ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. JUDICIAL DEPARTMENT.

Income Tax Reference No.234-2011

Commissioner Inland Revenue (Zone-II), LTU, Islamabad

Vs.

M/s CM Pak Limited

S. No. of order/ proceedings	Date of order/Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	12.12.2018	Hafiz Munawwar Iqbal, Advocate for applicant/petitioner. Mr. Ayyaz Shaukat, Advocate and Malik Sardar Khan Awan, Advocate for respondent.

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S(AZA)

AAMER FAROOQ J. This Tax Reference under section 133 of the Income Tax Ordinance, 2001 has been filed requesting for framing of questions of law and answering the same arising out of decision of learned Appellate Tribunal Inland Revenue dated 21.04.2011 passed in ITA No.998/IB/2010 for Tax Year 2008.

2. The facts, in brief, are that M/s CM Pak Limited/respondent is engaged in providing cellular telecommunication services in Pakistan. It filed income tax return for Tax Year 2008, which was treated as an 'assessment' and the order was issued accordingly. The respondent was selected for audit under section 177 of the Income Tax Ordinance, 2001 (the Ordinance); the Taxation Officer, Income Tax, Audit-IV, Large Tax Payers Unit, Islamabad passed order dated 30.05.2009 under section 122(1) of the Ordinance. In the referred order, two issues were raised; firstly the activation tax imposed on all cellular companies for activation of sims under SRO No.390(I)/2001 DATED 18.06.2001, which was claimed as an expense by the respondent; secondly the issue regarding

amortization of intangible expenses claimed as marketing and advertisement cost. The respondent felt aggrieved and filed an appeal before Commissioner Inland Revenue (Appeals). The referred appeal was decided vide order dated 07.09.2010. The matter was further agitated by way of an appeal by the Department which was decided vide order dated 21.04.2011.

3. On 17.01.2018, after hearing learned counsel for the applicant, this Court framed following two questions of law: -

> *a) Whether on the facts and in the circumstances of the case, the Honourable ATIR was justified in holding that the payment of activation tax under SRO No.390(I)/2001 dated 18.06.2011 was business expense?*
>
> *b) Whether on the facts and in the circumstances of the case, the learned ATIR was justified to uphold the verdict of CIR (A), who reduced the useful life of an intangible from 10 to 5 years, in contravention of section 24(4) of the Income Tax Ordinance, 2001?*

4. Learned counsel for the applicant, *inter alia,* contended that pursuant to SRO No.390(I)/2001 dated 18.06.2001, one-time activation charge was to be collected from the customer and to be deposited in government treasury; that the referred charge was levied on the customer and the respondent was only a collecting agent; that the fact that respondent deposited referred charges from its pocket and claimed the same as an expense, is not tenable. It was further submitted that in light of the referred fact, a sum of Rs.1,164,647,000/- claimed as an expense, was not tenable. It was also contended that company claimed the marketing expenses incurred by it as 'period cost' however the

assessing officer treated the same as an 'intangible cost' eligible for amortization. In this behalf, it was submitted that amortization was done for a period of ten years and it was reduced by learned Tribunal for a period of five years; that reduction of period to five years of amortization was not based upon any cogent reasons. Learned counsel, in support of his contentions, placed reliance on section 24(4) of the Ordinance.

5. Learned counsel for the respondent, *inter alia*, contended that due to the competitive market, it is the practice that such like levies and charges are borne by the companies', that the amount levied as 'activation charges' was duly deposited in the government treasury hence there was no loss to the government; that due to competitiveness of business, same was paid in company fund hence claimed as an 'expense', which was erroneously disallowed by the assessing officer. It was also contended that amortization has rightly been reduced to a period of five years inasmuch as market and advertisement is not an ongoing process and new strategies are to be devised for making the product more marketable. Learned counsel, in this behalf, referred to the decision of Government of Pakistan, Revenue Division, Federal Board of Revenue dated 22.06.2018 as well as case reported as 'Eastern Silk Store Vs. CIT' (1960 PTD 733)

6. Arguments advanced by learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

7. Vide SRO No.390(I)/2001 dated 18.06.2001 issued by Ministry of Finance, Government of Pakistan, there was a levy of the

rate of Rs.500 per set for activation of the cellular phone. For ease of convenience, relevant notification is reproduced below: -

"GOVERNMENT OF PAKISTAN
MINISTRY OF FINANCE, ECONOMIC AFFAIRS,
STATISTICS AND REVENUE
(REVENUE DIVISION)

.....

Islamabad, the 18th June, 2001.

NOTIFICATION
(CUSTOMS AND SALES TAX)

S.R.O. 390(I)/2001.- In exercise of the powers conferred by section 19 of the Customs Act, 1969 (IV of 1969), sub-sections (3A) and (6) of section 3, clause (b) of sub-section (1) of section 8, clause (a) of sub-section (2) of section 13 and section 71 of the Sales Tax Act, 1990, the Federal Government is pleased to exempt customs-duty leviable under the First Schedule to the Customs Act, 1969 (IV of 1969), and sales tax on the import or, as the case may be, on the supply of cellular telephone sets (hand-held sets) to the extent that the combined effect of both the levies shall be one thousand rupees per such set, hereinafter called the said amount, subject to the following conditions, namely:-

(i) No customs-duty or sales tax shall be collected on such cellular telephone sets at the time of import or, as the case may be, at the time of supply, but the said amount will be charged, collected and paid by the cellular company operator at the time the sets are presented to the cellular company operator for activation or energization;

(ii) Omitted;

(iii) the cellular company operator shall, if not already registered, obtain registration under the Sales Tax Act, 1990;

(iv) no cellular telephone set shall be activated or energized by the cellular company operator without charging and collecting the said amount;

(v) the said amount shall also be charged, collected and paid on every new activation or energization done by the cellular company operator;

(vi) the liability to charge, collect and pay the said amount shall be on the cellular company operator who shall deposit same through a monthly tax return in terms of section 26 of the Sales Tax Act, 1990, and rules made thereunder;

(vii) the cellular company operator shall, maintain proper records, whether in electronic form or otherwise, of all the sets energized or activated after payment of the aforesaid amount for a period of five years, and such records shall be produced for inspection, audit or verification as and when required by an officer authorised by the Collector of Sales Tax, and such officer shall not ask for proof of import of cellular telephone sets activated or energized; and

(viii) no adjustment of input tax shall be admissible to the cellular company operator or the buyer against the amount chargeable and payable under this notification.

Explanation.-- For the purposes of this notification, a cellular telephone set (hand-held set) includes one battery and a battery charger identifiable for use in connection with such mobile telephone set, provided that the amount payable under this notification shall not be effected on the ground that such battery or battery charger has not been presented or is not accompanied with such telephone set at the time of activation or energization.

Explanation 2.— For the purpose of condition (x), the expression "new activation or energization" means a new connection or number given by the cellular company operator but does not include a change in number given to a customer due to change in package or his location in Pakistan.

[C. No. 3(9)STL&P/2001]

(RIAZ AHMAD MALIK)
Additional Secretary

The bare perusal of the above notification shows that liability to charge, collect and pay the said amount was on cellular company and the referred amount was to be deposited through a monthly tax return in terms of section 26 of the Sales Tax Act, 1990. Moreover, under clause (viii), no adjustment of input tax was admissible to the cellular company operator or the buyer against the amount chargeable or payable under said notification. The charge was an indirect tax and was to be recovered from the customer. In this behalf, the burden was on the customer and the cellular company was only a collecting agent.

8. The fact, that respondent did not pass on the burden and paid that amount in government treasury from its own funds, is not tenable, especially when the respondent has claimed the same as an 'expense' for commercial expediency. Undoubtedly, the market is competitive and cut-throat competition exists amongst the cellular companies but the same is no justification for not paying on liability to the customers, as the levy was across the board and not on any individual company.

9. As noted above, activation tax/charges were to be received from the customer and were not the liability of the cellular company.

10. The fact, that cellular company did not pass on the burden, is its own doing and cannot turn around to claim it as an expense. In this view of the matter, we are of the opinion that

assessing officer has rightly disregarded the expense claimed by the respondent company regarding payment of activation charges for the Tax Year 2008.

11. The next issue is regarding marketing and advertisement cost; the same has been treated by the assessing officer as an 'intangible property' and allowed amortization of the same for ten years, which was reduced to five years by the learned Appellate Tribunal Inland Revenue. The respondent company did not question findings of appellate forums or even the assessing officer regarding treatment of marketing and advertisement cost as an 'intangible property' and amortization thereof. The relevant provisions of law for the present purposes, is Section 24 of the Ordinance which reads as follows: -

"24. Intangibles.—(1) A person shall be allowed an amortisation deduction in accordance with this section in a tax year for the cost of the person's intangibles–
(a) that are wholly or partly used by the person in the tax year in deriving income from business chargeable to tax; and
(b) that have a normal useful life exceeding one year.
(2) No deduction shall be allowed under this section where a deduction has been allowed under another section of this Ordinance for the entire cost of the intangible in the tax year in which the intangible is acquired.
(3) Subject to sub-section (7), the amortization deduction of a person for a tax year shall be computed according to the following formula, namely:—

$$A \quad B$$

where —
A is the cost of the intangible; and
B is the normal useful life of the intangible in whole years.
(4) An intangible —
(a) with a normal useful life of more than ten years; or
(b) that does not have an ascertainable useful life, shall be treated as if it had a normal useful life of ten years.
(5) Where an intangible is used in a tax year partly in deriving income from business chargeable to tax and partly for another use, the deduction allowed under this section for that year shall be restricted to the fair proportional part of the amount that would be allowed if the intangible were wholly used to derive income from business chargeable to tax.

(6) Where an intangible is not used for the whole of the tax year in deriving income from business chargeable to tax, the deduction allowed under this section shall be computed according to the following formula, namely:–

A x B/C

where —

A is the amount of 1 [amortization] computed under sub-section (3) or (5), as the case may be;

B is the number of days in the tax year the intangible is used in deriving income from business chargeable to tax; and

C is the number of days in the tax year.

(7) The total deductions allowed to a person under this section in the current tax year and all previous tax years in respect of an intangible shall not exceed the cost of the intangible.

(8) Where, in any tax year, a person disposes of an intangible, no amortisation deduction shall be allowed under this section for that year and —

(a) if the consideration received by the person exceeds the written down value of the intangible at the time of disposal, the excess shall be income of the person chargeable to tax in that year under the head —Income from Business ; or

(b) if the consideration received is less than the written down value of the intangible at the time of disposal, the difference shall be allowed as a deduction in computing the person's income chargeable under the head —Income from Business in that year.

(9) For the purposes of sub-section (8) —

(a) the written down value of an intangible at the time of disposal shall be the cost of the intangible reduced by the total deductions allowed to the person under this section in respect of the intangible or, where the intangible is not wholly used to derive income chargeable to tax, the amount that would be allowed under this section if the intangible were wholly so used; and

(b) the consideration received on disposal of an intangible shall be determined in accordance with section 77.

(10) For the purposes of this section, an intangible that is available for use on a day (including a non-working day) is treated as used on that day.

(11) In this section, — —

cost in relation to an intangible, means any expenditure incurred in acquiring or creating the intangible, including any expenditure incurred in improving or renewing the intangible; and —intangible means any patent, invention, design or model, secret formula or process, copyright 1 [, trade mark, scientific or technical knowledge, computer software, motion picture film, export quotas, franchise, licence, intellectual property], or other like property or right, contractual rights and any expenditure that provides an advantage or benefit for a period of more than one year (other than expenditure incurred to acquire a depreciable asset or unimproved land)".

12. The bare perusal of above provision shows that a person is allowed amortization

deduction in accordance with referred section in a Tax Year for the cost of person's intangibles that have a normal useful life exceeding one year and/or wholly or partly used by the person in a Tax Year in deriving income from business chargeable to tax. Subsection (3) provides amortization deduction formula. Subsection (4) provides that an intangible with a normal useful life of more than ten years and that does not have an ascertainable useful life, shall be treated as if it had a normal useful life of ten years. On the basis of referred subsection, the assessing officer fixed the useful life as ten years, however, learned Appellate Tribunal reduced it to five years. The sole justification provided by the learned Appellate Tribunal for reduction is the changing needs however the intention of law is contrary, as under section 24(4)(b), where normal useful life is not ascertainable, it shall be treated as ten years.

13. In view of above position of law and facts, we are of the opinion that answer to both the questions is in the '**negative**'.

14. Since the questions stand answered the instant reference application is accordingly disposed off.

15. Let copy of this decision be sent to the learned Appellate Tribunal Inland Revenue, Islamabad under the seal of the Court as required under the law.

Certified to Be True Copy

20 MAR 2019

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 07.03.2019.

JUDGE

JUDGE

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

T.R. NO. 234 /2010
(Tax Year 2008)

COMMISSIONER INLAND REVENUE (ZONE-II)
LARGE TAXPAYERS UNIT, ISLAMABAD — PETITIONER

VERSUS

M/S C. M. Pak Limited, 4th Floor
TF Complex, G-9/4, Islamabad — RESPONDENT

REFERENCE APPLICATION U/S 133 OF THE INCOME TAX ORDINANCE, 2001, PRAYING THE HONORABLE COURT TO DECIDE THIS REFERENCE ARISING OUT OF THE ORDER IN ITA NO. 998/IB/2010 DATED 21.04.2011 TAX YEAR 2008.

The appellant respectfully submits as under:-

1. That the appellant is Commissioner Inland Revenue (Zone-II), Large Taxpayers Unit, Islamabad exercising the powers and functions of the Commissioner Inland Revenue for the purpose of the proceedings against respondent under the provisions of Income Tax Ordinance, 2001.

2. That the respondent is an existing taxpayer under the jurisdiction of Commissioner Inland Revenue (Zone-II), Large Taxpayers Unit, Islamabad.

3. That the order of Tribunal bearing ITA No. 998/IB/2010 dated 21.04.2011 was received in this office on 02-05-2011 for which the limitation will expire on 30-07-2011.

4. The taxpayer is engaged in providing cellular telecommunication services in Pakistan. The taxpayer company filed return declaring loss at (Rs.180,458,473/-) which was selected for audit u/s 177 of the Income Tax Ordinance, 2001 for the following reasons: -

(i) *Fixed assets as at 31-12-2007 were shown at Rs.32,743,264,000/- as against Rs.22,842,117,000/- reflected on 31-12-2006. Major increase in the assets was under the head property and equipment amounting to Rs.8,850,568,160/- against which initial allowance was claimed at Rs 4,425,334,000/- which was required to be verified.*

(ii) *During the year, the company earned total revenue at Rs.2,307,891,000/-. Against this revenue, it claimed interconnected cost at Rs.376,191,000/- and dealer's commission at Rs.1,164,647,000/- These expenses required verification with reference to their admissibility under the relevant provisions of law.*