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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

17.

\+ **ITA 476/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

WITH

18.

\+ **ITA 477/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

WITH

19.

\+ **ITA 478/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

WITH

20.
\+ **ITA 479/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

WITH

22.
\+ **ITA 481/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

WITH

23.
\+ **ITA 482/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

WITH

24.
\+ **ITA 483/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

AND

31.
\+ **ITA 490/2016**

PR. COMMISSIONER OF I. TAX-DELHI-2 ..... Appellant
Through: Mr. P. Roy Chaudhuri, Senior Standing Counsel.

versus

BHARAT SANCHAR NIGAM LTD. ..... Respondent
Through: Mr. Mayank Nagi with Ms. Husnal Syali, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE NAJMI WAZIRI

O R D E R

% 01.08.2016

CM No. 27273/2016 (for exemption) in ITA No. 476/2016
CM No. 27274/2016 (for exemption) in ITA No. 477/2016
CM No. 27275/2016 (for exemption) in ITA No. 478/2016
CM No. 27277/2016 (for exemption) in ITA No. 479/2016
CM No. 27279/2016 (for exemption) in ITA No. 481/2016
CM No. 27280/2016 (for exemption) in ITA No. 482/2016
CM No. 27281/2016 (for exemption) in ITA No. 483/2016
CM No. 27291/2016 (for exemption) in ITA No. 490/2016

1. Allowed, subject to all just exceptions.

CM No. 27276/2016 (for condonation of delay of 38 days in filing the appeal) in ITA No. 478/2016

2. For the reasons stated in the application, the delay in filing the appeal is condoned.

3. The application is disposed of.

ITA No. 476-479/2016, ITA No. 481-483/2016 & ITA No. 490/2016

4. The challenge in these appeals is to the order dated 23rd December 2015 and the common order dated 22nd January 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in the following appeals:

High Court Appeal Nos.	Corresponding ITAT Appeal Nos.	A.Y.	Date of ITAT Order

476/2016	2176/DEL/2008	2005-06	22nd January 2016
477/2016	4275/DEL/2010	2006-07	22nd January 2016
478/2016	3386/DEL/2010	2004-05	23rd December 2015
479/2016	2162/DEL/2008	2005-06	22nd January 2016
481/2016	1901/DEL/2012	2008-09	22nd January 2016
482/2016	3701/DEL/2010	2006-07	22nd January 2016
483/2016	2879/DEL/2010	2007-08	22nd January 2016
490/2016	1823/De1/2012	2008-09	22nd January 2016

5. It may be mentioned that the order dated 23rd December 2015 passed by the ITAT for AY 2004-05 has been followed by it in the subsequent order dated 22nd January 2016 for the other AYs mentioned above.

6. The common question that is sought to be urged in all these appeals by the Revenue is whether the ITAT has erred in interpreting Section 80-IA (2A) of the Income Tax Act, 1961 ('Act')? The Revenue is aggrieved by the decision of the ITAT that the first degree nexus implicit in the words "derived from" used in section 80 IA is not required for computation of deduction in the case of undertaking engaged in providing telecommunication services since the words "derived from" do not occur in sub-section (2A) of Section 80 IA. According to the Revenue, the ITAT erred in reading the sub-section (2A) in isolation, and thereby carved out a separate scheme with regard to the nature and extent of deduction for undertaking engaged in providing telecommunication services.

7. Section 80IA (1), (2) and (2A) of the Act read as under:

"**80 IA: Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.-**

(1) Where the gross total income of an assessee includes any profits and gains derived by an undertaking or an enterprise from any business referred to in sub-section (4) (such business being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

(2) The deduction specified in sub-section (1) may, at the option of the assessee, be claimed by him for any ten consecutive assessment years out of fifteen years beginning from the year in which the undertaking or the enterprise develops and begins to operate any infrastructure facility or starts providing telecommunication service or develops an industrial park or develops a special economic zone referred to in clause (iii) of sub-section (4) or generates power or commences transmission or distribution of power 1 or undertakes substantial renovation and modernisation of the existing transmission or distribution lines

Provided that where the assessee develops or operates and maintains or develops, operates and maintains any infrastructure facility referred to in clause (a) or clause (b) or clause (c) of the Explanation to clause (i) of sub-section (4), the provisions of this sub-section shall have effect as if for the words "fifteen years", the words "twenty years" had been substituted.

(2A) Notwithstanding anything contained in sub-section (1) or sub-section (2), the deduction in computing the total income of an undertaking providing telecommunication services, specified in clause (ii) of sub-section (4), shall be hundred per cent of the profits and

gains of the eligible business for the first five assessment years commencing at any time during the periods as specified in sub-section (2) and thereafter, thirty per cent of such profits and gains for further five assessment years."

8. The question arose in the context of the Assessee being asked to explain why certain specific items categorized as 'other income' and 'extra-ordinary item' in the Profit and Loss Account in assessment year 2004-05 should not be excluded from the profit and gains of the Assessee. According to the Revenue, these items could not be considered as profits and gains 'derived from' the eligible business for the purpose of deduction under Section 80 IA. The said six items were:

(i) Extra Ordinary Items

(ii) Refund from Universal Service Fund

(iii) Interest from others

(iv) Liquidated Damages

(v) Excess provision written back

(vi) Others including sale of directories, publications, form, waster paper, etc.

9. The AO held that the six items of income could not be said to be derived from the business of the Assessee and added the income therefrom to the returned income of the Assessee. In the appeal by the Assessee, the Commissioner of Income Tax (Appeals) ['CIT (A)'] agreed with the AO that three of the above items, viz. Extraordinary Items, Refund from Universal Service Fund and Interest from Others, did not form part of the profit derived from eligible business. However, the Assessee's plea regarding the other three items as being derived from the business was

accepted by the CIT (A).

10. The Assessee filed appeals and the Revenue filed cross-appeals before the ITAT. The ITAT in the impugned orders concluded that with sub-section (2A) beginning with a non-obstante clause, the legislative intention of making available to an undertaking, providing telecommunication services, the benefit of deduction of 100% of the profits and gains "of the eligible business" was explicit. Indeed, the legislature appears to have made a conscious departure in adopting for sub-section (2A) a wording different from that appearing in sub section (1). Under Section 80IA (1), what is available for deduction are profits and gains "derived by an undertaking or an enterprise from any business referred to in sub-section (4)" whereas in Section 80-IA (2A) what is available for deduction is "hundred percent of the profits and gains of the eligible business". The following conclusion reached by the ITAT in para 13.11 of the impugned order correctly encapsulates the legal position as far as the interpretation of Section 80IA (2A) is concerned.

> "13.11 Thus, we find that the legislature being alive to providing tax deductions to business enterprises and undertakings, it wanted to curtail the time line during which deduction can be claimed and also addressing the extent upto which it can be claimed has consciously carved out an exception to specified undertakings/enterprises whose needs and priorities differ has taken care to expand the time line for claiming deductions. It has consciously enabled those undertakings/enterprise who fall under sub-section (2A) to claim 100% deduction of profits and gains of eligible business for the first five years and upto 30% for the remaining five years in the ten consecutive assessment years out of the fifteen years starting from the time the enterprise started its operation.

> The legislature having ousted applicability of sub-section (1) and (2) in the opening sentence brought in for the purposes of time line sub-section (2) into play but made no efforts whatsoever to put the assessee under sub-section (2A) to meet the stringent requirements that the profits so contemplated were to be "derived from". The requirements of the first degree nexus of the profits from the eligible business has not been brought into play."

11. As a result, the orders of both the AO and the CIT (A) to the extent they deny the Assessee, which in this case is in the business of providing telecommunication services, deduction in respect of the above items in terms of Section 80IA(2A) are unsustainable in law and have rightly been reversed by the ITAT.

12. Learned counsel for the Revenue sought to urge that while the Assessee in this case is engaged only in the business of telecommunication services, there could be an enterprise which has more than one undertaking and one such undertaking could be in the telecommunication services. According to him, in such an event, a question might arise whether such an enterprise would be able to seek deduction both under Section 80IA (2A) as far as the telecommunication business is concerned, and under Section 80-IA (1) as far as any other eligible business is concerned.

13. In the first place as far as the present appeals are concerned, the above issue as posed by learned counsel for the Revenue is purely hypothetical. In any event, Section 80-IA (2A) treats an undertaking providing telecommunication services as a separate species warranting a separate treatment as is evident from the non-obstante clause with which it begins.

The Court sees no reason why such an undertaking would not be able to take the benefit of deduction in terms of Section 80IA(2A) notwithstanding that the enterprise of which it forms part may have other eligible businesses for which the deduction would have to be calculated in terms of Section 80-IA (1) of the Act.

14. The Court finds no reason to differ from the view expressed by the ITAT in the impugned orders as far as the interpretation of Section 80-IA(2A) of the Act is concerned.

15. No substantial question of law arises for consideration. The appeals are dismissed.

S. MURALIDHAR, J

NAJMI WAZIRI, J

AUGUST 01, 2016
Aj/dn