



DEL ITAT: Provides Clarity On Tax Treatment Of Various Expenses For Telecom Operators

Facts of the Case

The Assessee, Bharti Hexacom Ltd., a telecom operator, filed returns for AYs 2016–17 to 2019–20. During assessment, the Assessing Officer (AO) made three disallowances:

- **License Fee & Spectrum Charges:** AO treated variable license fees paid under the 1999 Telecom Policy as capital expenditure, amortizing them u/s 35ABB instead of allowing as revenue expenditure u/s 37(1).
- **Subscriber Verification Penalty:** AO disallowed penalty paid to the Department of Telecommunications (DoT) for violation of KYC norms under Explanation 1 to section 37(1) of the ITA
- **Discount on Prepaid Instruments:** Free airtime/discount given to distributors was treated as commission, attracting TDS u/s 194H. Non-deduction led to disallowance u/s 40(a)(ia).

Contentions of the Revenue

The Revenue argued that the variable annual license fee under the 1999 Policy is capital in nature, as held by the Supreme Court in CIT vs Bharti Hexacom Ltd. (458 ITR 593). Consequently, the AO was of the view that License Fee and Spectrum Usage Charges (SUC) must be amortized u/s 35ABB. In respect of subscriber verification penalty revenue claimed that penalties for KYC violations are for acts prohibited by law and hence disallowable under Explanation 1 to section 37(1). Further, the Revenue contended that discounts to distributors are commission payments, requiring TDS u/s 194H and failure to deduct TDS warranted disallowance u/s 40(a)(ia).

Contentions of the Assessee

The assessee argued that the Supreme Court judgment in CIT v. Bharti Hexacom Ltd. (458 ITR 593; 2023) dealt only with license fee, not SUC. Assessee accepted Supreme Court's ruling on license fee but argued SUC is distinct and allowable as revenue expenditure. Tribunal and AO in later years allowed SUC as revenue expense. In respect of Subscriber Verification Penalty, the assessee argued that the penalty was contractual, not criminal; hence, Explanation 1 to section 37(1) does not apply. Tribunal in earlier years allowed similar claims. In respect of discount on prepaid instruments, the assessee argued that Supreme Court in Bharti Cellular Ltd. vs ACIT (2024) held that such discounts are not commission; hence, section 194H and related disallowance did not apply.

Order of the ITAT

Relying on Supreme Court ruling, ITAT held that variable license fee under the 1999 Policy is capital in nature and must be amortized u/s 35ABB. CIT(A)'s order allowing it as revenue expenditure was reversed. ITAT distinguished SUC from license fee and allowed SUC as revenue expenditure, citing consistent treatment in later assessments and judicial precedents. In respect of subscriber verification penalty, ITAT upheld CIT(A)'s deletion, holding that penalties for KYC violations are contractual and not for offenses prohibited by law. In respect of discount on prepaid instruments, the ITAT, relying on Supreme Court ruling, upheld CIT(A)'s deletion and affirmed that discounts to distributors are not commission and thus outside section 194H.

Citation

DCIT Vs Bharti Hexacom Limited (ITA No 1110 to 1113/Del/2023)



Our Comments

The ITAT's ruling provides *clarity* on three disputed issues—SUC allowability, TDS on distributor discounts, and KYC penalties. The ruling provided substantial relief to telecom operators on these issues. While license fee treatment now stands firmly settled as capital expenditure due to the Supreme Court's ruling, disputes on other issues decided in favour of the taxpayer in the present case seem far from over till the matter is settled by the Apex Court. In the meanwhile, telecom operators should segregate license fee and SUC for the correct tax treatment.