IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'C' NEW DELHI

BEFORE SHRI G. D. AGRAWAL, VICE PRESIDENT
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

I.T.A. No.2242/DEL/2014 (A.Y 2009-10)

DCIT Circle-11(1) New Delhi **(APPELLANT)**	Vs	Indus Towers Ltd. Bharti Cresent-1 Nelson Mandela Road, Vassant Kunj, Phase-2 New Delhi AABC17776B **(RESPONDENT)**

I.T.A. No.1040/DEL/2014 (A.Y 2009-10)

Indus Towers Ltd. Building No. 10, Tower A, 4th Floor, DLF Cyber City, Phase-II Gurgaon AABC17776B **(APPELLANT)**	Vs	Addl. CIT(A) Range11 New Delhi **(RESPONDENT)**

Appellant by	**Sh. Ajay Vohra, Sr. Adv**
Respondent by	**Sh. Ravi Sharma, Adv., Ms. Poonam Ahuja, CA**

Date of Hearing	**27.05.2019**
Date of Pronouncement	**07.06.2019**

ORDER

PER SUCHITRA KAMBLE, JM

These two appeals are filed by the Revenue as well as by the assessee against the order dated 31/01/2014 passed by CIT(A)-XV, New Delhi for Assessment Year 2009-10.

2. The grounds of appeal are as under:-

I.T.A. No.2242/DEL/2014

"1. *On the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 42,25,273/- made on account of disallowance of gratuity payments.*

2. On the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 30,32,30,226/- made on account of net accrual of equalization reserve.

3. On the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in deleting the addition of Rs. 1,23,75,65,807- made on account of disallowance interest on loan and respectively erred in deleting the addition of Rs. 1,07,50,16,411/- on account of disallowance of depreciation on telecom towers.

4. On the facts and circumstance of the case and in law, the Ld. CIT(A) has erred in restricting the addition of Rs. 31,03,91,544/- made on account of disallowance of IRU charges to the extent of Rs. 3,87,51,992/-."

I.T.A. No.1040/DEL/2014

"1. *That in the facts and circumstances of the case & in law, the Ld. CIT(A) erred in disallowing an amount of Rs. 3,87,51,992/- towards Indefeasible Right to Use ('IRU') charges while holding the said amount to be excessive and unreasonable, without appreciating that the entire amount of IRU charges claimed were duly confirmed by the recipient parties u/s 133(6) of the Act.*

1.1. That the Ld. CIT (A) erred in not appreciating the relevant clauses of IRU agreement(s) wherein it was categorically stated that the Appellant was bound to pay fixed monthly amount for IRU charges irrespective of the number of telecom sites leased.

2. That the Ld. CIT(A) erred in treating loan processing fee of Rs.21,87,50,000/- which is revenue in nature allowable under section 37(1) of the Act, as capital expenditure and thereby allowing depreciation instead of allowing it as revenue expenditure u/s 37(1) of the Act.

That the above grounds of appeal are without prejudice to each other."

3. The assessee is a public limited company registered under the Companies Act, 1956 and was incorporated 011 20.11.2007. The assessee is a joint venture among Bharti Infratel Ltd., Vodafone Essar Limited and Aditya Birla Telecom Ltd in the ratio of 42,42,16 respectively. The company has been formed with the main object of sharing telecom infrastructure among the various telecom service providers. It renders telecom supports services to several telecom operators viz. Bharti Airtel, Vodafone, Idea, Reliance, Aircel, Uninor, Datacom, Loop, BSNL, BNSL etc in 16 telecom circles through 93,723 telecom sites, out of which 79,239 telecom sites are taken under indefeasible right to use 011 01.01.2009 and remaining 14,484 sites are built and personalized by the assessee on its own during the financial year. The assessee company filed its E-return of income on 30.09.2009 declaring total loss, at Rs.452,16,70,660/- which was subsequently revised on 30.09.2010 revising the total loss at Rs.611,62,44,502/- (including unabsorbed depreciation of Rs.525,17,02,779/-). The return of income so revised is treated as valid return as it is furnished within the statutory time limit. The return was accompanied by the copies of final accounts and tax audit report u/s 44AB of the I.T. Act. The return was processed u/s 143(1) of the Act. The case was selected for scrutiny assessment and notice u/s 143(2) of the Act was issued and duly served on the assessee. In response to the above notices, Vice President-Taxation and Assistant Tax Manager of the company attended the proceedings from time to time, filed the details asked for as well as produced books of accounts which are examined by the Assessing Officer. On

commencement of the hearing for assessment, the assessee filed a letter dated 28.3.2011 wherein, it is informed that Hon'ble Delhi High Court has passed an order dated 07.03.2011 directing the completion of the assessment for the year under consideration by 15.06.2011 while disposing off of writ petition in the case of M/s Indus Towers Ltd (the assessee) Vs. Commissioner of Income Tax (TDS), Delhi. The department filed a miscellaneous application seeking extension of time for completion of the assessment till 30.09.2011. The Hon'ble High Court extended the time period for the completion of the assessment upto 31.08.2011 vide its order dated 03.06.2011. During the year under consideration, the assessee has claimed an expenditure of Rs. 9,79,20,569/- mainly 011 account of foreign exchange loss which is debited to the P&L a/c considering it as revenue in nature. To ascertain the actual nature of the expenditure, the assessee was asked to furnish the actual nature of expenditure and as to why the same should not he treated as capital expenditure, provided it relates to the acquisition of the capital asset. The assessment order was passed by the Assessing Officer thereby assessing loss of (-) Rs. 292, 27,98,604/- after making following additions/disallowances as under:-

S. No.	Particulars	Amount (in Rs.)
1	Foreign exchange fluctuation loss	9,05,76,526
2	Gratuity payments	42,25,273
3	Net accrual of equalization reserve	30,32,30,226
4	Capitalization of interest on loan	123,75,65,807
5	Depreciation on telecom towers	107,50,16,411
6	IRU charges	31,03,91,544
7	Depreciation on network cables, printers and scanners	94.78.632
8	Disallowance of loan processing fee	16,29,61,479
	TOTAL	**319,34,45,898**

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards Ground No. 1 of the Revenue's appeal, the Ld. DR submitted that the assessee is a joint venture among Bharti Infratel Ltd., Vodafone Essar Limited and Aditya Birla telecom ltd in the ratio of 42,42,16 respectively. The company was formed with the main objective of sharing telecom infrastructure among the various telecom service providers. It renders telecom service to several telecom operators viz. Bharti Airtel, Vodafone, Idea, Reliance, Aircel, Uninor, Datacom, Loop, BSNL etc in 16 telecom circle through 93,723 telecom sites out of which 79,239 telecom sites are taken under indefeasible right to use on 01.01.2009 and remaining 14,484 sites are built and personalized by the assessee on its own during the financial year. As regards Ground No. 1, the Ld. DR submitted that the question as to whether expenditure (in respect of so called gratuity can be said to be incurred wholly and exclusively for business purposes is a question of fact. This is settled position of law that u/s 37(1) onus is upon assessee to prove that the expenditure in respect of which this deduction is claimed was incurred wholly and exclusively for business purposes. It is undisputed that this expenditure is no salary in classic sense which is paid for the daily job/service done by the employee. The assessee incurred part of the expenditure in respect of past services of the employees which were rendered to earlier employers not to the assessee. These earlier employers are shareholders/JV partners in the assessee company. The duration of service with the assessee company is small very small in certain cases as compared to the duration of service with earlier employees. It seems that the earlier employers did not pay any gratuity in lieu of the services rendered by these employees to them earlier employers in spite of the fact that various such employees rendered services for more than five years with the earlier employer and they were compensated for all the services rendered by these employees with the 'group' at the time of leaving the assessee. In view of the above, the assessee could not discharge its onus to prove that the expenditure in respect of so called gratuity can be said to have been incurred

wholly and exclusively for business purposes. Therefore, the Assessing Officer rightly disallowed this deduction. The Ld. DR further submitted that the CIT(A) erred in holding that this was a contractual obligation, hence allowable u/s 37(1). The CIT(A) erred in holding that each and every contractual obligation is wholly and exclusively for business purposes. The CIT(A) erred in not appreciating that the Assessing Officer appreciating the relevant evidences returned a logical and implicit finding that the expenditure in respect of so called gratuity cannot be said to have been incurred wholly and exclusively for business purposes. The CIT(A) has not found that the said finding in perverse or in the process of reaching the said finding principles of natural justice has not been followed. The CIT(A) erred in not appreciating that the reading of Section 36(1)(v), in light of whole scheme of computation of income from profits and gains of business or profession, deductions in respect of payment of gratuity in lieu of period of service rendered with an employer is not allowed being capital and non-recurring in nature and also relates to earlier period. That's why contribution to approved gratuity fund created for exclusive benefit of its employees under trust. The CIT(A) erred in not appreciating that there is bar on allowability of deduction under Section 37(1) in respect of expenditure which are in nature of expenditure in respect of whom deduction is allowed under any other section. Natural connotation of the term nature narrows down the scope section 37(1).

6. The Ld. AR submitted that at the time of incorporation, some of the employees from Bharti, Vodafone and Idea group companies were transferred to the assessee and were enrolled as full time employees. The assessee was required to pay "ex-gratia/gratuity" amount in terms of the terms and conditions of appointment for such employees. Sample employment contracts, details of all the employees transferred from Bharti, Vodafone and Idea group companies, period of employees' continuous service and the amount of gratuity paid were duly furnished before CIT(A). It is the practice of the assessee to pay ex-gratia to its employees as matter of general practice and on

the principles of commercial expediency. No disallowance under section 40A(7) was called for, as it was not a case that the assessee had created a provision towards gratuity. In present case, gratuity was actually paid. The Ld. AR relied upon the decision of the Hon'ble Madras High Court in case of CIT vs. Premier Cotton Spg. Mills Ltd. (2003) 131 Taxman 79 (Mad.). The Ld. AR also relied upon the Hon'ble Supreme Court decision in case of Kerala Road Lines vs. CIT (2008) 168 Taxman 308 (SC) wherein it was held that payment for contractual obligation would also be a business expenditure. The Ld. AR relied upon the decision of the Hon'ble Gujarat High Court in case of CIT vs. Laxmi Cement Distributors (P.) Ltd. (1976) 104 ITR 711 (Guj).

7. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that at the time of incorporation, some of the employees from Bharti, Vodafone and Idea group companies were transferred to the assessee and were enrolled as full time employees. The assessee was required to pay "ex-gratia/gratuity" amount in terms of the terms and conditions of appointment for such employees. Sample employment contracts, details of all the employees transferred from Bharti, Vodafone and Idea group companies, period of employees' continuous service and the amount of gratuity paid were duly furnished before CIT(A). The CIT(A) called for the remand report and the Assessing Officer has not pointed out any fault with the evidence produced by the assessee. In present case, gratuity was actually paid. The Ld. AR relied upon the decision of the Hon'ble Madras High Court in case of CIT vs. Premier Cotton Spg. Mills Ltd. (2003) 131 Taxman 79 (Mad.) wherein it was held that if the entire amount is not allowable under section 36(1)(v), the balance amount would necessarily have to be allowed as a business expenditure under section 37 of the Act and also that section 40A(7) of the Act has no application when there was an actual payment to an approved gratuity fund. Thus, Ground No. 1 of Revenue's appeal is dismissed.

8. As regards Ground No. 2 of Revenue's appeal, the Ld. DR submitted that

during the year the assessee debited an amount of Rs. 16,21,45,355/- to the P&L Account under the head lease equalization reserve which is part of the lease rent to be paid or payable to the owner of the premise on which telecom sites (towers) are installed. Further, the debited amount has been added back in the computation of income under the normal provision of the Act. Similarly, the assessee enters into an agreement with telecom companies to provide them space on its towers in lieu of which services charges are being received. During the year, the assessee has credited an amount of Rs. 46,53,75,581 to its revenue account under the head revenue equalization reserve which is the part of service charges to be collected or collectible from telecom companies on account of use of space on assessee towers, further, credited amount has been reduced from the profit in the computation of income. The Ld. DR further submitted that the Income Tax Act permits two methods of accounting – mercantile (accrual) and cash. Under the mercantile method, income and expenses are accounted as and when the right to receive or the right to pay arises. Under the cash method, income and expenses are accounted on actual receipt or payment. The Income Tax Act clearly lays down the scope of total which includes both income received as well income accrued. From a conjoint reading of Section 5 and Section 145(2) it is amply clear that assessee is bound to follow either the cash system or mercantile system of accounting. The Ld. DR relied upon the decision of the Delhi Tribunal in case of KC Kailash Associates (ITA No. 2399/Del/2010) wherein it is held that use of mix system of accounting is prohibited. The Ld. DR relied upon the following decisions:

i) CIT vs. A. Gajapathy Naidu 1964 AIR1653

ii) CIT vs. Vazir Sultan & Sons 1959 Supp. 2 SCR 375

iii) S. D. Sasson & Co. Ltd. vs. CIT 1955 1 SCR 313

iv) Rogers Pyatt Shellack & Co. vs. Secretary of State (1929) ILR 52 Cal 1

v) CIT vs. Simplex Concrete Piles India (P) Ltd. 179 ITR 8

vi) CIT vs. Singari Bai

9. The Ld. AR submitted that due to adoption of AS 19, the assessee debited an additional amount of Rs. 16,21,45,355 to P&L over and above the actual lease expenditure/revenue during the assessment year. The additional expenditure/revenue is nothing but an average of increase in future lease rental over the lease term, which is credit to special account revenue/lease equalization reserve under AS 19. Further, the lease/revenue equalization reserve as per AS 19 being notional in nature has been added back in the computation of income. Lease expense is cancellable by giving one month's notice to the owner to terminate the agreement. Thus, liability to pay increased payments is contingent upon use of the premises in future. Thus additional expenditure representing lease equalization reserve is a notional expense not allowable under Section 37 of the Act. The Ld. AR relied upon the decision of the Hon'ble Supreme Court in case of CIT vs. Shoorji Vallabhdas & Co. (1962) 46 ITR 144 (SC) and also relied upon the decision of the Hon'ble Apex Court in case of Godhra Electricity Co. Ltd. (1997) 91 Taxman 351 (SC). The Ld. AR relied upon the following judicial decisions:-

i) CIT vs. Reliance Industrial Infrastructure Ltd. (2015) 234 Taxman 256

ii) CIT vs. Bilahari Investment (P.) Ltd. (2008) 299 ITR 1 (SC)

iii) CIT vs. Realest Builders & Services Ltd. (2008) 307 ITR 202 (SC)

iv) CIT vs. Excel Industries Ltd. (2013) 358 ITR 295 (SC)

v) CIT vs. Vishnu Industrial Gases Pvt. Ltd. (ITR No. 229/1988 [Del. Tri.])

vi) CIT vs. Dinesh Kumar Goel (2011) 331 ITR 10 (Del)

vii) CIT vs. Nagri Mills Co. Ltd. (1958) 33 ITR 681 (Bom)

10. We have heard both the parties and perused all the relevant material available on record. From the perusal of records it can be seen that the assessee debited an additional amount of Rs. 16,21,45,355 to P&L over and above the actual lease expenditure/revenue during the assessment year as the assessee adopted AS 19. The liability to pay increased payments is contingent upon use of the premises in future. Thus additional expenditure representing lease equalization reserve is a notional expense not allowable under Section 37 of the Act. The Ld. AR relied upon the decision of the Hon'ble Supreme Court in case of CIT vs. Shoorji Vallabhdas & Co. (1962) 46 ITR 144 (SC) wherein it was held that "If income does not result at all, there cannot be a tax, even though in book-keeping, an entry is made about a "hypothetical income", which does not materialize". The Ld. AR also relied upon the decision of the Hon'ble Apex Court in case of Godhra Electricity Co. Ltd. (1997) 91 Taxman 351 (SC) wherein it was held that only real income can be brought to tax. Both these decision are applicable in the present case as the assessee has made hypothetical income and is not a real income which cannot be taxed. Hence, Ground No. 2 of the Revenue's appeal is dismissed.

11. As regards to Ground No. 3 of the Revenue's appeal, the Ld. DR submitted that during the Financial Year 2008-09, the assessee has borrowed loan of Rs. 1850 crore from several financial banks and an amount of Rs. 3826.62 crores from its shareholders which is deployed for its business purpose. The total interest being paid on these borrowed funds are at Rs. 247,51,31,614/-. The Ld. DR submitted that it is purely a question of fact as to whether any part of loan taken is used to finance activity of construction of communication towers. It is a fact that being first year of operation, the assessee does not have internal accrual to finance the said activity which creates capital assets i.e. towers. As per the assessee details of telecom sites are voluminous in nature and hence were furnished to the Assessing Officer on a sample basis. However, before the CIT(A), the assessee took plea that these details were never called for. The CIT(A) erred in relying upon the

statements of the assessee that on an average the tower is constructed within 45 days where as there is no material to support this statement. Moreover, it is not necessary that each and every tower was constructed within 45 days. The statement of assessee that loan taken for construction of a particular tower was disbursed only after the construction of site was over which was already handed over to the telecom companies for business operations, is not supported by any material evidence. In fact, assessee has not mentioned any material to suggest that separate loan taken for construction of a particular tower. AS 16 defines a borrowing cost to be interest and other costs incurred by an enterprise in connection with borrowing of funds with reference to a qualifying asset. The term borrowing implies mobilizing of funds which are returnable. The plea of the assessee is based upon the implied statement that the loan was taken for each and every tower, separately after it was constructed, capitalized and put to use. The order of CIT(A) erred in not discussing evidence indicating this fact. In fact, the CIT(A) has accepted additional evidences in form of Ready For Active Installation (RFAI) Certificate in respect of 114 sites as a sample as submitted by the assessee. There is nothing in the order of the CIT(A) to show that these RFAI certificates indicate that each and every tower constructed during the year was up to use. It shows non-application of mind on the part of the CIT(A). The Ld. DR relied upon the decision of the Hon'ble Supreme Court in case of Punjab State Industrial Corporation Ltd. vs. CIT 225 ITR 792 (SC).

12. The Ld. AR submitted that construction of towers began in April 2008 whereas IRU agreement was entered into 1st January, 2009. The Assessing Officer was incorrect in stating that assessee commenced business through lease of towers under IRU agreement. Receipt of equipment and services is accounted for as CWIP while the telecom site is under construction and are capitalized to fixed assets only after site is completed and starts generating revenue. Assessee gets an average credit period of 90 days from its suppliers

for various material and services while erection and commissioning of telecom sites normally takes approx. 45 days for being ready to use. Accordingly, a telecom site is ready to use even before the suppliers are paid. Hence no loan needs to be drawn when the site is under construction. Details of 14,484 self-constructed towers were submitted as additional evidences before CIT(A) and sample RFAI certificates were furnished to CIT(A). The Ld. AR relied upon the following judicial decisions:

i) Capital Bus Service (P.) Ltd. vs. CIT 123 ITR 404 (Del.) wherein it is held that depreciation must be granted in case asset is ready for use.

ii) CIT vs. Insilco (2009) 179 Taxman 55 (Del)

iii) CIT vs. Max India Ltd. ITA No. 186 of 2013 (P & H High Court)

iv) CIT vs. Reliance Utilities & Power Ltd. (2009) 178 Taxman 135 (Bom)

v) East India Pharmaceutical Works Ltd. vs. CIT (1997) 91 Taxman 185 (SC)

vi) HDFC Bank Ltd. vs. DCIT (2016) 67 taxmann.com 42 (Bom)

vii) Bright Enterprises (P.) Ltd. vs. CIT (2015) 61 taxmann.com 73 (P & H HC)

viii) 193 TTJ 150 (Del)

13. We have heard both the parties and perused all the relevant material available on record. The construction of towers began in April 2008 whereas IRU agreement was entered into 1st January, 2009. Thus the Assessing Officer was factually incorrect in observing that assessee commenced business through lease of towers under IRU agreement. The submissions of the Ld. AR that Receipt of equipment and services is accounted for as CWIP while the telecom site is under construction and are capitalized to fixed assets only after

site is completed and starts generating revenue and the assessee gets an average credit period of 90 days from its suppliers for various material and services while erection and commissioning of telecom sites normally takes approx. 45 days for being ready to use is correct as per the records submitted before the CIT(A). Accordingly, a telecom site is ready to use even before the suppliers are paid. Hence no loan needs to be drawn when the site is under construction. Details of 14,484 self-constructed towers were submitted as additional evidences before CIT(A) and sample RFAI certificates were furnished to CIT(A). Thus, after going through the evidence, the CIT(A) arrived at a proper finding and correctly deleted this addition. There is no need to interfere with the findings of the CIT(A). The case laws relied upon by the Ld. DR is factually different from the present assessee's case as well as the ratio laid down does not apply. Therefore, Ground No. 3 of the Revenue's appeal is dismissed.

14. As regards to Ground No. 4 of the Revenue's appeal and Ground No. 1 of assessee's appeal, the Ld. DR submitted that the assessee had taken 79,239 telecom sites towers under Indefeasible right to use agreement from Bharti, Vodafone and Idea w.e.f. 01.01.2009 and total indefeasible right to use charges incurred by the assessee for 3 months i.e. from 01.01.2009 to 31.03.2009 was Rs. 268.20 crore which has been debited in P & L account claiming it as allowable expenditure. Notices u/s 133(6) were issued to all parties so as to confirm the number of towers being given on IRU agreement to the assessee, total cost incurred by the companies in erecting the towers eventually being leased out to the assessee, WDV of the towers in the books of the party as on the date of IRU agreement and total IRU charges being received by the above parties from the assessee during F.Y. 2008-09. The Ld. DR submitted that the CIT(A) passed a judicious decision but erred in certain points. The Ld. DR submitted that as per the Assessment Order, when certain confirmations were not received/there was mismatch between figures of towers taken on lease as shown by the assessee vis-à-vis as per confirmations received by way of enquiry u/s 133(6), the assessee was categorically asked to furnish

confirmation which it failed to furnish. As per statement of facts submitted before the CIT(A), the assessee did not dispute the fact that the assessee was categorically asked to furnish confirmation which it failed to furnish. However, as per Para 7.3.5 of CIT(A)'s order, the Assessing Officer took plea that the Assessing Officer did not ask the assessee to furnish the said confirmation. As per para 7.4 of CIT(A)'s order, the plea of the assessee has been taken as gospel truth without making any enquiry. It shows non-application of mind by the CIT(A). Therefore, order of the CIT(A) regarding admission of three confirmation letters as 'additional evidence' is erroneous as well as illegal.

15. The Ld. AR submitted that from the various clauses of IRU agreement with Bharti Infratel Limited, it can be inferred that passive infrastructure is defined as "Passive Infrastructure at any telecommunication site, any infrastructure located at such site which is permitted by applicable law to be shared, but shall not include any active infrastructure" without any reference to number of sites. Essence of IRU agreement was to make all sites available to Indus as per Clause C & D in the preamble. No clause in IRU agreement on proportionality of consideration which was fixed with reference to specific circles where towers were located. On the contrary, as per clause 2.1.3 consideration was not subject to change even when more towers were to be added. Amount paid as confirmed by various parties is no case less than amount as per IRU agreement and in most cases same as stated in IRU agreement. The Assessing Officer in his notice u/s 133(6) did not ask for number of tower confirmation. The Assessing Officer only asked for amount confirmation. In fact as per Table 1, page 44 of the CIT (A) order, there was excess confirmation of Rs. 75,41,467 by various vis-à-vis IRU agreements. There are cases where parties have confirmed more towers than as per IRU agreement. Similar clauses are present in other IRU agreements.

16. We have heard both the parties and perused all the relevant material

available on record. The assessee had taken 79,239 telecom sites towers under Indefeasible right to use agreement from Bharti, Vodafone and Idea w.e.f. 01.01.2009 and total indefeasible right to use charges incurred by the assessee for 3 months i.e. from 01.01.2009 to 31.03.2009 was Rs. 268.20 crore which has been debited in P & L account claiming it as allowable expenditure. Notices u/s 133(6) were issued to all parties so as to confirm the number of towers being given on IRU agreement to the assessee, total cost incurred by the companies in erecting the towers eventually being leased out to the assessee, WDV of the towers in the books of the party as on the date of IRU agreement and total IRU charges being received by the above parties from the assessee during F.Y. 2008-09. The Ld. AR contended that as per clause 2.1.3 consideration was not subject to change even when more towers were to be added. Amount paid as confirmed by various parties is no case less than amount as per IRU agreement and in most cases same as stated in IRU agreement. The Assessing Officer in his notice u/s 133(6) did not ask for number of tower confirmation. The Assessing Officer only asked for amount confirmation. From the records it can be seen that the confirmations filed by the assessee was not properly verified either by the CIT(A) as well as by the Assessing Officer and both the authorities take the cognizance of the relevant clauses of the IRU agreement. Therefore, it will be appropriate to remand back this issue to the file of the Assessing Officer to take into account all the relevant evidence. Needless to say that the assessee be given proper opportunity of hearing by following principles of natural justice. Hence Ground No. 4 of the Revenue's appeal and Ground No. 1 of assessee's appeal are partly allowed for statistical purpose.

17. As regards Ground No. 2 of the assessee's appeal, the Ld. DR submitted that there is no dispute with the principle that expenditure to acquire capital has to be treated as capital expenditure. The CIT(A) has considered the material on record and given a finding of fact that loans were taken for the purpose of acquisition of capital assets. Therefore, no fault can be found with

the order of the CIT(A). The Ld. DR relied upon the ratio of Hon'ble Supreme Court in case of Punjab Industrial Corporation Ltd. vs. CIT (Supra).

18. The Ld. AR submitted that assessee had taken loans from banks and financial institutions amounting to Rs. 1850 crores for operating its business and banks charges Rs. 21,87,50,000/- as one time processing fees (upfront fee). The entire amount of loans processing fees has been claimed as revenue expenditure u/s 37 of the Act, but for accounting purposes assessee amortised the total fees over the period of respective loan by debiting an amount of Rs. 4,45,38,521 to its P&L, based on number of years for which loan was used in this assessment year. The aforesaid expense has been incurred for getting the finance for normal business operations and does not provide any enduring benefit to the assessee. Business need funding from time to time and thus this expense is routine business expense claimed as revenue in nature. In fact, CIT(A) gave finding with respect to disallowance of interest and depreciation that "none of the loans related to incomplete towers shown as CWIP as the appellant has yet to make payment for such suppliers" i.e. loans were not utilized for construction of telecom towers. In view of this finding, expense related to loan cannot be capital in nature and allowable as revenue expenditure. Alternatively, the upfront fees paid to banks is in the nature of interest under Section 2(28A) of the Act which has very wide definition of interest and "includes any service fee or other charge in respect of the moneys borrowed or debt incurred". The Ld. AR relied upon the decision of the Hon'ble Delhi High Court in case of CIT vs. Gujarat Guardian Ltd. (2009) 177 Taxman 434 (Del) and also CIT vs. Bharti Telenet Ltd. & CIT vs. Bharti Infotel Ltd. in ITA Nos. 1110/2011, 386/2012, 387/2012 and 193/2013 dated 03.02.2015.

19. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the assessee had taken loans

from banks and financial institutions amounting to Rs. 1850 crores for operating its business and banks charges Rs. 21,87,50,000/- as one time processing fees (upfront fee). The entire amount of loans processing fees was claimed as revenue expenditure u/s 37 of the Act. The Ld. AR contented that for accounting purposes assessee amortised the total fees over the period of respective loan by debiting an amount of Rs. 4,45,38,521 to its P&L, based on number of years for which loan was used in this assessment year. The aforesaid expense incurred for getting the finance for normal business operations and does not provide any enduring benefit to the assessee. Business need funding from time to time and thus this expense is routine business expense claimed as revenue in nature. In fact, CIT(A) gave finding with respect to disallowance of interest and depreciation that "none of the loans related to incomplete towers shown as CWIP as the appellant has yet to make payment for such suppliers" i.e. loans were not utilized for construction of telecom towers. In view of this finding, expense related to loan cannot be capital in nature and allowable as revenue expenditure. These contentions of the Ld. AR are acceptable as the funding is required in business necessities from time to time and these expenses are regular business expenses claimed by the assesse. The assessee has filed the relevant evidence before the Revenue authorities as to the expenses and there is no adverse finding that these expenses are not utilized for the business. Thus, the assessee rightly claimed it as revenue expenses. Thus, Ground No. 2 of the Assessee's appeal is allowed.

20. In result, both Revenue's appeal as well as assessee's appeal are partly allowed for statistical purpose.

Order pronounced in the Open Court on 07th June, 2019.

Sd/- Sd/-

(G. D. AGRAWAL) **(SUCHITRA KAMBLE)**

VICE PRESIDENT **JUDICIAL MEMBER**

Dated: 07/06/2019

R. Naheed *

Copy forwarded to:

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

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	27.05.2019
Date on which the typed draft is placed before the dictating Member	28.05.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date of pronouncement: Date on which the final order is uploaded on the website of ITAT	07th June, 2019
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	