IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : "D" : NEW DELHI

BEFORE SHRI D.R. SINGH AND SHRI R.C. SHARMA

ITA No.2208 to 2011 & 2700/D/07
Assessment years : 1998-99, 1999-00, 2000-01, 2001-02 &2005-06

Mahanagar Telephone Nigam Ltd., Jeevan Bharti Building, Tower 1, 12th Floor, 124, Connaught Place, New Delhi	Vs.	A.C.I.T., Range-4, New Delhi
PAN No.AAA CL 0828 R		
(Appellant)		(Respondent)

Appellant by : S/Shri Ved Jain & Ms. Rano Jain, CAs
Respondent by : Smt. Kavita Bhatnagar, CIT- DR

O R D E R

PER R.C. SHARMA, AM:

These are the appeals filed by the assessee against the order of CIT(A) for the assessment years 1998-99, 1999-00, 2000-01, 2002-03 & 2005-06, in the matter of order passed by the Assessing Officer u/s 143(3) Income Tax Act, 1961.

2. Common grievance of the assessee in all the years relate to denial of claim of exemption u/s 80-1A in respect of income earned from telecommunication services. The grounds taken in the assessment year 1998-99 read as under:-

i) On the facts and circumstances of the case, the order passed by the learned CIT(A) is bad, both in the eye of law and on the facts.

ii) On the facts and circumstances of the case, the learned CIT(A) has erred, both on facts and in law, in upholding the action of the Assessing Officer in not allowing the deduction u/s 80-1A of the Act as claimed and allowable under the provision of the Act.

iii) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law, in confirming the action of the Assessing Officer by wrongly interpreting the provisions of section 80-1A, whereby deduction is available in respect of income derived from providing telecom services on or 1st April, 1995 and the appellant company being a service provider, its total income as such from providing telecom services shall be exempt.

iv) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law, in not appreciating the contention of the assessee that the deduction available u/s 80-1A being undertaking based, the computation of income eligible even otherwise has to be worked out for each undertaking @100 per cent for first five years and @ 30 per cent for the next 5 years from the date of setting up of such undertaking.

v) On the facts and circumstances of the case, the learned CIT(A) has erred both on facts and in law, in rejecting the contention of the assessee that the order passed by the Assessing Officer is not in consonance with the direction given by the ITAT.

3. Rival contentions have been heard and record perused. The facts in brief are that assessee is a Government of India Undertaking engaged in providing telecommunication services. In respect of income derived out of telecommunication services, the assessee claimed deduction u/s 801A which was declined by the Assessing Officer in the first round of proceedings before him on the plea that assessee is not eligible for such claim. The CIT(A) confirmed the order of Assessing Officer in respect of all these years and the assessee field second appeal before the Tribunal and the Tribunal restored the matter back to the file of Assessing Officer with the direction to the AO that assessment is to be framed after considering the observations contained therein. This is second round of appeal before us. The issue involved in all these appeals is the quantum of deduction under Section 80-IA of the Act. In the first round the AO has rejected the 80-IA claim in

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tality on the grounds of eligibility of the assessee company. However while framing the assessment in the second round the AO has accepted that the assessee is eligible to claim deduction but restricted the claim in terms of total telephone exchanges set up by the assessee. During the hearing before the ITAT in the first round the assessee has raised the following contentions as stated in the ITAT order para 52 internal page 34 which reads as under:

"52. The learned AR further submitted that as per the provisions of Section 80-IA this deduction is available to nine types of business which have been referred to as eligible businesses. For each type of eligible businesses different conditions have been imposed. Sub-section (1) of section 80-IA only enumerates these nine types of businesses and sub-section (2) to sub-section (4F), i.e. in all nine sub-sections place conditions to be fulfilled by each type of businesses for being eligible to claim deduction as tabulated below :

(i)	*Industrial undertaking*	*Sub-section (2) prescribes the Condition to whom it shall be applicable.*
(ii).	*Hotel*	*Sub-section (3)*
(iii)	*Operation of a Ship*	*Sub-section (4)*
(iv)	*Developing, maintaining and Operating any infrastructure facility*	*Sub-section (4A)*

(v) *Specific and Industrial Research* *Sub-section (4B)*

(vi) *Telecommunication Services* *Sub-section (4C)*

(vii) *Industrial Park* *Sub-section (4D)*

(viii) *Refining of Mineral Oil* *Sub-section (4E)*

(ix) *Housing Projects* *Sub-section (4F)*

52.1 Thus, the conditions for each of the entities are exclusive conditions and it is not that the conditions other than those stated in particular sub- section shall be applicable to others also. Accordingly, in the case of the appellant which is providing telecommunication services, all it has to fulfill is the condition prescribed in sub-section (4C) of the Act which reads as under :

*"**(4C).** This section applies to any undertaking which starts providing telecommunication services, whether basic or cellular including radio-paging, domestic satellite services or network of trunking and electronic data interchange services at any time on or after the 1st of April, 1995 but before the 31st day of March, 2000."*

52.2 The above is an exclusive clause applicable to telecommunication services and can not be confused with the conditions which are applicable to industrial undertaking and specified in sub-section (2). It is important to note that there is no word such as "new undertaking" in this sub-section nor there is any

condition that it would not have been formed by splitting up or reconstruction of a business already in existence, nor there is any condition that it should not be formed by transfer to new business of machinery or plant previously used for any purpose.

52.3 In the absence of any of these conditions being applicable to an undertaking providing telecom services, such undertaking can be formed out of a business already in existence and such undertaking can also use the machinery or plant previously used for any purpose an still can be eligible for deduction under Section 80-IA(1). These are important distinctions."

4. After examining the above contention the ITAT had held in para 60 internal page 49as under :-

"We have heard the parties with reference to the material on record. The relevant provisions of Statute have also been perused. ***It appears to us that the appellant has an arguable case but the authorities below have not passed any speaking order on the appellant's claim as to whether the appellant could be held an "undertaking" after it had put up new exchanges to the new subscribers and meets out the essential requirement so as to eligible for deduction under section 80-IA of the Act. If the appellant did not press its claim in the earlier years, that alone should not be taken as a disqualification for this purpose.*** *We, therefore, set aside the decision of the authorities below and restore the matter back to the assessing officer for taking a decision afresh in the light*

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of aforesaid directions. A reasonable opportunity of being heard shall be afforded to the appellant before taking decision in accordance with law."

5. Accordingly after the issue was set asided to the AO, the AO examined the facts and agreed that the assessee company is eligible for deduction under Section 80-IA.

6. However, the assessing officer did not allow the full deduction. He allowed a part deduction on the basis that deduction is available for new exchanges only and accordingly apportioned the total income eligible proportionately on the basis of total exchanges vis-à-vis the new exchanges. The CIT(A) has confirmed the order of the AO. Aggrieved by the order of CIT(A) the assessee is again before us.

7. It was contended by ld AR Shri Ved Jain that:

1. The issue as such before the Honourable Tribunal is whether assessee will be eligible for total income and whether AO was justified in apportioning the income in the manner he has done.

2. For this it is important to read section 80-IA and notice the important difference in Sub-section (4C) which is applicable in respect of telecommunication services vis-à-vis exemption available in respect of other activities.

3. On reading of Section 80-IA, it is be noticed that this section provides exemption to a different type of activities. Sub-section states these 9 activities in a narrative form. The exemption is with reference to the undertaking and the entire income which is derived from the business of the undertaking is eligible for exemption. Further, the percentage of income exempt for 9 different activities is stated in sub-section (5) and the number

of years for which exemption is available have been stated in sub-section (6).

4. (i). There is no such condition in sub-section (4C) that undertaking should have come into existence after 1.4.1995.

5. There is no condition that such undertaking be 'new'.

(iii). There is no condition that undertaking should not have been formed by reconstruction of existing business.

6. There is no such word 'new' undertaking nor new plant and machinery as distinct from the requirement in the case of industrial undertaking where it has to be a new industrial undertaking or a 'new hotel' or a new ship or ship not used earlier in India.

7. In fact even if an undertaking buys old machinery or equipment already used and provides communication services, it will be eligible for exemption.

8. There is no such clause in sub-section (4C) read with section (1) of Section 80-IA, that on an undertaking being eligible for exemption the benefit will be available or computed proportionately for the new equipments or new machinery.

9. The AO and the CIT(A) has ignored these important differences.

10. The AO and CIT has also ignored the fact that the appellant undertaking has been totally revamped. It is not merely addition of new exchanges. There is entire change in the set up, technology, instruments and equipments. It was earlier operating on old technology whereby there used to be big cross bar exchanges with large telephone instrument of dialing telephone numbers mechanically

by rotating the dial. This technology and the system has been totally abandoned and new exchange set up replacing the old.

11. The old lines stands replaced by optical fibres lines.

12. New technology and devices made possible a multitude of new and intelligent network services. A host of new services were introduced by MTNL after 1.4.1995. These are –Cellular services, virtually calling card, account calling card, premium rate service, virtual private network and ISDN, calling line identification presentation, call forwarding on busy and free, electronic clearing scheme, voluntary deposit scheme, credit card payment scheme, tele-mart interactive voice response services, telephone bill assistance, tele-cardiology and Directory on CDROM.

13. Several new technologies have been introduced after 1.4.1995. Some of them are SDH (Synchronous Digital Hierarchy) and the DLC digital loop carrier system), which reaches the benefits of optic fibre to the subscriber. Fully digital network has been established. This has involved totally new dimensions of work – scrapping of old lines and laying new ones, demolition of old exchanges and construction of new ones and discarding of old machinery and instruments and installation and introduction of new sophisticated ones.

14. Various add on services such as Datacom, Inet, DID PABX, voice mail, Radio paging and ISDN has been started after 1.4.1995. In addition to this phone plus facilities like dynamic locking, call waiting/call transfer, hot lines etc. has been extended to valued customers. Further in order to minimize human re-interface, important operator based special services have been automated with IVRS (Interactive Voice Response Systems).

15. It has started providing several other advanced and other add on services such as virtual card/account card calling, free phone, virtual private network, premium rate service, telewaiting etc. A new technique named DLC (digital loop carrier system) has also been established.

16. Thus, 1995 onwards the assessee's industry has underwent a tremendous revolution resulting from the possibilities opened up by automatic self operated exchanges. This was not a change or modification but introduction of totally different facilities. It has inducted de novo systems and technology in place of outmode and antiquated system and technology.

17. Post new Telecom Policy 1994 it has invested a more than Rs 5,000 crores in denovo technology.

18. The amendment in Income Tax Act granting exemption to telecom sector was in line with the Telecom Policy.

19. Thus the appellant's undertaking meets all the requirement and hence eligible for deduction under Section 80-IA. The AO agreed with the above facts and has not controverted any of these facts. However, he still works out the deduction proportionately.

20. The action of AO is wrong and against the express provisions of the section 80-IA. The AO is applying conditions which are not prescribed for telecommunication services. AO by restricting the deduction to new exchange is assuming that an undertaking should be new and further an undertaking can not be formed by reconstruction of a business already in existence. This is not a condition for telecommunication services as explained hereinabove.

21. The fact that the appellant has started providing cellular, radio paging services is an undisputed fact not controverted by AO as well as CIT(A).

22 Thus the eligibility of claiming exemption is fully met by the appellant.

23 Once the eligibility criteria is fulfilled than in terms of sub-section (1) of section 80-IA read with clause (ic) of sub-section (5) of section 80-IA 100 per cent of the income of the undertaking shall be exempt.

24 Section 80-IA(5)(ic), nowhere provides that proportionate deduction will be worked out. It clearly states if the undertaking is eligible than its entire income will be exempt.

25. The AO has admitted that the appellant is eligible for exemption. It is not the case of the revenue that appellant is not eligible. Once it is eligible in the absence of any statutory provision, bifurcation of income is not justified.

26 Legal opinion sought by the appellant on this issue also supports the above interpretation. Justice S.Ranganathan (Retired Judge Supreme Court of India) in his detailed opinion (at paper book pg. 192) has opined as under :

" It is clear that MTNL, has since 1.4 1995 inducted denovo systems and technologies in place of the outmoded and antiquated systems and technology that existed earlier and this was in pursuance of the same new telecommunications policy that gave birth to the insertion of this part of Sec.80-IA. It is very clear that MTNL, which was providing certain basic telecommunication services prior to 1.4.1995 started to provide various other types of basic telecommunication services on or after that date. Its activities, therefore, fall squarely within the

language of section 80-IA(4C). Once this condition is fulfilled the enterprise is entitled to a deduction of the specified percentage of all its profits and gains derived from its business of providing basic telecommunication services, whether existing of earlier or introduced after 1.4.1995. For the reasons above discussed, I am of the view that the MTNL is eligible for the deduction u/s 80-IA of the Income Tax Act, 1961."

27. Justice B.N.Kirpal (Chief Justice of India) after detailed analysis has opined as under : (Paper Book Page 199-201)

"On a careful analysis of the said provision it is evident that this section does not state that the benefit will be given if a new industrial undertaking comes into existence. The opening of section 80-IA(4)(ii) are "any undertaking which has started or starts providing....." This would mean that an undertaking can either be a new one or an existing undertaking which starts providing telecommunication services, whether basic or cellular. The Querist is an existing undertaking and what has to be seen is whether they fall in the category of such undertaking which started telecommunication services whether basic or cellular after 1st April, 1995".

28. Not only that the issue of exemption to telecom sector came up for consideration, when Finance Bill, 2004 introduced the restriction on Telecom Sector of benefit being not available to those companies which are formed by way of reconstruction or splitting of business already in existence or uses old plant and machinery.

29. The Telecommunication Minister then has written a DO letter dt. 26th August, 2004, raising apprehension that with the proposed restriction in the Finance Bill, 2004 the existing company like BSNL

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will loose exemption. The Honourable Finance Minister vide his DO letter dt. September, 2004, has clarified that

"The restriction on transfer of old plants and machinery and reconstruction of business which have been made applicable to Telecom Sector by the Finance (No.2) Bill, 2004 are not meant to cover cases such as BSNL which have been carved out of Department of Telecommunications. Moreover the amendment will be effective from asstt. year 2005-06, thereby making the restrictions applicable to undertaking in the telecom sector which start providing telecommunication services on or after 1.4.2004.Thus the amendments made would not affect the eligibility of BSNL for availing benefits under Section 80-IA of the Income Tax Act."

30. The above clarification by the Minister of Finance sets at rest all doubts on this issue of interpretation.

31. It may be further appreciated that a condition of not allowing the benefit to old undertaking was introduced in the Finance Act, 2004. This clearly means that no such conditions are applicable to undertakings before.

32. The above view gets further fortified by the order passed by learned CIT under Section 263. In this case after the AO has passed the order granting deduction under Section 80-IA, the CIT issued show cause notice under Section 263. On being appraised of the facts, the CIT not only dropped 263 proceedings but made following observations in his order dt. 26.02.2008 (PB Pg. 363)

"I am of the view that the case of MTNL (the assessee) is not entirely different from that of BSNL. Both are PSUs owned by the Govt. of India and as far as the nature of business is concerned, they are similar also. Since the taxation law has also been farmed by the same

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Govt. and since that Govt. has taken the view that BSNL is eligible for section 80-IA deduction, it is logical, fair and reasonable to hold that the same liberal view should be taken by the taxing authorities in regard to the allowability of Section 80-IA in this case. It has always been the stand taken by the leading courts that the beneficial provision of tax laws should be construed liberally to enable the industry to receive the benefit intended for them. Moreover, there is no real loss to revenue as the assessee MTNL itself is owned by the Govt. of India."

33. In view of the above facts the AO was not justified in treating exchange as un undertaking and treating the denovo exchanges based on entirely new technology as old exchanges. The appellant having being eligible for deduction as has been held by AO himself. Its total income derived from the business of the undertaking as against individual exchanges worked out by the AO shall be exempt.

34. On the other hand, learned DR contended that AO has already allowed claim for deduction u/s 80IA with respect of number of telephone exchanges installed up to 1995 and thereafter. He further relied on the order of the lower authorities.

35. We have considered the rival contentions and gone through the orders of the authorities below. From the record, we found that the assessee is a government of India undertaking engaged in providing telecommunication services. In respect of its income from providing telecommunication services, it claimed deduction u/s 80IA which was declined by the AO and CIT(A) confirmed the AO's action. In an appeal filed before the Tribunal, after appreciating the correct provisions of the law as it stood at the relevant point of time, the matter was restored back to the AO for deciding the issue afresh as per law. While giving effect to the order of the Tribunal, the AO

has accepted the assessee's eligibility for claim of deduction u/s 80IA however the quantum of deduction was restricted to the number of exchanges installed after 1995. Sub-section (4C) deals with allowability of claim of deduction u/s 80IA in respect of assessee engaged in providing telecommunication services which reads as under:-

> *"**(4C).** This section applies to any undertaking which starts providing telecommunication services, whether basic or cellular including radio- paging, domestic satellite services or network of trunking and electronic data interchange services at any time on or after the 1st of April, 1995 but before the 31st day of March, 2000."*

36. A plain reading of the above Section makes it clear that unlike provisions of sub-section 2 of Section 80IA in respect of industrial undertaking which imposes a condition that it should be a new undertaking and that it should not be formed by splitting up or reconstruction of a business already in existence, nor there is any condition that it should not be formed by transfer to a new business of machinery or plant previously used for any purpose. After analyzing all these eligibility criteria, the AO has reached to the conclusion that assessee is eligible for deduction u/s 80IA u/s 4C of the IT Act. Now, we have to see whether AO was justified in restricting claim of deduction with reference to exchanges installed after 1995. It is pertinent to mention here that deduction u/s 80IA is to be computed on the profits of the eligible business and not on the basis of amount invested in plant & machinery in the form of telephone exchanges. Therefore, the profit accruing from telecommunication services is required to be taken into account while granting claim of deduction u/s 80IA. In this regard, we found that after 1995, there is a complete revolution in telecommunication industry and old exchanges, if any, had been totally revamped. It was not merely addition of the new exchanges but there was

entire change in the set up, technology, instruments and equipments. The exchanges which were earlier operating on old technology whereby there was use of big cross bar exchanges with large telephone instruments of dialing numbers mechanically by rotating the dial. Since this technology has been totally abandoned and revamped, replacing the old, most of the income generated is attributable to such new technology exchanges. Merely on the number of old exchanges which were not in operation at all or had undergone totally revamped, income cannot be attributable to such old exchanges, we found that the new technology and the new exchanges made possible a multitude of new intelligent network services which are like cellular services, virtually calling card services, premium rate services, ISDN, calling line identification, call forward on busy and free lines, credit card payment scheme, tele-mart interactive voice response services, directory on CD-Rom etc. Various add on services such as Datacom, Inet, DID PABX, voice mail, Radio paging and ISDN has been started after 1.4.1995. In addition to this phone plus facilities like dynamic locking, call waiting/call transfer, hot lines etc. has been extended to valued customers. Further in order to minimize human re-interface, important operator based special services have been automated with IVRS (Interactive Voice Response Systems). We also found that the assessee MTNL started providing several other advanced and other add on services such as virtual card/account card calling, free phone, virtual private network, premium rate service, telewaiting etc. A new technique named DLC (digital loop carrier system) has also been established. Thus, 1995 onwards the assessee's industry has underwent a tremendous revolution resulting from the possibilities opened up by automatic self operated exchanges. This was not a change or modification but introduction of totally different facilities. It has inducted de novo systems and technology in place of outmode and

antiquated system and technology. In view of the above discussion, it is crystal clear that merely on the basis of attributing the income in the ratio of telephone exchanges not proper, but we have to see the various services rendered by MTNL after 1995 which were actually generating income. Since the deduction is to be allowed in respect of income generated by all these facilities, we are required to compute deduction as per these host of services being rendered by MTNL. The lower authorities have also nowhere declined the very fact of old exchanges totally being revamped, most of which were non-operating and under discarded position. As the income generated through so many services being rendered by the new exchanges which is eligible for claim of deduction u/s 80IA, we cannot restrict the claim in respect of the nominal income if any generated out of the old exchanges. Keeping in view the totality of facts and circumstances of the case, we direct the AO to attribute 75% (seventy five percent) of the income from various services enumerated above as having been carried out only by virtue of new exchanges having been installed. 25% of the income may be attributed to the old exchanges. Accordingly, the matter is restored back to the file of the AO for recomputing the claim of deduction u/s 80IA with reference to 75% of the income being eligible for deduction, whereas balance 25% is not eligible for deduction in all the years under consideration. We direct accordingly.

37. The other grounds in the appeal were not pressed by the learned AR, the same are therefore dismissed in-limine.

38. Since in the AY 2005-06, there was change in the eligibility criteria of deduction eligible u/s 80IA, we direct the AO to recompute the deduction in terms of the amended provisions of the law applicable for the AY 2005-06. However, the same criteria for apportioning the income attributable to

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income generated through various services by the new exchanges and old exchanges at 75% and 25% is to be kept. We direct accordingly.

39. In the result, the appeal of the assessee is allowed in part, in terms indicated hereinabove.

This order pronounced in the court on 11-03-2010.

(D.R. SINGH)
JUDICIAL MEMBER

(R.C. SHARMA)
ACCOUNTANT MEMBER

Dated : 11-03-2010
NS :

Copy forwarded to: -

1. Appellant, By Hand
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

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