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

BEFORE,
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.6547/Del/2019
(ASSESSMENT YEAR 2013-14)

ITA No.6548/Del/2019
(ASSESSMENT YEAR 2014-15)

Asst. CIT Circle-4(2) New Delhi	Vs.	M/s. Bharti Haxacom Ltd. Bharti Crescent 1 Nelson Mandela Road Vasant Kunj, Phase-II New Delhi 110 070 PAN-AAACH 1766P
(Appellant)		**(Respondent)**

Appellant by	Mr. P. Praveen Sidharth, CIT-DR
Respondent by	Mr. Anil Bhalla and Mr. Vinay Meena, CAs

Date of Hearing	26/06/2023
Date of Pronouncement	19/07/2023

ORDER

PER M. BALAGANESH AM:

Both appeals of the Revenue arises out of the order of the Learned Commissioner of Income Tax (Appeals)-33, New Delhi, [hereinafter referred to as 'Ld. CIT(A)'] in Appeal Nos.429/17-18 and 427/17-18 dated 27/05/2019 against the order passed by

Assistant Commissioner of Income Tax, Circle-4(2), New Delhi (hereinafter referred to as the 'Ld. AO') u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on 29/12/2016 and 30/12/2016 for the Assessment Years 2013-14 and 2014-15 respectively.

2. The Revenue has raised the following grounds of appeal in both appeals.

ITA No.6547/Del/2019

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the allowance of Rs.103,63,54,345/- made on account of amortization of variable license fee u/s 35ABB of the I.T. Act, 1961 u/s 37(1) of the I.T. Act, 1961 by treating as revenue expenditure.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition of Rs.13,4,65,160/- made on account of subscriber verification penalty u/s 37(1) of the I.T. Act, 1961 by ignoring the fact that expenditure is totally penal in nature and not allowable as business expenditure u/s 37 of the I.T. act, 1961.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition made on account of disallowance u/s 40(a)(ia) of the I.T.Act, 1961 amount to Rs.40,71,40,308/-.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forgo any grounds(s) of appeal at any time before or during the hearing of this appeal."

ITA No.6548/Del/2019

"1. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the allowance of Rs.459,23,08,476/- made on account of amortization of variable license fee u/s 35ABB of the I.T. Act, 1961 u/s 37(1) of the I.T. Act, 1961 by treating as revenue expenditure.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition of Rs.2,80,83,232/- made on account of subscriber verification penalty u/s 37(1) of the I.T. Act, 1961 by ignoring the fact that expenditure is totally penal in nature and not allowable as business expenditure u/s 37 of the I.T. act, 1961.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is right in deleting the addition made on account of disallowance u/s 40(a)(ia) of the I.T.Act, 1961 amount to Rs.83,46,72,606/-.

4. The appellant craves leave for reserving the right to amend, modify, alter, add or forgo any grounds(s) of appeal at any time before or during the hearing of this appeal."

2. As identical issues are involved in both these appeals, hence they are taken up together and disposed of by this common order for the sake of convenience. The appeal of the Revenue for AY 2013-14 is taken up for adjudication and the decision rendered thereon shall apply with equal force for AY 2014-15 also in view of identical facts except with variance in figures.

4. The first issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in deleting the disallowance made on account of amortization of variable licence fee and allowing the same as revenue expenditure u/s 37(1) of the Act.

5. We have heard the rival submissions and perused the material available on record. The assessee company is engaged in the business of Cellular phone and landline services and its associated value added services in the telecom circle of Rajasthan and North East pursuant to the licence granted by Department of Telecommunication. A sum of Rs.394,76,33,759/- was debited in the P&L account towards payment of licence fee and spectrum charges. The Ld. AO show caused the assessee as to why this amount should not be amortized over the remaining period of licence in case of each circle u/s 35ABB of the Act instead of allowing it as revenue expenditure. The assessee gave its submissions and also informed the Ld. AO that issue is covered in its favour by the decision of Hon'ble Delhi High Court in its own case wherein it was allowed it a revenue expenditure. The Ld. AO observed that revenue's appeal before the Hon'ble Supreme Court is

pending and hence in order to keep issue alive, the Ld. AO proceeded to disallow the same as revenue expenditure and allowed amortization of expenditure in terms of section 35ABB of the Act. The Ld. CIT(A) deleted the same and allowed the expenditure as revenue expenditure by following the decision of Hon'ble Jurisdictional High Court in assessee's own case. We find that since the relief has been granted by the Ld. CIT(A) by following the decision of Hon'ble Jurisdicitonal High Court in assessee's own case on the impugned issue, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly, ground no.1 raised by the revenue is dismissed.

6. Ground no.2 raised by the Revenue is challenging the deletion of disallowance of Rs.13,54,65,160/- towards Subscriber Verification Penalty u/s 37(1) of the Act.

7. We have heard the rival submissions and perused the material available on record. The assessee during the year had paid an amount of Rs.13,54,65,160/- towards Subscriber Verification Penalty to the Department of Telecom. As per the licence agreement entered by the assessee with the Department of Telecommunication

("DOT"), the assessee is supposed to ensure adequate verification of each and every customer before enrolling him as a subscriber while granting new connection. In other words, the assessee is supposed to follow the Know Your Customer (KYC) norms stipulated by DOT. When there is deficiency in adhering to aforesaid KYC norms, the DOT Enforcement, Resources and Monitoring Cell, after audit of the company, levies penalty on the assessee. This penalty was treated by the Ld. AO as amount paid for violation of any law in force and thereby it attracts the provision of Explanation to section 37(1) of the Act. Accordingly, the Ld. AO proceeded to disallow the same in terms of Explanation to section 37(1) of the Act. The assessee pleaded that this payment is made as part and parcel of contractual obligation and that it was not paid for breach of any law for the time being in force. Further, it was submitted that the very same issue was covered in favour of the assessee by the order of the Ld. CIT(A) in Assessment Years 2012-13 and 2015-16, wherein it was held that the penalty levied due to omission in verification of subscribers data without infringement of law is to be treated as compensatory in nature. Accordingly, the Ld. CIT(A) following the precedents and decision of various High Courts, deleted the disallowance.

8. We find that this issue is already settled in favour of the assessee by decision of this Tribunal in assessee's own case for AY 2015-16 in ITA No.3522/Del/2019 dated 16/06/2013 wherein it was held as under:

> *10. We have considered rival submissions, decisions relied upon and materials on record. Undisputedly, the disallowance of expenditure made by the Assessing Officer is in relation to penalty paid to the Department of Telecommunication for violation of KYC norms. The issue arising for consideration is, whether the payment of penalty is allowable as business expenditure u/s. 37(1) of the Act. A reading of section 37(1) makes it clear that any revenue expenditure laid out or expended wholly or exclusively for the purpose of business is allowable as deduction while computing the business income. However, Explanation 1 to said section carves out an exception by providing that any expenditure incurred by an assessee for a purpose, which is an offense or which is prohibited by law, shall not be allowed as deduction. Therefore, it needs to be examined whether penalty paid for violation of KYC norms falls within the purview of expenditure incurred towards an offense or is prohibited by law.*
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> *11. Before us, learned Departmental Representative has furnished certain circulars/guidelines issued by the Department of Telecommunication, Government of India. As could be seen from the documents furnished before us, one of the conditions of the license agreement between the Department of Telecommunication and the service provider/licensee, is that the licensee shall ensure adequate verification of each and every customer before enrolling him as a subscriber and instructions issued by the licensor in this regard, from time to time, shall be scrupulously followed by the licensee. One more condition of the license agreement is, the licensor may also impose financial penalty for violation of terms and conditions of license agreement.*
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> *12. The communication dated 24.12.2008 issued by the Department of Communication, Government of India, further stipulates that if any number is found working without proper verification, a minimum penalty of Rs.1000/- per violation of subscriber number verification shall be levied on the licensee apart from immediate disconnection of the subscriber number by the licensee. It further provides that in case the licensee is not complying with the service verification condition, penalty at graded scales to be imposed after 1" April 2009 as a deterrent measure. However, the*

issue is, whether the penalty is paid for any offense or is prohibited by law as per Explanation 1 to section 37. From the facts on record, it does not transpire that the violation of KYC norms entails any criminal liability or prosecution. As per the license agreement, for violation of any terms of the agreement including KYC norms, the assessee is to be visited with penalty of various amounts. As already discussed, such penalty is imposed as a deterrent measure and not for any offense or due to prohibition of law. It is further necessary to observe, the penalty arises because of breach of certain terms and conditions of the license agreement, hence, in regular course of business.

. Pertinently, in case of Mangal Keshav Securities Ltd. vs. ACIT (2016) 46 ITR(T)458 (Mumbai), the coordinate Bench, while dealing with more or less identical issue of penalty levied by Stock Exchange for violation of KYC norms, has held that payment made towards penalty for violation of KYC norms would not fall within the ambit of Explanation 1 to section 37(1) of the Act. Thus, in our view, in the facts of assessee's case, the exceptions provided under Explanation 1 to section 37(1) of the Act will not get attracted. Thus, we do not find any infirmity in the decision of learned Commissioner (Appeals) in deleting the disallowance. Ground raised is dismissed.

8.1. Respectfully following the aforesaid decision, the Ground No. 2 raised by the revenue is dismissed.

9. The last issue to be decided in this appeal is as to whether the Ld. CIT(A) was justified in deleting the disallowance of expenditure u/s 40(a)(ia) of the Act.

10. We have heard the rival submissions and perused the materials available on record. We find that the assessee sells the pre-paid SIM Card with available talk time worth Rs.100/- at a discounted price of Rs 70 to the distributors. This discount charges of Rs 30 (100-70) is the subject matter of dispute before us. The

case of the assessee is that its relationship with the distributors is that of Principal to Principal. Accordingly, no tax would be deductible on the said discount charges. The case of the Revenue is that relationship between the assessee and its distributors would be that of Principal and the Agent. Accordingly, difference between the maximum retail price and discounted price i.e., Rs.30/- in the aforesaid example (100-70), in the opinion of the Department, amounts to commission warranting deduction of tax at source in terms of section 194H of the Act. Since, no tax was deducted on the said transaction, the Ld. AO provided to treat the discount charges on prepaid SIM Card as not allowable in terms of section 40(a)(ia) of the Act. The Ld. CIT(A) followed the decision of various High Courts on the issue and deleted the disallowance. We find that this issue is covered in assessee's own case by the decision of this Tribunal in assessment year 2015-16 in ITA No.3522/Del/2019 dated 16/06/2012 wherein it was held as under:

> *14. In ground No. 3, Revenue has challenged deletion of disallowance of Rs 14.37,08,678/-made u/s. 40(a)(la) of the Act.*
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> *15. Briefly, facts are, in course of assessment proceedings, the Assessing Officer noticed that in the year under consideration, the assessee has provided discounts to pre-paid card distributors amounting to Rs.32.61.66.998/- for Rajasthan Circle and R&1.12.40.84.755/- for North East Circle. He observed, free airtime is given as a discount and margin to*

the distributors on the retail price of start up kits, recharge coupons etc. According to the Assessing Officer, such discount/margin given to the distributors is in the nature of commission. Hence, the assessee was obligated to deduct tax at source in terms of section 194H of the Act. Since, the assessee had not deducted tax at source while allowing such discounts/margins to the distributors, the Assessing Officer disallowed an amount of Rs.14,37,08,678/- by invoking provisions of section 40(a)(ia) of the Act. Assessee contested the aforesaid disallowance by filing an appeal before Id. Commissioner (Appeals). Noticing that identical issue has been decided in favour of the assessee by the Hon'ble Gauhati High Court, learned Commissioner (Appeals) deleted the disallowance.

16. Before us, it is a common point between the parties that the issue stands squarely covered in favour of the assessee by decisions of various Benches of the Tribunal as well as Hon'ble Gauhati High Court.

17. Having considered rival submissions, we find, while dealing with identical issue in assessee's own case for earlier assessment years, various Benches of the Tribunal have held that the provisions of section 194H are not attracted to the discounts given to distributors. Hence, section 40(a)(a) would not be applicable. Pertinently, the Hon'ble Rajasthan High Court has decided the issue in favour of the assessee in earlier assessment years. In fact, in the latest order passed for the assessment year 2009-10, the Tribunal in order dated 08.11.2016 in ITA No. 5980/Del/2012, has deleted similar disallowance, following the coordinate Bench decision. Facts being identical, respectfully following the decision of the coordinate Benches in assessee's own cases as well as the Hon'ble Rajasthan High Court, we hold that the provisions of section 194H are not applicable to the discounts given to the distributors. Therefore, we do not find any infirmity in the decision of learned first appellate authority in deleting the disallowance made u/s. 40(a)(ia) of the Act. Ground raised is dismissed.

10.1. Accordingly, ground no.3 raised by the revenue is dismissed.

11. In the result, the appeal of the Revenue is dismissed for AY 2013-14.

12. As stated earlier, the grounds raised by the revenue for AY 2014-15 are exactly identical with those grounds raised in AY 2013-

14. Hence, the decision rendered herein above for AY 2013-14 shall apply mutatis mutandis to AY 2014-15.

13. In the result, both the appeals filed by the Revenue are dismissed.

Order pronounced in the open court on 19th July, 2023.

Sd/-	Sd/-
(ANUBHAV SHARMA)	**(M. BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 19/07/2023
Pk/sps
Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI