

the assessee on 15.10.2010 declaring total income of Rs 32,34,578/-. During the course of assessment proceedings, the Id AO observed that the assessee had debited in its Profit and Loss Account Technology Upgradation Expenses of Rs 19,31,097/- and asked the assessee as to why the same should not be treated as capital expenditure. The assessee replied to the same by enclosing the copy of the bills by stating that the said expenditure is incurred for maintenance of the transmitting system. It was stated that in the Balance Sheet, the assessee had shown Rs 91,84,203/- as the cost of intelligent electronics devices and Rs 61,20,167/- under machineries. The assessee has to maintain the machineries / transmitting system. In the process of such maintenance, the assessee has incurred some expenses which are therefore of revenue nature. The Id AO found this reply to be non-satisfactory and treated the same as capital expenditure and accordingly disallowed Rs 19,31,097/- in the assessment.

2.2. The Id CITA observed that the assessee was engaged in the business of Internet Services (Broadband Services) and that Software technology is rapidly changing and that no enduring benefit accrues in the process. That switches, module, connector and other allied spares are installed in the open areas and are very much sensitive to heavy showers, lightning and extreme heat during the high summer seasons. As a result, such items require constant and frequent replacements and the expenditure incurred do not bring into Existence any asset capable of generating any income. In most of the cases, the value of spares are below Rs 5,000/-. The assessee also placed reliance on the decision of the *Hon'ble Madras High Court in the case of CIT vs Southern Roadways Ltd reported in 288 ITR 15 (Mad) and 304 ITR 84 (Mad)*. The assessee also placed reliance on the decision of the *Hon'ble Delhi High Court in the case of CIT vs Asahi India Safety Glass Ltd reported in 203 Taxman 277 (Del)*.

2.3. The Id CITA deleted the disallowance by observing as under:-

“6.2. I have considered the submission of the AR of the appellant in the backdrop of the assessment order. I find that the AO has not given any cogent finding or reasoning that the impugned expenses were capital in nature against the contention of the assessee that they were

of revenue in nature. He has merely stated that since the expenses related to balance sheet items the same were capital in nature as well. It is my considered opinion that expenses incurred with respect to the balance sheet items will have to be treated as revenue in nature as per Section 37(1) of the Act since such expenses are recurrent in nature to keep the business running smoothly on a continuous basis even though the advantage may endure for an indefinite future. As held by the Apex Court in the case of Empire Jute Co. vs CIT (1980) 124 ITR 1 (SC), it is not every advantage of enduring nature acquired by an assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. I find the case of the appellant to be squarely covered by the aforesaid judicial decision. In view of this, the AO is directed to delete the addition made in this regard of Rs. 19,31,097/."

2.4. Aggrieved, the revenue is in appeal before us on the following ground:-

1. In the facts and circumstances of the case and as per law, the Ld. CIT(A) has erred in deleting the addition of Rs. 19,31,097/- made by the AO treating the technology upgradation expenses as capital expenditure.

2.5. We have heard the rival submissions. The ld DR vehemently relied on the order of the ld AO. We find that the ld DR could not controvert any of the findings recorded by the ld DR before us. The ld AR reiterated the submissions made before the lower authorities. We find that the ld CITA on verification of the bills for these expenditure had come to a conclusion that the cost of spares are less than Rs 5,000/- and are frequently replaceable which does not accrue any enduring benefit to the assessee. We find that the case laws relied upon by the ld AR on the Hon'ble Madras High Court and Hon'ble Delhi High Court supra squarely applies to the case of the assessee. We also find that the decision of the Hon'ble Supreme Court in the case of Empire Jute Co. vs CIT reported in 124 ITR 1 (SC) , where their Lordships had duly distinguished the enduring benefit in the revenue field and enduring benefit in the capital field. They had held that pursuant to incurrance of expenses , if there is some enduring benefit in the revenue field , then the same would only amount to revenue expenditure. We hold that the expenditure incurred by the assessee towards technology upgradation charges which requires

frequent replacement due to rapid change in technology and constant need for upgradation would only be revenue in nature. Hence we do not find any infirmity in the order of the Id CITA in this regard. Accordingly, the Ground No. 1 raised by the revenue is dismissed.

3. The next issue to be decided in this appeal is as to whether the Id CITA was justified in deleting the addition of Rs 10,09,593/- made by the Id AO treating software expenses as capital expenditure in the facts and circumstances of the case.

3.1. The brief facts of this issue is that the Id AO observed that the assessee had debited 'software expenses' of Rs 10,09,593/- in its Profit and Loss Account under the head Selling, Distribution and Administrative Expenses and the assessee was asked as to why the same should not be treated as capital expenditure. The assessee vide its submission dated 13.2.2013 submitted as under:-

"The assessee had purchased various type/module of software for a variety of uses viz. Authentication, billing, network, anti-virus, voip channel performance monitoring etc. The developers and retailers allow to the assessee to use such software for only one year. Such software/licenses have to be purchased or renewed annually. Therefore, the entire expenses related to such have been treated as revenue expenses instead of capital expenditure. Please find enclosed herewith ledger for purchase of software. Without prejudice to our above submission, we would like to submit that there is addition of software amounting to Rs. 3,68,540/- before 30.09.2009, and addition of Rs. 6,41,053/- after 30.09.2009. If the software expenses is treated as capital expenditure, depreciation @ 60% may kindly be allowed on the same. We would further like to submit that in the assessment year 2009-10, software expenses amounting 59,00,647/- has been treated as capital expenditure and Rs. 35,40,388/- has been allowed depreciation on the same. You are requested to allow depreciation of Rs. 14,16,155/- on the w.d.v. of Rs. 23,60,259/- (Rs. 59,00,647 – Rs. 35,40,388)".

The Id AO disallowed the sum of Rs 10,09,593/- as revenue expenditure, but however, granted depreciation @ 60% on the same in the assessment.

3.2. The Id CITA observed that the expenditure incurred by the assessee was revenue in nature as it was for payment of License Fee which do not bring any capital asset into existence and moreover, the benefit of such expenditure would be consumed by the assessee company over a

short period of time. The assessee pleaded that the Id AO had misinterpreted software expenses as computer software. These expenses are in the nature of application of software licence fees which were payable to the vendor every year. Statement of accounts along with bills for licence fees which were enclosed before the Id AO were duly ignored. These expenses representing software were mainly paid towards smooth functioning of business of the assessee and not paid for acquiring any capital assets. The software was used for updating and rationalizing the existing system and the benefits derived therefrom were neither permanent nor enduring nature. The expenditure incurred by the assessee on software primarily was in the nature of annual renewal of software licences.

3.3. The Id CITA deleted the disallowance by observing as under:-

“7.2. I have considered the submission of the AR of the appellant and perused the assessment order. I have also perused through the above cited case law in the case of Motorola India Electronics (P) Ltd. vs. Dept. of Income Tax as decided by the ITAT, Delhi Bench ‘E’ New Delhi in I.T.A. No. 2977/Del/2012 for the assessment year 2003-04 dated 28.06.2013. Based on the material facts on records as well as the decision of the Hon’ble ITAT, Delhi as above in the case of Motorola India Electronics Pvt. Ltd., I find that the software expenses were incurred by way of renewal of license fees to the vendor on an annual basis which should be considered as revenue expenses. These expenses representing software was mainly paid towards smooth functioning of business of the assessee and not paid for acquiring any capital assets. The software was used mainly for updating and rationalizing the existing system and the benefits derived therefrom were neither permanent nor enduring nature. The expenditure incurred by the assessee on software primarily was in the nature of annual renewal of software licenses. The case of the appellant is also squarely covered by the ruling of the Hon’ble ITAT, Delhi supra wherein the observation of the CIT(A) that the assessee had purchased software for its various units and software purchased were to be utilized in the development of other software and were in the nature of application software license meant for smooth functioning of business and not for acquiring any new capital asset was upheld by the ITAT. I find that the AO has not brought about any cogent reasons or findings to justify his action in treating the impugned expenses as capital expenditure. Therefore, taking a similar view, I hold that the impugned software expenses incurred towards renewal of license fees on an annual basis was in the nature of revenue expenses and hence the addition of Rs. 10,09,593/- made by the AO on account of capital expenditure is directed to be deleted. Resultantly, the depreciation allowed on this count is to be withdrawn. The AO is directed accordingly.”

3.4. Aggrieved, the revenue is in appeal before us on the following ground:-

2. In the facts and circumstances of the case and as per law, the Ld. CIT(A) has erred in deleting the addition of Rs. 10,09,593/- made by the AO treating software expenses as capital expenditure.

3.5. We have heard the rival submissions. The Id DR vehemently relied on the order of the Id AO. We find that the Id DR could not controvert any of the findings recorded by the Id DR before us. The Id AR reiterated the submissions made before the lower authorities. We find that the Id CITA had given a categorical finding on verification of the bills for these expenditure that software expenses were incurred by way of renewal of licence fees to the vendor on an annual basis which does not accrue any enduring benefit to the assessee and that the same were paid towards smooth functioning of business of the assessee and not paid for acquiring any capital assets. These findings were not controverted by the Id DR before us. Hence we do not find any infirmity in the order of the Id CITA in this regard. Accordingly, the Ground No. 2 raised by the revenue is dismissed.

4. The last issue to be decided in this appeal is as to whether the Id CITA was justified in deleting the addition of Rs 48,40,728/- made by the Id Ao treating optical fibre expenses as capital expenditure in the facts and circumstances of the case.

4.1. The brief facts of this issue is that the Id AO observed that the assessee had debited 'Optic Fibre expenses' of Rs 37,90,878/- and 'Fiber Optic Laying expenses' of Rs 10,49,850/- in its Profit and Loss Account under the head Selling, Distribution and Administrative Expenses and the assessee was asked as to why the same should not be treated as capital expenditure. The Id AO observed that the assessee could not adduce any acceptable explanation and accordingly disallowed the same but however granted depreciation @ 15% on the same in the assessment.

4.2. The assessee submitted that among other ingredient, Optical Fiber Cable is the main ingredient mainly used for transmitting speed at a minimum of 512 kbps- 5 mbps to home broadband. Such optic fiber is fitted in the open space and passing through pole to pole and

some time it is passing through trees where pole system is not available and never be possible to protect optical fiber from heavy shower, lightening and from the heavy duty vehicle when passing beneath the optic fiber and it is of course out of control of the assessee. Because of this reason it tears, cuts and damages the optic fiber. Its span of life and usable capacity is very low. In order to maintain proper speed for ultimate user constant monitoring and replacement of optical fiber is necessary. Resalable value is Zero. The assessee is engaged in business of distribution of Internet Broad Band Services to the customer through Optic Fiber Net Work. In order to maintain proper speed constant monitoring is required. When the Optical Fiber Cable get damaged because of the reasons explained above, the assessee has to repair and replace the damage portion of optic fiber by laying afresh. To maintain proper internet speed the assessee has to keep on replacing damage Optical Fiber Cable. The customer can only get a better speed and experience through the properly maintained Optical Fiber Cable. Therefore it may not be correct to say that the assessee get an enduring benefit by replacing the damage portion of optic fiber. Constant changing of Optical Fiber Cable does not guarantee that the Optical Fiber Cable will give the same benefit for ever. The assessee has the same risk of damage from heavy shower, lightening and from the heavy duty vehicle when passing beneath the optic fiber. Optic fiber laying expenses incurred in the ordinary course of business and such expenses are in the nature of labour charges require to be paid to those who engaged in replacing the damaged portion of the Optical Fiber Cable. Such expenses were incurred not only for replacing damage portion optic fiber but also for other recurring purposes and also in the nature of post-operative expenses. The assessee relied upon the decision taken in the case of Akash Cable Net Work (P) Ltd vs. Department of Income Tax on 31st, March, 2009.

4.3. The Id CITA deleted the disallowance by observing as under:-

“8.2. I have considered the submission of the AR of the appellant and perused the assessment order. Material facts available on record are also taken into account in deciding the issue. I find that the appellant is engaged in the business of providing internet services through optic fibre network. As submitted, I find that the nature of expenses incurred in maintaining the fibre cable network in providing uninterrupted internet connection facility to the end users is a continuous and recurring process. To maintain proper internet speed, fibre cables would have to be continuously replaced which are subjected to constant wear and tear due to the rigours of nature like storms, heavy downpours,

lightning etc. as well as the adverse impact of movements of heavy vehicles. In this respect constant replacements of fibre cables do not bring about any enduring benefit to the appellant and therefore cannot be considered as being related to capital expenditure. I find a similar issue had come up before the ITAT, Bench 'A', Hyderabad in the case of DCIT, Circle 1(1), Hyderabad vs. M/s Akash Cable TV Network in ITA No. 678/Hyd/2009 dated 30.06.2010 for the AY 2006-07 wherein it was held as follows:

"The very fact that the optical fiber cable was laid by the assessee for continuing in the business of transmitting signal through cable net work system establishes that the assessee did not acquire any new asset which is of enduring in nature. Therefore, in our opinion, merely because the optical fiber cable gives better quality of signal to the customers/viewers it cannot be construed as giving enduring benefit to the assessee. In our opinion, replacement of cable is an essential requirement for continuation in the business. Therefore, the expenditure incurred by the assessee is in the Revenue field. We do not find any infirmity in the order of the lower authority and the same is confirmed."

Applying the same ratio of judgment as above, I am of the considered opinion that the expenses incurred on optic fibre cable for providing uninterrupted fast speed internet services to the customers did not bring about any enduring benefit to the appellant or creation of new assets and therefore the same is treated as revenue expenditure. I find that the AO has not brought about any cogent reasons or findings to justify his action in treating the impugned expenses as capital expenditure. The addition made by the AO of Rs. 48,40,728/- on account of capital expenditure is therefore directed to be deleted. Resultantly the depreciation allowed on the count is to be withdrawn. The AO is directed accordingly."

4.4. Aggrieved, the revenue is in appeal before us on the following ground:-

3. In the facts and circumstances of the case and as per law, the Ld. CIT(A) has erred in deleting the addition of Rs. 48,40,728/- made by the AO treating optical fibre expenses as capital in nature.

4.5. We have heard the rival submissions. The Id DR vehemently relied on the order of the Id AO and further stated that the optic fibre cables are generally laid only in the underground and hence the assessee's explanation that the same would get damaged by heavy downpour, lightning, heat etc does not hold any water. He argued that the amount incurred towards optic fibre cables are very huge and assessee gets enduring benefit out of the same and hence the same has to be treated as capital expenditure which had been rightly treated by the Id AO. The laying of optical fibre cables cannot be compared with regular cable wires as was the case before the Hyderabad Tribunal which had been relied upon by the Id CITA. In response thereto, the Id AR drew our attention to pages 37 to 83 of paper book containing the various

bills for optic fibre cables and its laying wherein he stated that the unit rate of the same ranges from Rs 9.62 to Rs 17.30 per meter . He also drew our attention to the list of expenditure towards optic fibre cables wherein the same were replaced on a monthly basis regularly by the assessee. At the outset , we agree with the argument of the Id DR that the replacement of optic fibre cables used in smooth functioning of internet broadband services cannot be compared with normal cable wires which are used in the business of television channels through cable network. We find that in the facts before the co-ordinate bench of Hyderabad Tribunal in the case of DCIT vs Akash Cable TV Network (P) Ltd in ITA No. 678/Hyd/2009 for Asst Year 2006-07 dated 30.6.2010 also, the assessee there had replaced the traditional cable into optical fibre cable. The contention of that assessee was that the traditional cable was cut and damaged by the rival cable network operators. The assessee therein had to necessarily replace the damaged part of the cables alone and not the entire cable by optical fibre cable for transmitting TV signals. It was held that these are done only for better signals for the viewers and due to this no new customers could be obtained by that assessee. The replacement of optic fibre cables were done only for satisfying the existing customers and for retaining the existing customers with that assessee. In these circumstances, the Hyderabad Tribunal held that optical fibre cables were laid by the assessee for continuing in the business of transmitting signals through cable network system establishes that the assessee did not acquire any new asset which is enduring in nature. Accordingly it was held that this enduring benefit is only in the revenue field to the assessee and accordingly held the replacement of optical fibre cables as revenue expenditure. We find to counter this judgement, the Id DR placed reliance on the decision of Delhi Tribunal in the case of SAIL vs Addl CIT dated 25.11.2010 vide para 38 of the judgement but he did not place a copy of the said decision before us. Hence we deem it fit to ignore the said citation of the Id DR. We find from the entire details of optic fibre cables purchased that are enclosed in page 36 of the paper book, the assessee herein had been incurring expenses towards the same towards replacement on a monthly basis, which itself goes to prove that the same is incurred on a recurring basis and there is no enduring value benefit to the assessee on the previously replaced cable wires. Moreover, we find that the

assessee had incurred a sum of Rs 14,56,604/- in the previous year ended 31.3.2009 relevant to Asst Year 2009-10 , which the ld AR stated that the same was allowed by the ld AO as revenue expenditure. This was not controverted by the revenue before us. We find that the facts before the Hyderabad Tribunal and the facts before us are almost the same and hence the ratio laid down therein could be very much be applicable herein and we find that the ld CITA had rightly followed the said decision. Accordingly, we do not find any infirmity in the order of the ld CITA in this regard. Accordingly, the Ground No. 3 raised by the revenue is dismissed.

5. In the result, the appeal of the revenue is dismissed.

Order pronounced in the Court on 06.12.2017

Sd/-
[N.V. Vasudevan]
Judicial Member

Sd/-
[M.Balaganesh]
Accountant Member

Dated : 06 .12.2017

SB, Sr. PS

Copy of the order forwarded to:

1. DCIT, Circle-11(1), Kolkata, P-7, Chowringhee Square, Kolkata-700069.
2. M/s Alliance Broad Band Services Pvt. Ltd., P-89, CIT,Road, Kolkata-700014
- 3..C.I.T.(A)- , Kolkata 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches