a consideration of Rs. 100 crores or 50% of the value of set off permitted by the DoT. Having held that the appellant had acquired a capital asset, he further held that the said right to set off was exercised by the assessee company on 31.03.2014 being the date, under which the set off was allowed by DoT. Consequently, he held that consequent to the set off, capital asset acquired by the appellant was extinguished and thus there was a 'transfer' of a capital asset within the meaning of section 2(47) of the Act. In view thereof, he held that since the asset acquired by the assessee, before it got extinguished, which asset had been held by it for a period less than 36 months, and that the said capital asset constituted a short term capital asset within the meaning of section 2(14) of the Act. AO held that the difference between the cost of acquisition and the full value of consideration constituted capital gain liable to be assessed in the hand of the assessee.

5. The assessee, being aggrieved, preferred an appeal before the learned CIT (A) against the said order. The learned CIT (A)

negated the various contentions raised by the appellant before him and held that the approach of the AO to bring to tax the aforesaid sum being in accordance with law, there is no infirmity in his order. However, he held that for the purposes of calculating depreciation, the AO had erred in not adopting the cost of acquisition at Rs. 4018.20 crores instead of the sum considered by the appellant which was a sum after reducing the cost of acquisition by the amount of set off allowed to it by DoT. He further in the alternative also held that the acquisition of right to set off of the license fee and subsequent set off allowed by the DoT against the license fee payable for fresh licenses, is adventure in the nature of trade and commerce and it is covered u/s 28 of the Act and as such is taxable under the head profits and gains from business and profession.

6. Before us, learned Senior Counsel Mr. C. S. Aggarwal ahd not argued the case at length not only orally but also in writing which briefly are set out as below:-

(a) There existed no right of set off with UW. It had been submitted that UW had in the year 2008 paid onetime non-refundable entry fee and soon the licenses got cancelled, all rights, title and interest in the said licenses got terminated with no right of refund to it. This is well demonstrated from the agreement entered into by the appellant with DoT. He contended that the learned CIT (A) has erred in his order when he observed that there was no agreement entered into between UW and Government of India, which is factually incorrect.

(b) That the appellant on 06.12.2012 had entered into two agreements. Under the business transfer agreement, it had acquired the business operations of UW as an ongoing concern and the amount of set off arose on acquisition of business and has no separate, independent existence. It was however explained that the amount of set off was not granted to it by way of any right, title and interest therein but on the principles of restitution and as such the finding that the appellant had acquired any right of set off itself is misconceived.

(c) Thirdly, it was contended that the alleged right of set off could not be termed as either short term capital asset or a business receipt since the set off of the license fee was allowed by way of policy decision of the Government of India and was based on the principles of right to equal restitution.

(d) The next submission of his was that, the actionable claim agreement had only permitted it to exercise its legal remedy for enforcement of claims and counter claims with DoT. In such event the appellant had merely acquired right which is in the nature of right to 'sue' and no more. It was further submitted that right to sue is not a capital asset and as such there being no right which could be regarded in the nature of capital asset.

(e) It was further submitted by him that even assuming and without admitting that the same agreement namely Actionable Claim Agreement, is an independent contract, in that event also amount of set off allowed could not be taxed

in the year under consideration since the agreement had not been culminated in as much as only one of the transaction has been completed and other remains yet to be settled between the DoT and the appellant. It was further submitted that the final taxability of gain or loss, if any, could be considered in the year in which all the claims and counter claims are settled by the DoT and not in the piecemeal manner. It was further submitted that the exercise of alleged right of set off of license fee is not in the nature of extinguishment which constituted transfer within the meaning of section 2(47) of the Act.

(f) He also brought to our notice, the report No. 55 of 2015 of CAG which had been tabled before the Parliament wherein it had been stated by the CAG that no set off of non-refundable entry fee was permissible to the appellant on the grounds that the setoff would be permitted only to the quashed license holder participating in the auction and since the appellant was not the quashed license holder, set off of entry fee paid by UW (quashed license holder) against the payment due from the appellant was not as per approval of empowered group of Ministers.

(g) It was further contended by him that the appellant had not acquired any right to claim a set off which right of set off could only be acquired by it from the Government which alone was capable to grant such a set off had been allowed.

(h) That the amount stated to have been set off was an amount waived off by the Government in part and not that the

appellant had acquired any right in capital asset which could have been transferred by it.

(i) The learned Counsel further submitted that in the absence of any enforceable right in law to claim refund or set off being in existence been with UW, no capital asset much less stated to have been held by the UW, it could not have been held by the revenue, that the assessee had acquired any right of set off. He had emphasized that the right must be such a right which is enforceable in law. He contended that there being no enforceable right of set off with UW, in law, as such set off allowed in any case cannot be equated with any right which was in the nature of capital asset held by UW and was acquired by the appellant under an actionable claim agreement.

(j) It was next contended by him that UW had ceased to have any proprietary right upon cancellation of the licenses by the Supreme Court on 02.02.2012 and that the license holders were not owners but merely held licenses to exploit the same and ownership remains with DoT. This submission was supported by the provisions contained in Section 4(1) of Indian Telegraph Act, 1885 under which the licenses were granted in the year 2008. In view thereof the agreement entered by it on 06.12.2012 between the appellant and UW, there was no capital asset held by UW which could be regarded as an actionable claim.

(k) Further, the actual cost of license fee borne by the appellant was as a result of unilateral action of DoT, when DoT

bestowed the said set off in favour of the appellant and as such set off could only reduce the amount of license fee paid. In support he cited the judgment of the High Court of Delhi in the case of **Steel Authority of India vs. CIT,** reported in 348 ITR 150.

7. In short, his contentions were that the AO and CIT(A) both have erred on facts and in law in concluding the appellant had acquired any right which right got extinguished and thus there arose a capital gain liable to be assessed as short term capital gain. The aforesaid submission was made apart his further contention that the assessee had not entered into any venture in the nature of trade, so as to hold that income accrued to it by way of business income. In support he relied on the judgment of the Supreme Court in the case of **Shrimant Padmaraje R. Kadambande vs. CIT** reported in 195 ITR 877. He had further alternatively contended that even if it is held that the appellant had acquired a capital asset, there can be no computation of capital gain, since the set off i.e. concession provided by the DoT was under a policy decision of Government of India had not been extinguished. The ld. Senior Counsel also provided the details of the treatment provided by it in the books of accounts and the basis thereof. It was his contention that mere fact that it had paid Rs. 100 crores as consideration, cannot by itself be regarded as valid ground to hold that it had acquired any capital asset when there existed no capital asset with UW.

8. Elaborating its first contention, the ld. Senior Counsel submitted that upon cancellation of the licenses by the order of

Apex Court, the licenses allotted to UW in 2008 stood quashed and all the rights, title and interest in the said licenses were terminated. As per the terms of the agreement between UW and DOT, the one-time entry fee paid by UW in respect of such licenses was non-refundable. Further, there being no provision, under the agreement, for claiming of a refund or set off of such entry fee. It could not been held that there was any vested right with the license holders to seek either a set off or a refund thereof. Accordingly, there being no right with UW to claim a set off or refund of such entry fee from DOT, which could be stated to be enforceable in law. The Hon'ble Supreme Court in its order dated 02.02.2012 had neither dealt with issue of the Entry Fee paid to Government of India by those 122 License holders nor it had dealt with process of claiming the refund of such amount or adjustment, if any, which is to be made in future in respect of spectrum fee deposited by license holders. Further, it is evident from the various press releases, notifications issued by the DOT that no party had any inherent or vested right to seek refund or set off of entry/spectrum fee of quashed licenses.

9. During the course of hearing, we had asked the Ld. Senior Counsel about the treatment of non-refundable license fee paid by the erstwhile cancelled license holders. In response, it was submitted by him that as per the information available in public domain that, refund claim had been rejected by the DoT specifically in the case of M/s Loop Telecom Limited which also not found favour from Telecom Dispute Settlement & Appellate Tribunal ('TDSAT'). In view of the above, it was submitted by him

that UW had no right of a claim of refund of the one-time non-refundable entry fee paid in respect of the 22 licenses. Accordingly, it was submitted by him that it cannot be contended by the Revenue that UW had any right, which was enforceable in law whatsoever in the entry fee paid by it and as such, it had transferred such an alleged right of set off to the appellant under the actionable claim agreement.

10. Regarding the observation made by ld. CIT (A) in its order that there was no contract between UW and GOI as per Indian Contract Act 1872, he submitted that the aforesaid finding was based in disregard of the agreement entered between UW and DOT dated 29.02.2008 which had been completely overlooked by the ld. CIT (A) nor did he attempt to call for such a document i.e. agreement from the appellant. He submitted that whenever a license is granted, there has to be necessarily an agreement between the licensor and licensee as per law. However, such a license has been placed by the assessee on record. Accordingly, the observations made by the Ld. CIT (A) were factually incorrect.

11. The second submission of the Senior Counsel was that set off had been allowed to the appellant on the basis of principle of equal restitution as a policy decision taken by the Government of India and thus in pursuance to the overall acquisition of business of UW as an ongoing concern and it had no separate independent existence. Both the agreements (BTA and actionable claim agreement) were entered by the appellant and UW on same date for transfer the business of UW in a seamless manner so as to maintain the continuity of services to the customers of UW.

The intent of the parties was that entire business, customers, employees etc. of UW including claims and counter claims of third parties and DoT for the period in which the cancelled licenses are in operation to be acquired by the appellant with approval of DoT. Due to regulatory norms and commercial reasons, the part of the DoT's claims over UW and UW's claim over DoT were kept under the agreement of actionable claims though the same were part of the overall business operations which had been transferred to the appellant. In effect, both the agreements were composite and integral to each other which relates to the transfer of business with lock, stock and barrel including contingent assets and liabilities of UW. Accordingly, the set off allowed by DoT to the appellant is part of the overall transaction of acquisition of business of UW and was not a separate independent transaction which was in the nature of acquisition of any capital asset.

12. The learned Senior Counsel had emphasized that the such a set off was allowed by DoT to the appellant not by virtue of the agreement entered with UW but as per the policy decision taken by the Empowered Group of Ministers (EGoM) based on the principle of equal restitution which was in the nature of a concession bestowed upon it by the Government. It was submitted by the Senior Counsel that the DoT in line with directions of Hon'ble Supreme Court made fresh auction. It further clarified its position on two fundamental issues i.e. participation of the cancelled license holders in the fresh auction as well as to allow transfer of business and customers to

successful bidders including cancelled license holders if they eventually succeed in fresh auction for those areas. The DoT further issued clarification regarding participation of group companies if they are held by the same parent company, directly or indirectly. He had further contended that DOT at the time of initiating fresh auction had not even assured the license holders whose licenses were quashed, that they will be eligible for a refund or set off of the license fee paid by them. Even the NIA also did not so stated that any set off is allowable to the cancelled license holders or any other group entity in the event, such companies are successful in fresh auction. Subsequently, a policy decision was taken by the Empowered Group of Ministers (EGoM) in October 2012 based on which the DoT issued clarification that the set off of the earlier license fees paid by the entities would be adjusted against the earnest money and subsequent payment due, if the same entities participate and are successful in the auction. The amount will be limited to the total licenses fees paid by the entities for UASLs that were quashed by the Hon'ble Supreme Court. It was contended by him that UW did not participate in the fresh auction. In fact it was submitted by him that there was no clarity as regards to the amount of the license fees paid by the license holders. The entities whose licenses were cancelled and who successfully bid for the fresh licenses, got the set off allowed from the government as a policy decision taken by it. No refund of licenses fees has been granted to any other entities whose licenses were cancelled and who have not participated in the fresh spectrum auction. Considering that a new entity (i.e. appellant) participated and won spectrum for

Telenor Group, both UW as well as Telenor group represented before DoT for allowing the set off to appellant. However, this was completely contingent upon the final decision of DoT. In fact CAG Report states that on February 23, 2013 a decision was taken by the DoT that no set-off of this non-refundable spectrum fee would be given to appellant. However, subsequently in the meeting convened by the EGoM in March, 2013, a decision was taken to permit the set off to the appellant. Therefore, in substance, the set off was allowed to appellant not by virtue of the agreement it entered with UW, but as per the policy decision of Government of India. Accordingly, the amount of set off bestowed upon the appellant by the Government of India is not in the nature of a capital asset which could be transferred by UW or acquired by the appellant under an agreement.

13. The Senior Counsel further submitted that the amount of set off allowed by the DoT to appellant against the fresh spectrum fee is not chargeable to tax as the same arose in the capital field and on account of the reason that the appellant being successor-in-interest in the business of quashed licenses of UW which had been statutorily recognised by the DoT and Government of India. Therefore, the amount of set off of Rs 1,658.57 crores from the license fee payable by the appellant to DoT, was on account of spectrum fee can alone be construed to be an amount that has been borne by another person for the purpose of acquiring the spectrum licenses which could only be considered as grant or reimbursement of cost of fresh spectrum fee. Accordingly, the

appellant had rightly reduced the same from the cost of fresh spectrum fee.

14. Thereafter, the Senior Counsel placed reliance on *Explanation 10* to Section 43(1), and argued that by allowing the set-off to appellant, the DoT has given a grant or reimbursement of the license fee/ entry fee to appellant (which otherwise was due to UW if it participated in fresh auction of spectrum). Therefore, the cost of fresh spectrum fee is directly/ indirectly met by the cost of spectrum to the extent of Rs. 1,658.57 crores by way of grant or reimbursement. He relied upon the decision of the Hon'ble Delhi High Court in the case of *Steel Authority of India Ltd. v. Commissioner of Income-tax [2012] 20 taxmann.com 198 (Delhi)*, wherein the Hon'ble High Court in para 13 has summarised the correct and true position for insertion of Explanation 10 to section 43 of the Act in the following words:

> *"...Apparently Explanation 10 was introduced to ensure appropriate computation of actual cost of assets in case subsidy is received. After the introduction of Explanation 10, it is no longer possible to contend that the subsidy given by the government, by whatever name called, cannot be reduced from the actual cost of the assets in terms of Section 43(1) of the Act for the purpose of allowing depreciation. But Explanation 10 does not cover the case of waiver of the loan. It covers only the grant of a subsidy or re-imbursement by whatever name called. The case of the assessee may not, therefore, fall under Explanation 10, but having regard to the facts as found which we have alluded to earlier, the waiver of*

the loan amounted to the meeting of a portion of the cost of the assets under the main provisions of Section 43(1) of the Act. The waiver of the loan is not a mere quantification of a subsidy granted generally for industrial growth. It was granted specifically to the assessee and the assessee in its books of accounts reduced the cost of the assets by the amount waived. This reflected a contemporaneous understanding of the purpose of the grant of the loan on the part of the assessee. As already mentioned earlier, the assessee is a public sector undertaking and the loan and the later waiver were from the Government of India. The loans under the SDF were specifically for meeting the capital cost of the assets, on which depreciation was being claimed."

15. Accordingly, it had been submitted by him that the amount allowed by the DoT to be set off with fresh spectrum fee only had an effect to reduce the cost of spectrum allotted in fresh auction, which resulted into reduction in the cost of spectrum cost eligible for depreciation under section 32 of the Act. Thus, the effect of the completion of the transactions under the Business Transfer Agreement and Actionable Claim Agreement that both had become part of the single transaction i.e. transfer of the business of UW in favour of the appellant on going concern basis. It had been further submitted that the appellant has already reduced the amount of set off by claiming depreciation on lower value and hence the amount in question cannot be held chargeable to tax either as short capital gain or as an income from business and the treatment accorded by the appellant for

the tax purposes deserves to be accepted as proper and valid. His submission was that the set off has been bestowed upon the appellant by the Government of India as a policy decision taken on the basis of principle of equal restitution and accordingly, the same cannot be considered as a right acquired by the appellant through an agreement which is in the nature of a capital asset. The learned Senior Counsel has submitted that in case if it is held that in the quashed licenses, UW had any such right then such right was only right to sue and to seek damages by civil suit which obviously was not an actionable claim. It was thus stated by him that it is not correct to contend, as has been held by AO and upheld by CIT (A) that the appellant had acquired any right from UW which was separate and independent right under the Actionable claim agreement. Accordingly, the submission of the Senior Counsel was that there is no capital asset in the nature of right to claim refund or set off which can be transferred by UW to the appellant under BTA or the actionable claim agreement.

16. Based on the aforesaid, the ld. Senior Counsel submitted that there being no enforceable right either under contract or statutorily, as per which UW could seek a refund or set off the amount of one-time entry fee so as to enable the appellant to have acquired any such right from UW under an actionable claim agreement. It was submitted that the Ld. CIT (A) in his order has also held that the appellant had earned an income and such an income is an income being adventure in the nature of trade. With regard to the aforesaid finding, it was submitted that the set off has been granted from the license fee payable by it to DoT and

the said sum of set off has not resulted into any business transaction entered by it with DoT. The said sum of set off so allowed was in the nature of mere waiver or concession from the license fee payable and cannot be held to be an income much less business income. The assumption of the revenue that the assessee had carried on any activity which had resulted into earning of income is highly hypothetical and illusory. In the instant case the assessee has received no sum directly or indirectly. It had not entered into business transaction or any transaction with DoT in respect of such amount so waived and had been set off by DoT on the principle of equal restitution.

17. Further, it was submitted that the appellant is not in the business of trading of UASL. Further, the DoT guidelines applicable at that time did not permit trading/sharing of spectrum with pre-approval from DoT. It was privy only to the Appellant and the Appellant alone could use it to render permitted telecom services. Thus, the right of set off against the spectrum fees cannot, by any stretch of imagination, be construed in the revenue field or sum chargeable to tax under the head PBGBP. It has been held by the Apex court in number of cases that to determine the nature of receipt (i.e. either capital or revenue), it is important to carry out a purpose test i.e. a purpose for which the amount is being received by an assessee. The Learned Senior Counsel placed reliance on the case of **CIT v. Ponni Sugars & Chemicals Ltd. [2008] 306 ITR 392 (SC)**. The purpose of such set off is merely to obtain benefit in the capital

field and that is allowed by the Government voluntary by taking policy decision.

18. The proposition that, whether the sum is receipt in the nature of capital or revenue is well defined, i.e., as a general rule, a receipt is capital in nature when it is relatable to fixed capital and on the other hand, revenue receipt is a receipt when it is relatable to circulating capital. In the present case, the entire expenditure incurred by the appellant under the Business Transfer Agreement and Actionable Claim Agreement was incurred out of fixed capital to acquire and create capital asset on infrastructure that was to be provided before the commencement of the business. Therefore, any receipt arising from the same expenditure, would be of capital nature and would be reduced from the capital cost of the appellant so acquired and not in nature of income arising from the business as held by the Ld. CIT(A) in its order.

19. His next submission of Mr. Aggarwal was that since UW does not have any right in the one-time license fee paid, what has been transferred through the actionable claim agreement was merely a right to sue/claim damages which itself is not a capital asset. It was submitted that upon cancellation of licenses by the Hon'ble Supreme Court, the UW does not have any right, whatsoever, in the entry fee paid in respect to the 22 licenses allotted by DoT in 2008. As per the terms of UASL agreement between UW and DoT, the amount of onetime entry fee paid by UW is non-refundable and therefore, the sum payable by UW was neither refundable nor could have been refunded since neither

UW had any right, title or interest in the said license fee paid nor it could have transferred the same to the appellant. Therefore, the appellant had not acquired any right to set off the license fee paid by UW under the actionable claim agreement which is in the nature of a capital asset as per the provisions of the Act. Reference was also made by him to Section 3 of Transfer of Property Act, 1882 (T.P. Act), which defines actionable claim as under:

> "actionable claim" means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

It was contended that, since the amount paid by the UW was non-refundable as such, same does not bear the character of debt, and hence the sum paid by the UW to DoT would not be actionable claim. Also, UW had no beneficial interest in movable property and the amount paid by it to DoT was non-refundable and on the quashing of the licenses, the said fee paid became non-existing asset and was thus not transferrable. As such in the absence of UW had any interest in a movable property, there could have been no agreement of transfer and any such agreement was void. The mere fact that there was some

negotiation going on between the appellant and UW and possibility of Government decision on said issue, there exist no right which was transferrable and as such in the absence of any right being in existence there could have been no right acquired by the appellant nor could there have been any transfer made by UW. The letter dated 31.03.2014 merely shows that DoT on its own volition had set off the entry fee paid by UW against the payable bid amount by the appellant company when it directed the appellant that, the amount equated annual installment of Rs. 200,45,84,952/- will be paid. It was a mere concession given by the Government and there was no right, title or interest had been acquired by it from UW as an asset which was transferrable. In short, the learned Senior Counsel for the appellant contended that the amount of non –refundable sum as a license fee paid by UW to DOT was not a debt owed by DOT towards UW.

20. He further supported his submission when he sought to place reliance on the judgement in the case of Bancharam Majumdar v. Adyanath Bhattacharjee (1969) 36 Cal 936 where it has been laid down that a “debt” is a sum of money which is now payable or will become payable in future by reason of a present obligation. Debt is nothing more than the benefit of an obligation to pay money. It is in law as in fact a very different thing from a sum of money in a man's own possession. The appellant claimed that though it entered into an actionable claim agreement with UW for transfer of all the claims, judgements, demands etc. as well as right to represent UW with respect to the forfeited amount of spectrum fee by UW, the agreement merely gives the appellant

the right to seek legal remedy for compensation/refund/set off of one time spectrum fee paid by UW based on the principle of Restitution as well specific performance. The sequence of events stated also highlighted that due to intervention of the Court, the licenses allotted by DoT were cancelled and DoT/Government of India failed to fulfil its obligation to allow the access of spectrum licenses for 20 years. The remedy available with the appellant is a legal remedy which can be exercised within the framework of law which includes right to sue for compensation/damages against the DoT in appropriate Court.

21. Mr. Aggarwal also contended that mere right to sue cannot be transferred as per the provision of T.P. Act. When a contract is broken, it gives rise to a civil wrong which may entitle the injured party to sue the wrong doer (1) for damages liquidated or unliquidated, or (2) for specific performance and in some cases (3) for restitution or even (4) an injunction. In the given case, the contract between UW and DoT for allowing the telecom licenses for 20 years got terminated in pursuance to the cancellation of licenses by Hon'ble Supreme Court. Further, the Hon'ble Court also directed the Government of India to conduct the fresh auction of licenses. Accordingly, the asset i.e. telecom licenses, which were subject matter of contract between UW and DoT, were disposed-off (i.e. extinguished), the only remedy available with UW was the right to sue for the compensation/refund of the amount paid to DoT. Further, Section 5 of the TP Act defines the expression 'transfer of property' without attempting to define the term 'property'. It would, however, suffice to say that the term

'property' is used in its widest and most generic legal sense so as to include all actionable claims. Section 6 states that property of any kind may be transferred, except as otherwise provided by the TP Act or by any other law in force for the time being. Clauses (a) to (i) which immediately follow enumerate what cannot be transferred. Clause (e), with which is relevant in the given case, states that 'a mere right to sue cannot be transferred'. Accordingly, in the given case, upon termination of contract between UW and DoT, the only right which survived with UW was a right to sue for damages/compensation on breach of contract. This right was not an actionable claim within the meaning of section 3 of the TP Act, since it could `not be said to be a debt or a beneficial interest in movable property not in the possession of UW. It was a mere right to sue which could not be transferred by virtue of section 6(e) of the TP Act. In view of the aforesaid, the appellant has neither acquired any capital asset within the meaning of Section 2(14) of the Act under the aforesaid actionable claim agreement from UW nor there was any transfer as envisaged in Section 2 (47) of the Act.

22. The learned Senior Counsel also relied upon the decision of Hon'ble Gujarat High Court in the case of Baroda Cements and Chemicals Ltd. vs. CIT (158 ITR 636). In the said case, the assessee entered into a contract with another company to purchase a second-hand mill for an agreed price. Subsequently, the vendor committed a breach of the contract by defaulting to sell the machinery, etc., to the assessee and sold the same to a third party. The assessee received compensation in full and final

settlement of all claims arising ex-contracts on account of the breach of the contract. The assessee claimed that the impugned receipt was a non-recurring capital receipt and being casual, was not liable to tax. The ITO while agreeing that it was in the nature of capital receipt, held that the payment resulted in extinguishment of the assessee's right to acquire the subject-matter in intangible asset, and was, therefore, covered by section 2(47), read with section 45, and was liable to tax as short-term capital gain. The Tribunal upheld the ITO's order. On appeal, the Hon'ble Court held as under:

> *"Once there is a breach of contract and the defaulting party not only refuses to perform his part of the contract but also disposes of the subject-matter, the injured party has nothing left in the contract except the right to sue for damages. After the amendment of section 6(e) of the Transfer of Property Act a mere right to sue, whether arising out of tortuous act or ex-contract, is not transferable. The word 'mere' indicates that if the right to sue is accompanied with any other right under the contract, it would not be hit by section 6(e). In the instant case, there was a total cessation of the contract and the only right which survived in the assessee was a right to sue the defaulting party which could not be transferred.*
>
> *Further, both sections 45 and 48 postulate the existence of a capital asset and the consideration received on transfer thereof. If the transfer takes effect on extinguishment of a right in the capital asset, there must be receipt of consideration for such extinguishment to attract liability to tax. Now in legal parlance the terms 'consideration' and*

'compensation' or 'damages' have distinct connotations. The former in the context of sections 45 and 48 would connote payment of a sum of money to secure transfer of a capital asset; the latter would suggest payment to make amends for loss. But once there was a breach of contract by one party and the other party did not keep it alive but acquiesces in the breach and decides to receive compensation thereof, the injured party could not have any right in the capital asset which could be transferred by extinguishment to the defaulter for valuable consideration. That was because a right to sue for damages not being an actionable claim, a capital asset, there could be no question of transfer by extinguishment of the assessee's rights therein since such a transfer would be hit by section 6(e). In any view of the matter, the impugned sum received by way of compensation by the assessee was not consideration for the transfer of a capital asset. Moreover, if the revenue fails to show that the assessee had incurred a cost as in the present case, it would be impossible to compute the income chargeable to tax under the head 'Capital gains' and what the revenue would be charging would be the capital value of the asset and not any profit or gain. Accordingly, the sum received as compensation was not liable to capital gains tax."

In light of the above, it was contended by him that it is evident on the facts of the case that, UW has merely transferred its right to sue, if any for compensation /damages or to enforce legal remedy in favour of the appellant under the actionable claim agreement

which cannot be termed as a capital asset under section 2(14) of the Act.

23. The learned Senior Counsel strenuously contended that had there been any right of set off, there could have been no occasion for the DoT to have denied such a right and instead such a right would have been allowed, whereas in the instant case, on 31.03.2014, DoT on without prejudice has allowed the set off against the payable bid amount. This shows that set off has been bestowed to the appellant as per the policy decision of the Government of India and not in view of any existing right. That right must be enforceable in law and it is not any and every right whether it is enforceable in law or not can be regarded as capital asset. Though the DoT was not under an obligation to allow the refund of spectrum fee in respect of the cancelled licenses or to allow set off thereof, however, due to the subsequent changes in the Policies, the DoT allowed set off of the spectrum fee of the cancelled licenses to the Appellant. The set off so allowed to the appellant was subject to conditions and the rights of DoT to recover all claims/counter claims of cancelled licenses of UW from the appellant. This was clearly evident from the undertaking given by the Appellant to DoT to discharge all liabilities of the cancelled licenses whose license/entry fee was allowed to be set off against the spectrum fee payable for the fresh licenses. It was submitted that the appellant had received a number of notices from DoT for such liabilities which were pending for quantification/ascertainment as appellant had contested the quantification and determination/applicability of

said liabilities before appropriate forums. Sample copies of show cause notices amounting to Rs. 970.56 Cr were submitted by the appellant to the AO at assessment stage. Further, it was submitted that the appellant may receive more notices in future as well. Accordingly, it was argued that the amount of set off allowed could not be taxed in the year under consideration since the agreement for acquisition of actionable claim had not been culminated in as much as only one to the transaction has been completed and other remains yet to be settled between the DoT and the appellant. It had been submitted that at best, the amount allowed to be set off by DoT was mere advance of money to appellant and could not be termed as transfer of capital asset namely alleged set off of spectrum fee. As per the actionable claim agreement, bunch of assets and liabilities had been acquired by appellant from UW. As a precondition for approving the BTA, DoT sought an undertaking from the appellant, where it was required to assume various contingent liabilities of UW, including dues owed to the DoT. The appellant recorded the said fact in the amendment agreement dated 30.12.2013 that the consideration for transfer of actionable claim was revised due to various liabilities assumed by the Appellant by way of giving undertaking to DoT for the cancelled licenses. Accordingly, the payment of Rs. 100 crores was merely a part payment for actionable claims and the remaining amount shall be payable to DoT as and when it was demanded instead of UW on account of undertaking given to DoT. Also, it was stated that there is defined procedure laid down in TP Act that how the assignment of actionable claim would be effected between the parties including

assignor, assignee and other person. It was submitted that Section 132 of the TP Act states that the transferee (i.e. Appellant) of an actionable claim shall take it subject to all the liabilities and equities and to which the transferor (i.e. UW) was subject in respect thereof at the date of the transfer. The transferee of actionable claim is subject to meet all obligations of the transferor i.e. the transferor if had any liabilities against such actionable those were also to be assumed by the transferee and he had no option whatsoever selectively take liabilities of the transferor in respect of such actionable claim. It is a general rule that the assignee will not get a better title than the assignor. Accordingly, a transferee of a claim is only entitled to get what transferor is eligible to receive. If the debtor has a right to receive some amount from the assignor, then he has the right to set off such amount against the payment to be made to the assignee.

24. Thus, in the facts of the present case, the spectrum fee paid by UW was in relation to services provided till the date spectrum licenses were cancelled by the Hon'ble Supreme Court. The liabilities accrued to UW on account of cancelled licenses are thus intrinsically linked with the spectrum fee paid by UW to DoT. Accordingly, the moment, UW assigned its rights on spectrum fee alongwith its all claims as well as right to set off, all corresponding liabilities of UW due to DoT were automatically vested with appellant due to the provisions of section 132 of the TP Act. The appellant placed reliance on the decision of Supreme Court in the case of *Calcutta Co. Ltd. v. CIT [1959] 37 ITR 1 (SC)* wherein it has been held that the expression to compute gain or

loss has to be understood in its commercial sense and there can be no computation of such profits and gains until the expenditure which is necessary for the purpose of earning the receipts is deducted therefrom irrespective of whether the expenditure is actually incurred or the liability in respect thereof has accrued even though it may have to be discharged at some future date. Thus, he submitted that the cost of acquisition was indeterminate in the given case and the same was supported by the provisions of TP Act. Accordingly, the capital gains cannot be computed and taxable in the year under consideration. The final taxability of gain or loss, if any, could be considered in the year in which all the claims and counter claims are settled by the DoT and not in the piecemeal manner.

25. With respect to the last contention that there is no transfer of any asset as envisaged under section 2(47) of the Act, the appellant contended that the AO and the Ld. CIT (A) were incorrect in making a finding that upon exercise of right to set off by the appellant on 31.03.2014, the capital asset acquired from UW under the actionable claim agreement was extinguished which constituted as transfer as per section 2(47) of the Act. On this his submission was that the appellant had exercised such right by way of surrender as per the contractual and policy decision of the Government of India, and thus, could not be termed as extinguishment of rights therein or exchange as alleged by the AO and Ld. CIT(A). Surrender of rights does not amount to 'transfer' within the meaning of section 2(47) of the Act. Also, once the set off has been allowed to it by the DoT, the

alleged capital asset i.e. right to set off the license fee itself has been destroyed. Where asset is extinguished by its destruction, there can be no transfer of the asset. It has been contended that there was no extinguishment of any right. Since, the alleged right came to end as soon as the amount had been set off by DoT on its own volition and as such the same cannot be regarded as extinguishment of any right therein as envisaged in Section 2(47) of the Act. The said proposition was being upheld by the Judgement of Hon'ble Madras High Court in the case of Neelamalai Agro Industries Ltd. v. Commissioner of Income-tax (2002) 259 ITR 651 (Madras HC) wherein the court held as under:

> *"18. In the case of Mrs. Grace Collis (supra), the Court did not have occasion to go into the question as to whether the destruction of a capital asset which as a consequence brings about the extinguishment of the rights of the assessee-owner in such asset, would amount to transfer. The Court did not hold that Vania Silk Mills (P.) Ltd.'s case (supra) was wrongly decided, or that the definition of 'transfer' in section 2(47), particularly, the use of the words 'extinguishment of any rights therein' would cover cases of destruction of the capital asset. Cases such as the destruction of the capital asset in a fire, or its complete loss as in the case of sinking of a vessel in the sea, cannot be regarded as having been brought within the fold of definition of 'transfer' in section 2(47), by reason of what has been said and laid down in the case of Mrs. Grace Collis (supra).*

20. The law laid down in Vania Silk Mills (P.) Ltd.'s case (supra), that extinguishment of rights in a capital asset as a necessary consequence of destruction of the asset does not amount to transfer, has not been overruled by the Apex Court in the case of Mrs. Grace Collis (supra)."

Contention Raised by Ld. CIT-DR on behalf of the Revenue.

26. On the other hand, Mr. S. S. Rana, the learned CIT DR appeared for the revenue, in his submission strongly supported the findings of the AO and CIT (A) and contended that:

(a) The appellant had acquired under the business transfer agreement, business operations as a going concern and the right of set off was independent right and was not a part of business transfer agreement.

(b) It was next submitted by him that the set off of refund of Rs. 1558.70 crores to UW can be said to be amount received by it, based upon the right of equal restitution. However he submitted that the transfer of his right of the set off from UW to the assessee is not based on right to equal restitution. He stated that the transaction entered by the assessee was commercial transaction based upon the payment of Rs. 100 crores to UW. He further submitted that the appellant is trying to push the non-existing fact, there was a contract between UW and Government of India as per Indian Contract Act 1872 and what was transferred by UW to the appellant was a right to set off of refund and not any right to sue.

(c) His further contention was that the reliance placed by the appellant on CAG's report that the same was tabled before the Parliament on 11.03.2016 and was thus not available upto the date of filing of return which is subsequent event and cannot be affect taxability of the amount in the year under consideration. It was stated by him that subsequent report cannot be stated to be that the amount was contingent liability on the date of filing of return of income. In support of his contention that the exercise of the right of set off of the license fee was not in the nature of extinguishment which constitutes transfer u/s 2(47) of the Act, he read the findings of the CIT(A) in paras 5.3 to 5.5.4. It was held that set off of refund was a capital asset as per the provisions of section 2(14) of the Act.

(d) He further submitted that the right of set off constituted transfer as defined in section 2(47) of the Act.

(e) The learned CIT DR had further submitted that the cost of acquisition as required u/s 48 of the Act cannot be regarded as indeterminate for the reasons stated by the CIT(A) in his order in paras 5.1 to 5.7.4.

(f) He further supported the findings of the CIT(A) wherein it had been held that the assessee in the alternative earned income by way of profits and gains from the business and relied on the following judgments:

(i) CIT vs. Kasturi Estates Pvt. Ltd., 62 ITR 578 (Mad.)

(ii) M. Raman Pillai vs. CIT, 51 ITR 829 (Ker.)

(iii) CIT vs. P.K.N. Co. Ltd., 80 ITR 65(SC)

(iv) R. Dalmia vs. CIT, 137 ITR 665 (Del.)

(v) Lakshminarayan Ram Gopal & Son Limited vs. Government of Hyderabad, 25 ITR 449 (SC)

(vi) Dalhousie Investment Trust Co. Ltd. vs. CIT, 68 ITR 486 (SC).

(g) He had objected to the admission of additional evidence furnished, without stating which of the evidence furnished by the assessee, was additional evidence.

REJOINDER BY APPELLANT

28. The appellant filed its rejoinder on 03.04.2018 on the contentions raised by the Ld. CIT (DR) in its submissions. Regarding the first contention, the Senior Counsel submitted that there was no requirement to enter into an actionable claim agreement for allowing alleged right of set off of the license fee paid by UW. It was only by way of abundant precaution that the said agreement was entered into by the parties. Thus, the submission of the Ld. CIT (DR) was devoid of any merit and liable to be rejected. It was submitted that the Ld. CIT (A) failed to appreciate that the set off was allowed by DoT due to the policy decision of the Government of India and not by virtue of the Actionable Claim Agreement entered with UW. The findings of the Ld. CIT(A) were incorrect as the entire factual position and documents were placed on records which are completely disregarded and misconceived. The two agreements were made because of the no clear guidelines issued for transfer of business of UW. In respect to the second contention, the Senior Counsel Appellant relied on its earlier submission that the set off was

allowed to the appellant merely by way of a policy decision of Government of India and based on right to equal restitution. The relevant quote of the report of the CAG was extensively relied upon by him to supports the said view. Also, the Ld. CIT (DR) also not disputed the finding of the CAG and DoT stated in the CAG Report. Also, the contention of the Ld. CIT(DR) that there is no agreement between UW and Government of India was factually incorrect and devoid of any merit as the Government of India through DoT had entered into an agreement with UW vide agreement dated 29.02.2008 which constituted a valid contract as per the provisions of Indian Contract Act, 1872 which was placed on record by the appellant. Further, the Ld. CIT(A) failed to appreciate that UW had no other right except right to sue Government of India for breach of contract. Even such rights have been invoked by other persons, though not successfully. The appellant placed the judgement of TDSAT in the case of Loop Telecoms on record. The submission of the Ld. CIT (DR) that CAG Report has been tabled subsequently and was not available up to the date of filing of return of income had no relevance and completely misconceived. In respect to the same, the Senior Counsel submitted that the report of the CAG has been tabled much before the completion of the assessment proceedings and it was not the case where the assessee had withdrawn its claim on account of the aforesaid report. On the contrary, it was a case, where the Assessee argued that the sum was not chargeable to tax as capital gains and in support of this, the factual analysis given by a constitutional body i.e. CAG was placed on record. The Ld. CIT (DR) had placed reliance on the order of Ld. CIT(A) to

argue that the right of set off of refund was a capital asset as per section 2(14) of the Act and it was transferred by UW to the assessee as per section 2(47) of the Act. The Senior Counsel submitted that the Ld. CIT(A) failed to appreciate that the term 'right' is not used in the definition of 'Capital Asset' in section 2(14) of the Act. The Ld. CIT(A) drew analogy from section 55 of the Act and right in itself could be 'Capital Asset', but failed to appreciate on the facts of the case that rights which are held as capital asset are capable of transfer and identifiable and not inchoate or contingent right in the form of 'right to sue' as in the present case. The Ld. CIT (DR) erred in contending that the exercise of right by the Appellant resulted in relinquishment of the asset or the extinguishment of any right therein which was to be considered as transfer as per section 2(47) of the Act. The Senior Counsel submitted that once the set off has been allowed by DoT, the asset itself has been destroyed. Where asset is extinguished by its destruction, there can be no transfer of the asset. Further, it had been contended that there was no extinguishment of any right. Since, the alleged right came to end as soon as the amount had been set off by DoT on its own volition and as such the same cannot be regarded as extinguishment of any right therein as envisaged in Section 2(47) of the Act. The Senior Counsel placed reliance on the judgement of Hon'ble Madras High Court in the case of Neelamalai Agro Industries Ltd. v. Commissioner of Income-tax (2002) 259 ITR 651 (Madras HC). It was also contended by the Ld. CIT(DR) that the Assessee had made an application to DoT seeking a set off of spectrum fee paid by UW wherein it had never been contended by

it that it would sue the DoT if the set off was not granted. The contention of the Ld. CIT (DR) that since there was no notice issued of threat to sue it amounts to acceptance/admission on the part of the Assessee that it had a right to seek a set off of the spectrum fee paid by UW. It was submitted by Senior Counsel that on the face of it such a contention was fanciful. It was submitted that by making an application with DoT, the Assessee had not get vested with the right to set off. The Assessee could not adopt two course of action, one by threatening to sue and other by seeking benevolence. The all what assessee did was seeking a benevolence which benevolence was in the nature of waiver or concession in the amount of spectrum fee payable to DoT in respect to the fresh licenses.

Decision

29. We have considered the rival submissions, perused the relevant material placed on record including the written submissions filed by both the parties and the orders of the lower authorities. The first issue before us, is about the taxability of Rs 1658.57 crores under section 45 of IT Act in respect of an amount, allowed to the appellant on 31.03.2014 "without prejudice", as a set off being non-refundable entry fee paid by the UW to DOT in the year 2008 against the allocation of licenses to the appellant against the fresh spectrum fee payable in respect of the newly acquired spectrum of six circles in an auction conducted on 14.11.2012. Thus, the core/issue, which needs to be examined is, whether the appellant had acquired any such

'capital asset', in the form of a right to set off, under an agreement of actionable claim dated 06.12.2012 from the UW.

29. In order to examine the above issue, we have carefully examined the facts, leading to the set off non-refundable entry fee paid by the UW in year 2008 which have been detailed, in the earlier part of the this order and is summarised as below:-

i. UW had acquired 22 licenses from the Government of India to operate as telecom operator in 22 Circles on payment of Rs. 1658.57 Crores in aggregate in the year 2008 on first cum first service basis.

ii. The contracts had been entered between the DOT and UW in respect of the 22 licenses under the Indian Telegraph Act, 1885. Under the aforesaid contracts, when the UW had paid one time non-refundable entry aggregating to Rs. 1658.57 Crores in respect of 22 licenses.

iii. Subsequently, the Hon'ble Apex Court in a Public interest Litigation vide its judgement dated 02.02.2012 quashed the allotment of 122 licenses including the 22 licenses allotted to UW in 2008. The Hon'ble Apex Court in the interest of the users of the telecom services under said licenses allowed the operations of such 122 licenses till 15.02.2013 by passing interim orders time to time. The Apex Court also issued directives to Government of India to make fresh auction of said 122 quashed licenses by way of fair transparent manner. Here, it is important note that the judgement of the quashing of licenses by the Hon'ble Apex Court, the contract of granting licenses to UW and others stood quashed.

Further, it is also evident from the judgement of the Hon'ble Apex Court that, no directions had been made, regarding the amount paid as one time non-refundable entry paid by various operators.

iv. The appellant placed on record the report of CAG which was tabled before the Parliament on 11.03.2016 in support of its contention that the "non-refundable entry fee" paid by the telecom companies which is not liable to be transferred or refundable in any circumstances.

v. That under the terms of the contracts of allotment of licenses in 2008 the same did not provide for any refund of the entry fee paid by the operator DOT as the same were non-refundable even in the case of surrender of licenses.

vi. The appellant company was incorporated on 24.02.2012 in which the Telenor Group held 74% equity and remaining shares was held by an Indian Company, Lakshyadeep Investment & Finance Limited.

vii. That the appellant had been incorporated to act as telecom operator in India with intention to provide telecommunication services in India.

viii. That on the directives of the Hon'ble Apex Court, DOT had issued a Notice Inviting Applications (NIA) in public domain on 28.09.2012 and further it had subsequently published responses to the Queries to NIA on 12.10.2012 of the telecom companies who had desired to participate in the fresh auction. Such responses made by DOT were broadly, to decide the issue, namely eligibility of the participant's

technical and financial qualification bidder and with respect telecom operator whose licenses were quashed by the Apex Court. (query no. 23) Further also, the transfer of business of quashed licenses in case to successful bidder including in favour having group entities (Query No. 31 to 35 and clarification dated 12.10.2012 issued by DOT in respect of Query 31) was responded. Finally, the Set off one time non-refundable fee paid by quashed license holder in 2008 (query no. 74) was also explained.

ix. In addition to above, the appellant has placed on record all communications and letters addressed by the appellant, UW, and Telenor Group to DOT and the responses in respect thereof.

x. The significant communications before the appellant became successful bidder in fresh auction are:-

a) 04.10.2012: The appellant sought clarification/permission from DOT for transfer of business of UW as an ongoing concern basis.

b) 15.10.2012: UW based upon clarification issued on NIA sought refund of entry fee paid in 2008, as it had been decided by UW that they would not participate in fresh auction to be conducted in November 2008.

c) 17.10.2012: Telenor Group intended to participate in fresh auction through appellant and communicated its desire for the transfer of UW telecom business to appellant as on going concern upon the appellant being successful bidder in

fresh auction. It is also communicated that the UW would not participate in fresh auction and requested to DoT to consider the set off of entry fee paid by UW as part of overall transfer of telecom business in accordance then existing policy.

d) The appellant being declared successful bidder on 14.11.2012 in fresh auction in respect of 6 circles became liable to pay Rs. 4018.20 Crores as spectrum fee.

e) Subsequently on 06.12.2012, the agreement for business transfer as well as actionable claim were entered by the appellant with UW.

f) Thereafter, the appellant made other several representations to DOT for approval of business transfer of UW as well as set off of entry fee against the spectrum fee payable in respect of the fresh licenses acquired by the appellant and in furtherance of the approval of business transfer granted by the DOT. The appellant submitted undertakings and indemnities with respect to the liabilities of UW in respect of the quashed licenses.

g) Finally, on 31.3.2014, the DOT allowed the set off of Rs. 1658.57 crores to appellant on without prejudice basis.

30. The above facts are demonstrated from the records placed before us. Considering the aforesaid fact and having heard the contentions of both the parties in respect of the taxability of a sum of Rs. 1658.57 crores under the head capital gain, it is necessary for us to render our findings about the nature of the

receipt. It is undisputed fact that the assessee had been allowed a set off of Rs. 1658.57 crores by DoT on 31.03.2014 and was without prejudice basis. The aforesaid sum has been brought to tax as short term capital gain. In order to attract the provisions of section 45 of the Act, it is axiomatic that there has to be an income derived by the assessee on transfer of a 'capital asset'. In the instant case in our opinion the appellant had not acquired any capital asset from UW under an agreement dated 06.12.2012, since UW had no such asset held by it at any point of time. The 'asset' in the instant case, is stated to be a 'right' in a property. There is no dispute that right in a property is an asset u/s 2(14) of the Act. However in the instant case, UW had no such right, title, interest in the amount of non-refundable entry fee paid by it to DoT in the year 2008. In fact, UW had exploited said licenses from the year 2008 till the date when said licenses were quashed, i.e., for a period of 4 years. In such circumstances, one time non-refundable entry fee, after the licenses were exploited by it, UW had been left with no right, title, interest in the amount paid as license fee paid to DoT. Further, having gone through the agreement entered by UW with DoT, we find there is no provision of refund of any sum paid as entry fee. In fact it is also not a case, where DoT had failed to perform its obligations to UW; and therefore, ostensible conclusion is that UW had no right, title or interest under the said agreement. Further statutorily too, under the provisions of 'Indian Telegraph Act' there was no provision seeking refund of the onetime entry fee paid by the license holders. In such circumstances, we do not find any justification to hold that the appellant had acquired any

right from UW, when in our opinion UW itself had no right, title, interest in the amount of non-refundable entry fee paid by it. In our opinion it is not any and every 'right' which can be regarded as a capital asset. 'Right' must be such a right which is enforceable in law either under a statute or under binding contractual agreement. In view thereof, in our opinion since UW had been left with no right, title, interest in the amount of entry fee paid in the year 2008 in respect of the licenses granted to UW, it cannot be validly held that UW held any capital asset, which capital asset could be stated to have been acquired by the appellant from UW under an actionable claim agreement dated 06.12.2012. We have also noticed that under the aforesaid agreement, the appellant had paid Rs. 100 crores to acquire such an alleged right. Be that as it may, the mere fact that the appellant had paid Rs. 100 crores against such an alleged right, will not be a decisive factor to the nature of the asset alleged to have been acquired by it. The relevant clauses of the agreement entered between the assessee and UW under which theappellant had paid Rs. 100 crore are extracted herein below:

"....

(F) Unitech Wireless did not participate in the Spectrum Auction and will have no future operations effective 18 January 2013 as a result of which Unitech Wireless will not be able to claim the benefit of the set off of License Fee which has been permitted by the DoT. Further, the business of Unitech Wireless to be transferred to Telewings as a result of which Telewings will be entitled to claim set off of the License Fee against payments being made it to the DoT (Set Off). The

parties have agreed that Telewings shall pay fair consideration, which has been computed on an arm's length basis to Unitech Wireless for facilitating such entitlement and the parities. Therefore, wish to execute this agreement to record the terms thereof.

....

TRANSFER OF ACTIONABLE CLAIMS

....

"1.2 All claims judgments, demands, lawsuits, causes of action, choses in action, rights of recovery and other rights of Unitech Wireless, whether arising under tort or contract, arising under or in connection with all warranties and representations , implied or express, all actions , indemnities and guarantees against the DoT relating to the grant by the DoT of the UASLs to Unitech Wireless and the payment of the License Fee for the UASLs granted to Unitech Wireless by the DoT in 2008 shall together constitute Actionable Claims.

...

2. CONSIDERATION

.....

2.2 The consideration has been computed on the basis that Unitech Wireless which shall cease to have any business operations effective from 18 January, 2013, will not have any opportunity to claim the set off of License Fee and the process involved in seeking the set off will be preliminary driven by the efforts of Telewings"

31. The said agreement had been modified by way of an amendment letter dated 30.12.2013 as the appellant had given indemnities and undertakings sought by DoT for approval of BTA. After giving the undertakings, the parties amended the actionable claim agreement to take into account the changes made in the BTA on account of additional liabilities assumed by the Appellant and duly recorded the same in the amendment letter dated 30.12.2013. The relevant clauses of the said amendment letter are reproduced hereunder:

> *"2. The parties failed to obtain the aforesaid DoT approval by 18 January 2013 and further did not agree to a different date in writing. Accordingly, the Actionable Claims remain with Unitech Wireless.*
>
> *3. Despite the expiry of the Agreement, Unitech Wireless and Telewings have pursued the business transfer agreement dated 6 December 2012 (BTA) signed between the Parties which required specific approvals from the Department of Telecommunications (DoT) for transfer of certain UASL related resources from Unitech Wireless to Telewings.*
>
> *4. As a precondition to such approvals, the DoT sought an undertaking from Telewings whereby it was required to assume various additional contingent liabilities of Unitech Wireless, that were not contemplated in the BTA, including dues owed to the DoT. Telewings agreed to provide the undertaking and consequently assumed such liabilities of Unitech Wireless."*

In view of the above, the consideration agreed in the actionable claim agreement had also been modified in the said amendment letter which is as under:

> "8. In view of the above, the Parties have agreed to revive the Agreement and agree to the following amendments:
>
> (a) The Parties agree that as on the date of this letter, clause 2.1 of the Agreement shall be deleted and replaced with the following clause 2.1:
>
> *"In consideration of the transfer of Actionable Claims from Unitech Wireless to Telewings, Telewings shall make a payment of Unitech Wireless which is the lower of:*
>
> *(a) INR 100 crore; or*
> *(b) 50% of the value of the Set Off permitted by the DoT.*
>
> *Which the parties agree would be the fair value for the Actionable Claims (Consideration)"*
>
> (b) The Parties agree that as on the date of this letter, clauses 4.1(a) and 4.1(b) of the Agreement will stand deleted in their entirety."

32. In view thereof, we are of the considered opinion that UW had no enforceable legal right, title, interest in the amount of non-refundable entry fee paid by UW to DoT. Once we conclude that, there was no right, title, interest which was enforceable in law, the answer to the issue involved, in our opinion is that, since UW had no right, title, interest in the said non-refundable entry fee or it was not entitle to make any claim from DoT for set off of the said license fee, UW could have not transferred any such

right so as to enable the appellant to acquire such an alleged right.

33. Further, the fact that the appellant had paid Rs. 100 crores to acquire such a right, under the actionable claim agreement, itself shows, when there existed no right, the amount so paid by the appellant was apparently by way of abundant precaution to safeguard its interest. However, in our opinion, it cannot be held that the assessee had acquired any capital asset which was transferred by it by way of extinguishment in favour of DOT, as held by the Revenue on mere fact that the appellant had paid Rs 100 crores which in our opinion is not a decisive factor.

34. Our aforesaid opinion further gets supported by the CAG's Report No. 55 of 2015 which has been heavily relied upon by the Ld. Sr. Counsel before us, for the sake of convenience, is being extracted herein below:

> *"...It was seen in audit that M/s VTL, M/s ICL, M/s TCSPL4 and M/s SSTL were allowed set-off of entry fee of Rs. 5476.30 crores against the auction fee payable in November 2012 / March 2013. Audit has following observations:*
>
> • *The entry fee paid by the licensees was one-time entry fee and was non-refundable as per terms and conditions of UAS license. Further, the Attorney General of India in his response to the legal opinion sought by DoT's query "Whether entry fee paid by licensees needs to be refunded as demands are being made by the licensees?", stated (August 2012) that the question of refund of entry fee paid by the licensees does not arise at this stage.*

- *NIA stipulated that the companies/licensees whose licenses were slated to be quashed as per the directions of the Supreme Court would be treated as 'New Entrant'. This meant that they had to deposit the full auction fee without any linkage to entry fee paid for their quashed licenses.*

- *Further the Hon'ble Supreme Court had not made any distinction amongst the licensees while quashing the 122 licenses of the nine operators. But DoT on the plea of the operators that their licenses were cancelled for no fault of theirs, created two categories of quashed licensees-licensees whose licenses were cancelled due to their fault and licensees whose licenses were quashed without their fault and allowed set-off on the principle of equal restitution.*

……

- *It was also pointed out by the Comptroller and Auditor General of India in his Performance Audit Report No.19 of 2010-11, that VTL and Unitech were ab-initio ineligible to obtain the UAS licenses.*

……

- *M/s. TCSPL requested (October 2012) DoT for allowing set-off of the onetime entry fee of ` 1658.57 crore paid by M/s. Unitech in 2008 for obtaining 22 UAS licenses which was cancelled by the Hon'ble Supreme Court.* ***On 23 February 2013, a decision had been taken by the DoT that no set-off of the non-refundable entry fee was permissible to TCSPL on the grounds that set-off would be permitted only to the quashed license holder***

participating in the auction and since M/s TCSPL was not a quashed license holder, set-off of entry fee paid by Unitech (quashed license holder) against the payment due from TCSPL (participating entity), was not as per approval of EGoM. *On 05 March 2013, TCSPL again requested DoT that though they were separate entity, DoT should set-off the one-time entry fee paid by the Unitech group against the payment due from them. On the same date (i.e. on 05 March 2013) a note for the EGoM was prepared and the same was approved in the meeting of the EGoM held on 06 March 2013.*

Audit observed that the 'supplementary note' to EGoM prepared on 05 March 2013 did not include the facts regarding suppression of vital information at the time of submission of their application, submission of false certificate and misrepresentation of facts, etc. by Unitech group though these were brought out by the C&AG in Report No. 19 of 2010-11 and also the decision taken by the DoT that no set-off of the non-refundable entry fee was permissible to TCSPL. Further, TCSPL was incorporated on 24 February 2012 only, well after the decision of Hon'ble Supreme Court of India (02 February 2012) on cancellation of UAS licenses.

On this being pointed out, the DoT replied (October 2013) that,

- *The CAG cannot comment on and object to the matter of policy.*

- *As regards the criminal liability of the M/s Unitech Wireless, the matter is still pending before the various courts, without establishing the same there is no legal basis for taking civil action. Besides, in the operative part of its order, the Hon'ble Supreme Court did not make any such distinction between operators while allowing the operators to continue operations as well as to participate in the auction of spectrum process.*
- *Set-off allowed was not in the nature of refund of entry fee and not allowed to any of the quashed license holders that did not participate and win spectrum in auction.*
- *The decision to allow set-off was taken by the EGoM in the light of the various representations and submissions by the stakeholders and guided by the principle of equal restitution.*
- *Set-off was taken as full up-front payment and no set-off was allowed to be carried forward against future instalments.*
- ***The request of the Telenor Group was not acceded to by the DoT in accordance with the then extant policy/guidelines on the issue and therefore it was decided by the competent authority to refer the matter to EGoM and the decision to allow set-off was an administrative decision taken by the EGoM on 06 March 2013.***

  ……..

  The replies of the DoT are not acceptable as:

- *Audit has not questioned the policy of the Government per-se. Audit has commented on the incompleteness and inadequacy of information submitted to EGoM.*

- *Decision on Show-cause Notices issued by DoT to VTL and Unitech group relating to their eligibility as on date of submission of application for UAS licenses was pending with DoT at the time of submission of note to the EGoM for set-off. This fact was also not brought to the notice of EGoM by DoT in its note. Further, despite DoT's awareness regarding pendency of the matters pertaining to criminal liability of the M/s Unitech Wireless before the various courts, DoT neither brought it to the notice of EGoM in its note nor waited till finalization of these matters and allowed set-off of one time entry fee paid by M/s Unitech against the auction price payable by M/s TCSPL.*
- *Since TCSPL was a separate legal entity and a new company incorporated (24 February 2012) after the Hon'ble Supreme Court judgment (02 February 2012), it was not eligible for set-off against payment made by another legal entity. DoT had not initially allowed the proposal of set-off on this ground, but subsequently referred the request for set-off to EGoM, which was approved by EGoM on 06 March 2013.*
- *Since the one-time entry fee paid by the operators was non-refundable as per the license agreement, the question of the claim for refund with interest for the pro-rata amount for the balance period as stated by the DoT does not arise.*
- *Even the revenue of ` 7741.65 crores earned by these companies from the quashed licenses since 2008 was not considered by DoT while preparing the note for EGoM for set-off of non-refundable entry fee. In this way the licensees appear to have been rewarded for losing their licenses, as for*

the period of operation of the license (2008-12), no entry fee was levied on the licensees due to set-off allowed.

Thus, set-off of the non-refundable entry fee of ` 5476.30 crore, paid by licensees whose license was declared illegal and quashed by the Hon'ble Supreme Court, against the auction price payable for spectrum in 1800 MHz/800 MHz held in November 2012 / March 2013 was inappropriate and deprived the Government of the revenue to that extent.

34. In short, the conclusion of CAG in respect of the set off allowed to appellant is summarized as below: -

i. That the set off allowed by the DOT to the quashed license holders was inappropriate and thus deprived the Government of the revenue.

ii. CAG's report confirms the fact that the entry fee paid in respect of quashed licenses was non-refundable to the quashed license holders and they do not have any contractual right to seek refund of such one-time entry fee.

iii. The CAG report also highlighted that the fresh auction fee payable by the successful bidder had no linkage to entry fee paid for their quashed licenses.

iv. CAG report also confirms that the appellant is not eligible for the set off of non-refundable entry fee paid by UW. The initial request of the setoff of entry fee paid was rejected by the DOT on 23.02.21013. However, the subsequent request of the appellant is placed before the EGOM on 05.03.2013, when the appellant again

requested DoT that though they were a separate entity, DoT should set-off the one-time entry fee paid by the Unitech group against the payment due from the appellant. On the same date (i.e. on 05.03.2013), a note for the EGoM was prepared and the same was approved in the meeting of the EGoM held on 06.03.2013 which shows that the set off was granted not by way of any right but on the basis of principle of equal restitution.

v. DOT responded on October 2013 to CAG, (i.e. much prior to actual set off allowed to appellant on 31.03.2014), where DOT itself stated that set off of entry fee was allowed as a policy decision guided by the principle of equal restitution.

vi. With respect of the set off of entry fee allowed to the appellant, it was confirmed that the decision to allow set-off was an administrative decision taken by the EGoM on 06.03.2013 and initially the request of the Telenor Group was not acceded to by the DoT in accordance with the then existing policy/guidelines on the issue.

35. From the perusal of the aforesaid report and as observed above, it is evident that CAG was also of the considered opinion that UW had no right, title, interest to claim any set off and so far as the appellant is concerned, in any case, the appellant had no legal enforceable right to seek a set off and has been also stated in the aforesaid report of CAG, as being not allowable to the appellant. On the issue of nature and effect of CAG report, it was submitted by the learned Senior Counsel that CAG, which is a

constitutional body, in its Report prepared under Article 151 of the Constitutionand tabled before the Parliament, is binding in nature which deserves to be taken into consideration to decide the present issue, especially when it dealt with the controversy arising on account set off of non refundable entry fee to various telecom operators. He further submitted that the Article 151 of Constitution of India is binding on all executive and statutory authorities and thus revenue's stand is contrary to the report of the CAG which is impermissible both on facts and in law.

36. We are in tandem with Mr. Aggarwal on the point that the CAG Report which was available in public domain and also placed before CIT (A) has to be given due weightage. The objection of the ld. CIT DR that the taxability of the amount cannot be judged on basis of CAG report which was tabled before the Parliament after the filling of return of income is not acceptable. Further, the power of CAG and case law relied upon by the appellant, we agree that CAG being a Constitutional Authority, the findings as noted in the Report cannot be disputed and consequently its findings in the Report cannot be ignored. We observe that there is no inconsistency between the facts stated in CAG report regarding the event which lead to the set off of such amount and submission made by the appellant before us. Therefore in the absence of any contrary material, we consider it appropriate to have to accept the facts and findings recorded in CAG report. Accordingly, the objections of the ld. CIT DR that the taxability of the amount in question cannot be decided by considering the CAG report is rejected.

37. The other issue, i.e., the need of entering into two separate agreement, i.e., Business Transfer Agreement and Actionable Claim Agreement on 06.12.2012 separately, Mr. Aggarwal had contended that need of entering into an agreement for actionable claim alongwith Business Transfer Agreement arose since the appellant had become a successful bidder in respect of six of the circles in the fresh auction. It was thus, considered as a commercially prudent to enter into Business Transfer Agreement and also an Actionable Claim Agreement on 06.12.2012 with UW. The intent and purpose of the parties to enter into two separate agreements was for the acquisition of business as an ongoing concern for commercial consideration and such consideration had also been communicated to DOT much prior to its participation in the fresh auction. However, the DoT had, in its responses to various queries, had not formulated the regulations, procedures and policies for transfer of business of quashed license holders and thus only as an abundant precaution, the part of the DoT's claims over UW and UW's claim over DoT were kept under the agreement of actionable claims which were linked with overall business operations of UW which were acquired by the appellant as a going concern. The submission of Mr. Aggarwal that, on account intention of the appellant to be treated as successor-in-interest of the business UW and subsequently agreed to take excluded liabilities of UW towards DOT, clearly shows that the transaction of set off entry fee is not independent transaction but composite transaction in respect of acquiring the business of UW with all assets and liabilities are acceptable, and is thus accepted.

38. In view of our finding in preceding paras, that alleged right to set off is not a capital asset in the hands of the appellant on account of set off by DOT on 31.3.2014, otherwise also, we hold that, the appellant had not acquired any capital asset and as such no asset was transferred by it by way of alleged extinguishment. Thus, the other contentions raised in the course of hearing by the parties were mere academic in nature and do not require separate adjudication. Accordingly, the action of the AO and Ld. CIT (A) is reversed on this count.

39. Having dealt with chargeability of such amount as short term capital gain, we are left with the alternative contention of the Revenue that the such sum is chargeable to tax as income from business as the activity of entering into agreement of actionable claim and subsequently getting set off of entry fee is an income by way of "adventure in nature trade and commerce". Since, we have already expressed as aforesaid our opinion that the amount in question which has been allowed as set off being by way of administrative and policy decision of Government of India unilaterally and there is no *quid pro quo*, between the appellant and DOT for such decision, therefore same could not be held adventure in the nature of trade and commerce. The ld. CIT DR had relied upon the finding of the CIT (A) in its order and did not make any further submissions. On the other hand, Mr. Aggarwal had submitted the transaction is on capital account and as such there is no question, it could be taxed as revenue receipt. He had further drawn our attention with respect to the fact that the even the licenses issued by the DOT are not tradable

and license holder merely get the right to exploit the licenses. In our opinion the set off had been granted from the license fee payable by it to DoT and the said sum of set off has not resulted into any business transaction entered by it with DoT. The said sum of set off so allowed was in the nature of mere waiver or concession from the license fee payable and cannot be held to be an income much less business income. In the instant case the assessee has received no sum directly or indirectly. It had not entered into business transaction or any transaction with DoT in respect of such amount so waived and such sum had been set off by DoT on the principle of equal restitution. Also, we find that the appellant is not in the business of trading of UASL. Further, the DoT guidelines applicable, at that time did not permit trading/sharing of spectrum. It was privy only to the Appellant and the Appellant alone could use it to render permitted telecom services. Thus, the set off against the spectrum fees cannot, by any stretch of imagination, be construed in the revenue field or a sum chargeable to tax under the head profit and gains from business and profession.

40. Thus, in our considered view, the action CIT(A) to tax such amount as business receipts is devoid any merit.The amount of set off is allowed on account administrative and policy decision and not by way of adventure in nature of trade. The CIT (A) in its order placed reliance in the case Of CIT vs. Kasturi Estates reported in 62 ITR 578 which is clearly distinguishable as the issue in the said case was whether the sale and purchase of land would fall under capital field or revenue field. Accordingly, the

appellant also succeed on this count. In view of the above, the ground nos. 2 to 4 are allowed.

41. The second issue involved in this appeal is in respect of the taxability of unearned revenue of Rs. 220.80 crores in the current year i.e. AY 2014-15.

42. As discussed above, the Appellant is engaged in the business of providing telecom services and only operates on the Pre-Paid business model. The Appellant does not provide Post Paid mobile services. The main revenue of the Appellant comprises of subscription revenue from Pre-Paid plans in the form of talk-time and revenue from Interconnect Usage charges are received from other telecom operators. During the year under consideration, the Appellant had reported a revenue from operations amounting to INR 1,263.4 crores in its audited financials. The subscription received which remained unutilised at year end amounting to INR 220.80 crores has been disclosed as Unearned Revenue as a Current Liability under the head "Other Liabilities" in the audited financials and has been offered to tax in the succeeding year when the said sum was accrued to it as income. In other words, the aggregate receipt by the appellant which included unearned revenue, aggregates to Rs. 1484.20 crores. The AO held that unearned revenue of Rs 220.80 crores is also the income accrued to the Appellant during financial year 2013-14 relevant to AY 2014-15 (i.e. the year of receipt of the said amount by the Appellant) since the conditions for revenue recognition stipulated in AS– 9 are unequivocally satisfied and no additional efforts are required by appellant to

keep on providing services. Also, he held that there is no ambiguity regarding the quantum and collection of revenue and that there is no further obligation of the appellant, to refund the money to the subscribers. The Ld. CIT (A) has confirmed the order of AO.

43. The submission of the appellant in respect of the aforesaid treatment by the AO is that, it follows mercantile system of accounting, wherein income on account of prepaid plans would accrue and be recognized over the period, in which the Appellant has the obligation to render the concerned services and not upon mere receipt of money. Further, as per the guidelines of DoT, the telecom companies are required to share their revenue with DoT as per terms of license granted to them. Accordingly, in order to adopt a transparent system for payment of license fee on revenue sharing basis, the Appellant installed integrated ERP software as per which the revenue in respect of services that has been provided to the customers was automatically recognized in the accounts i.e. talk time charges were recognized on the basis of actual use of customers which is a normal practice followed by the telecom companies as per the terms with DoT. The amount in respect of which the customers had not used the prepaid card, was treated as advance in the balance sheet and shown as liability towards customers under the head "Unearned Revenue". In the next year, when the talk time was actually used, the same was adjusted with Unearned Revenue and credited as income in the profit and loss account in that year. Once the validity period for the prepaid card was over, entire amount was recognized as

revenue, whether used or not. The said treatment is in conformity with AS-9 on Revenue Recognition which is duly disclosed in Notes to Accounts and has been consistently followed by the Appellant. For revenue from rendering of services, the AS-9 provides that revenue from services should be recognised when all of the following criteria are satisfied:-

- Performance has been achieved;
- Revenue is measurable, i.e., no significant uncertainty exists regarding the amount of the consideration that will be derived from rendering the service;
- It is not be unreasonable to expect the ultimate collection.

As all the above conditions are to be met cumulatively, thus revenue could not be recognised until the performance of service has been achieved. Since, the appellant is yet to provide the services in respect to the unutilised talktime of the customers, the revenue in respect to the same was not booked in the financial statements as income and recorded as unearned revenue in the Balance Sheet. The appellant has placed reliance on decision of **Hon'ble Delhi High court in the case of CIT v Dinesh Kumar Goel [2011] 331 ITR 10 (Delhi**) where it is specifically held that under AS-9 revenue is recognized only when the services are actually rendered. If the services are rendered partially, revenue is to be shown proportionate with the degree of completion of the services. Also, the Appellant had placed reliance on the decision of this Tribunal in the case of ACIT vs. Shyam Telelinks Limited (2013) (151 TTJ 464) wherein on the

identical facts, the additions made by the AO on account of unearned revenue is deleted by the Tribunal.

44. The findings of the AO that no additional efforts are required to keep on providing the services to the customers with respect to such unused talk time is incorrect since in the subsequent year, the appellant has to incur operational cost for providing such services which indeed has been incurred and had been stated of Rs 342.24 crores on an estimated basis. Further, the Ld. CIT (A) has also erred in our opinion in observing that the accrual of income takes place at the time of selling of recharge vouchers. The Ld. CIT(A) had also in fact directed the Appellant to provide the accounting entries with respect to the recognition of revenue in the books of accounts. The Appellant submitted the same during the course of appellate proceedings, when it had been explained that sales were recorded by the appellant as and when the services are consumed and completed and not prior to that. The payment received from distributors/customers was treated as advance of sale and shown as liability in the balance sheet. The advance amount is further transferred to unearned revenue upon activation of recharge coupons and as and when the customer utilises the services, the corresponding revenue is transferred from Unearned Revenue account to the income account. This entry is an automated entry made through the integrated ERP system used by the appellant for accounting and billing purpose. On monthly basis, the amounts are booked in the books of accounts for ease of convenience.

44. The appellant, in alternative, has also submitted that if the said some is taxable as income for the captioned year, the corresponding expenditure should be allowed against such income on the basis of matching principles on estimation basis. The appellant placed reliance on the decision of Supreme Court in the case of CIT vs. Bilahari Investment Pvt. Ltd. reported in 299 ITR 1 and Calcutta Co. Ltd. vs. CIT (1959) (37 ITR 1) (SC).

45. The learned CIT (DR) placed reliance on the order of AO and CIT(A) and argued that the income is accrued to the appellant in the current year as all the conditions as per AS-9 are already met and no further efforts are required from the appellant in future. Further, it was submitted by him that the appellant is under no obligation to refund the unused amount of talk time to the customers. He further contended that the decision of this Tribunal in the case of Shyam Telelinks Limited (Supra) deals with the method of accounting followed by the assessee. As this is the first year of operations of the appellant, there is no precedent in the case of appellant regarding the method accounting.

46. We have heard the rival submissions of both parties, perused the material placed on record and the orders of the lower authorities. The contention of Mr. Aggarwal is that the amount of unearned revenue has not accrued to the appellant during the captioned assessment year and accordingly, not taxable in given year. He has placed reliance on the decision of this Tribunal in the case of ACIT vs. Shyam Telelinks Limited (Supra) which was subsequently followed in the case of DCIT vs. Sistema Shyam

Teleservices Ltd. (ITA No. 3926/Del/2014). In addition to this, it was submitted that the appellant has duly recognised such amount as income in the next financial year (i.e. FY 2014-15) and offered the same to tax in the relevant assessment year. Therefore, the said additions only resulted in a timing difference and the overall taxable income remains the same and as such, there is no loss to the Revenue. The CIT (DR) relied upon the order of AO and Ld. CIT (A) based on the contention that the amount had accrued to the appellant in the captioned year and the AO had rightly brought to tax the same in the hands of the Company. We find that the facts of the present case are identical to the facts and circumstances of the case of ACIT vs. Shyam Telelinks Limited (Supra) and is squarely covered by the decision of this Tribunal wherein on the basis of identical facts the ITAT deleted the additions made by the AO. The relevant paras of the order of ITAT are reproduced as below:

> *"The very premise on which the Assessing Officer has proceeded in making the addition is not correct. The fundamental principle is that income is to be recognized when it accrues to assessee, whereas expenditure is to be charged the moment liability gets crystallized. The two aspects cannot be mingled and have to be considered separately. [Para 14]"*
>
> *"There is no gainsaying that receipt of amount and accrual of income are entirely two different concepts. Every receipt of amount cannot be treated as income and only that part of receipt can be treated as income which can be legally appropriated by the receiver in his own right to the exclusion of its giver. As long as the payer has some right over the amount it has paid to the payee, it cannot be said that income has accrued to the payee. A legal right to appropriate the amount should*

have accrued in favour of the payee for recognizing the sum as income. Unless debt has accrued in favour of payee, it cannot be said that income had accrued to the payee. [Para 15]"

"In the present case, the main dispute is regarding revenue recognition relating to unused talk time remaining available as at the end of the year. ***As noted earlier, there is no dispute that company had to provide talk time to its subscriber till the expiry of the period of card or till complete utilization of talk time, whichever is earlier. As long as assessee is under obligation to provide talk time, it cannot be said that a debt has accrued in favour of assessee-company against the subscriber. The assessee cannot appropriate the charges relating to available talk time to the exclusion of subscriber as long as it is under obligation to provide the said services****. Therefore, the Commissioner (Appeals) in principle has rightly accepted the mode of revenue recognition by assessee. The department has submitted that from the system followed by the assessee, there is every likelihood of revenue leakage. In this regard it was submitted that the matter can be restored to the file of Assessing Officer for verification of this aspect only. Therefore, the matter is restored to the file of the Assessing Officer for the limited purpose of verification whether in the subsequent year the assessee has declared the revenue in respect of expired prepaid cards or not. In case no discrepancy is found in this regard, no adjustment is called for with the assessee's mode of revenue recognition. [Para 16]"*

47. The aforesaid approach had also subsequently been followed by the Tribunal in the case of DCIT vs. Sistema Shyam Teleservices Ltd. (ITA No. 3926/Del/2014). The appellant being also in the same industry and therefore, following the same principle of recognizing the revenue as in the aforesaid cases, we uphold the contentions of the Assessee that the unearned revenue had accrued to the appellant as income for the AY 2014-

15. Accordingly, the earlier orders of this Tribunal are applicable in the case of the appellant also.

48. Hence, we direct the learned AO to examine whether unearned revenue of Rs 220.80 crores has been offered to tax in the succeeding year, if so, then the said amount is directed to be deleted. However, in case, the appellant, fails to satisfy the learned AO, then the AO is directed to allow corresponding expenditure incurred by the appellant to be stated Rs. 342.24 crores be allowed as deduction in the year under consideration, which of course subject to the verification by the learned AO. Accordingly, the above ground of appeal is allowed as directed above for statistical purpose.

49. In the result appeal of assessee is partly allowed for statistical purposes.

Order Pronounced in the open Court on 26th November, 2018.

Sd/-	Sd/-
[PRASHANT MAHARISHI]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 26th November, 2018