

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'A' NEW DELHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER  
AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No. 647/Del/2005  
AY: 2001-02**

**M/s NIIT Online Learning Ltd., vs Asstt. Commissioner of Income Tax,  
B-234, Okhla Industrial Area, Circle 13(1),  
Phase-1, New Delhi.  
New Delhi-110020  
(PAN: AABCN1113B)  
(Appellant) (Respondent)**

**Appellant by :** Shri Ajay Vohra, Sr. Adv.  
Shri Gaurav Jain, Adv.

**Respondent by :** Shri R.C. Danday, Sr. DR

**PER SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

This appeal has been preferred by the assessee against the order dated 23.11.2004 passed by the Ld. CIT(A)-XVI, New Delhi and pertains to AY 2001-02.

2. Brief facts of the case are that the assessee is a company engaged in the business of education and training through a website namely "netvarsity.com". The company was incorporated on 26.5.2000 with the main objective of providing online education services to the students. Prior to the assessee's incorporation, this activity was carried on by NIIT Ltd. but in order to exploit the rising demand of online learning, the NIIT Ltd. decided to segregate the online education services and make it an

independent business activity. The decision to transfer the online learning business to the assessee was approved by the Board of Directors of NIIT Ltd. in December, 2000 which was subsequently approved by the shareholders in January, 2001. Memorandum of Understanding (MOU) dated 2.1.2011 was entered into between the assessee and NIIT Ltd. in accordance with the approval granted by the Board of Directors and the shareholders. It was agreed in the MOU that the online education business is transferred to the assessee by NIIT Ltd. with effect from the date of incorporation of the assessee and further, during the intervening period, the business shall be deemed to have been carried on by the NIIT Ltd. for and on behalf of the assessee. It was also agreed that the expenses incurred by NIIT Ltd. in respect of online education business during the intervening period would be deemed to have been incurred on behalf of the assessee. The consideration for transfer of business was agreed at Rs.7,81,82,456/- which was as per the valuation certificate issued by M/s Price Waterhouse Cooper. During the intervening period, NIIT Ltd. had incurred various expenses like advertising, travel and conveyance, salaries etc. which as per the MOU were incurred for and on behalf of the assessee and for which

reimbursement was subsequently sought by NIIT Ltd. through a debit note raised on the assessee.

2.1 For the relevant previous year, the return of income was filed declaring a loss of Rs. 7,79,51,050/-. The assessment was completed u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') by computing the loss at Rs. 2,94,57,500/- after making several additions/disallowances which were as under:-

1. Advertisement & Other expenditure	Rs. 4,50,85,827/-
2. Travelling & Conveyance Expenses	Rs. 5,68,199/-
3. Personnel Expenses	Rs. 29,91,882/-
4. Royalty Expenses	Rs. 1,42,106/-

2.2 Aggrieved, the assessee preferred an appeal before the Ld. Commissioner of Income Tax(A) who dismissed the assessee's appeal and now the assessee has approached the ITAT and has raised the following grounds of appeal:-

*"1. That the Commissioner of Income-tax (Appeals) erred on facts and in law in confirming the assessment completed at loss of Rs.2,94,57,500 as against the returned loss of Rs.7,79,51,050.*

*2. That the Commissioner of Income-tax (Appeals) erred on facts and in law in disallowing advertisement expenditure amounting to Rs.4,50,85,827 holding it to be in the nature of capital expenditure.*

*2.1 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that advertisement expenditure incurred by NUT Ltd, and debited to the appellant was not incurred on behalf of the appellant and the portal was being*

*used by NUT Ltd. for its own business till 31.3.2001.*

*2.2 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that the arrangement between the appellant and NUT Ltd, was only an afterthought, so that expenses could be claimed in the hands of the appellant.*

*2.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in holding that the business of the appellant could not be said to have commenced from May 2000 but only from February 2001.*

*2.4 Without prejudice, the Commissioner of Income-tax (Appeals) erred on facts and in law in not directing the assessing officer to allow depreciation on the advertisement expenses disallowed as capital in nature.*

*3. That the Commissioner of Income-tax (Appeals) erred on facts and in law in disallowing the expenditure incurred on travel and conveyance debited by NIT Ltd, to the appellant amounting to Rs.5,68,199/- holding it to be in the nature of capital expenditure on the same ground as relating to disallowance of advertisement expenditure.*

*3.1 Without prejudice, that the Commissioner of Income-tax (Appeals) erred on facts and in law in not directing the assessing officer to allow depreciation on the travel and conveyance expenses disallowed as being capital in nature.*

*4. That the Commissioner of Income-tax (Appeals) erred on facts and in law in sustaining the disallowance made by the assessing officer on account of personnel cost incurred by NIIT Ltd. for employees working on behalf of the appellant to the extent of Rs.26,97,423/-*

*4.1 That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding the order of the assessing officer in allowing only 1/5th of the expenditure of Rs.14,72,297 on personnel on the ground that the same was*

*incurred prior to commencement of business and was covered under section 35D of the Income-tax Act ("the Act").*

*4.2 That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding the disallowance of Rs.9, 14,650 on account of personnel costs debited by NIIT Ltd. on the ground that the personnel were working for NIIT Ltd, and not for the appellant.*

*4.3 That the Commissioner of Income-tax (Appeals) erred on facts and in law in upholding the disallowance of Rs.6,04,935 on account of staff welfare expenses debited by NUT Ltd. on the ground that the personnel were working for NIIT Ltd. and not for the appellant.*

*The appellant craves leave to add, alter, amend, or vary the above grounds of appeal at or before the time of hearing.”*

3. The Ld. Senior Advocate for the assessee submitted that the assessee is a wholly owned subsidiary of NIIT Ltd. and it was incorporated in May 2000 with the sole objective of acquiring online learning business from NIIT Ltd. It was further submitted that due to procedural formalities, the transfer was approved by resolution only in December 2000 and the MOU was consequently entered into between the assessee and the NIIT Ltd wherein it was agreed that the business and all the activities including expenses shall be deemed to have been transferred to the assessee w.e.f. May 2000 i.e. the date of incorporation. It was submitted that in view of the MOU, the expenditure incurred by NIIT Ltd. during that period was not for the business purposes of

NIIT Ltd. but for the business purposes of the assessee who had acquired the business with retrospective effect and, therefore, the disallowance made by the Assessing Officer by holding that since the decision to transfer business to the assessee was taken only in December 2000/January 2001, the expenditure incurred during the period prior to the decision could not be said to be the expenditure of the assessee.

3.1 It was also submitted that the Assessing Officer drew adverse inference on the basis of some discrepancy between the period of expenditure mentioned in the debit note for advertisement raised by NIIT Ltd. and the actual details submitted by the assessee. It was further submitted that the noting on the debit note raised by NIIT Ltd. was a clerical mistake and the actual period of expenditure pertained to May 2000 to January 2001 which was duly supported by the bills and further that the assessee cannot be penalised for a clerical mistake committed by a third party. It was further submitted that another objection of the Assessing Officer in allowing advertisement expenditure to the assessee was that the 'portal' netvarsity.com was the property of NIIT Ltd. till 31.03.2001. In this regard, it was submitted that NIIT Ltd. had not generated

any revenue from the use of the portal netvarsity.com but was only upgrading the portal/asset for ultimate use by the assessee.

3.2 It was also submitted that another objection of the Assessing Officer in not allowing the advertisement expenses was that the assessee itself had treated the same as deferred revenue expenditure in its books of account and, therefore, there was no reason that the same should be treated as revenue expenditure. In this regard, the Ld. Sr. Advocate submitted that the treatment in books of accounts of a particular item of expenditure is not the only determining factor for allowing an item of expenditure under the provisions of the Act and further, the Income Tax Act itself does not recognise the concept of deferred revenue expenditure.

3.3 The Ld. Sr. Advocate further submitted that another objection of the Assessing Officer was that the advertisement expenditure was incurred for building of the 'brand' 'netvarsity.com' which was purchased for a consideration of Rs. 7,81,82,456/- whereas the written down value of the portal on the date of sale in the books of NIIT was only Rs. 34,38,117/- and, therefore, the amount spent on advertisement represented expenses towards building up of the brand and was in fact capital expenditure and hence not allowable as a revenue

expenditure. Refuting this observation of the Assessing Officer, the Ld. Sr. Advocate submitted that the brand netvarsity.com was already in existence and the expenditure was only incurred towards its promotion and, therefore, the expenses were allowable as revenue expenditure.

3.4 It was further submitted that another objection of the Assessing Officer was that since revenues were generated in the hands of the assessee only from February 2001, the business could be said to have commenced only from that date and, therefore, the advertisement expenditure incurred prior to that was essentially capital in nature. To this observation of the Assessing Officer, the Ld. Sr. DR submitted that the online learning activity was initially provided without any extra charges being charged from the students along with the normal class room curriculum. It was further submitted that commencement of business does not wait for the actual revenues to start coming in and, further, a business is said to be set up as soon as it is in a position to start operations. It was further submitted that there can be a time lag between the set up of business and commencement of activities and further that expenses incurred before set up are to be disallowed but expenses incurred between

the date of set up and commencement of business are fully allowable. It was further submitted that since the online learning business was already in existence prior to its being taken over by the assessee, the same can be said to have been acquired by the assessee with effect from its incorporation which was in May 2000 and, therefore, all the expenses incurred after that date are fully allowable.

3.5 It was further submitted by the Ld. Senior Advocate that the assessee's appeal on this issue was dismissed by the Ld. Commissioner of Income Tax (A) on the ground that the decision to transfer the activities was taken after seven months of incorporation whereas the same should not have taken so much time because the assessee as well as NIIT Ltd. were group concerns. It was submitted by the Ld. Sr. Advocate that due to the time lag of seven months between the date of incorporation and decision to transfer of activities, the Ld. Commissioner of Income Tax (A) had drawn the inference that the business was carried on by NIIT only and the decision to transfer the same was only an afterthought and as such, the expenses were not allowable in the hands of the assessee. To this observation of the Ld. Commissioner of Income Tax (A), the Ld. Sr. Advocate

submitted that NIIT Ltd., being a widely held listed company, some time lag in completing procedural formalities and obtaining the approval of the Board as well as the shareholder is not abnormal and the assessee's contentions cannot be brushed aside only on the ground of time lag between the date of commencement of business and the date of signing of the MOU.

3.6 In respect of disallowance of travelling and conveyance expenses amounting to Rs. 5,68,199/-, the Ld. Sr. Advocate submitted that his arguments were similar to as raised for the allowability of advertisement expenses.

3.7 On the issue of personnel expenses, the Ld. Sr. Advocate submitted that personnel expenses of Rs. 14,27,297/- were incurred towards ascertaining the feasibility of business and making a business plan and the Assessing Officer was of the view that since these were incurred prior to the commencement of business, only 1/5<sup>th</sup> of the same were allowable in terms of provisions of section 35D of the Act. It was submitted by the Ld. Sr. Advocate that the arguments for the allowability of these expenses were the same as for the allowability of advertisement expenses and further that it had been held by various Hon'ble

High Courts that disallowance u/s 40A(2) of the Act could be made only after recording a finding by the Assessing Officer that the expenditure was excessive or unreasonable having regard to the market value of goods or services, the ultimate business needs and the benefit derived by or accruing to the assessee there from. It was submitted that the onus had been cast upon the Assessing Officer to find out the fair market value of goods and bring on record comparable expenses before making disallowance in this regard.

3.8 It was also submitted that NIIT Ltd. was a profit making company and without prejudice to earlier arguments and even assuming that excess expenditure had been incurred by NNIT Ltd on account of the assessee, the same had been treated as income by NIIT Ltd., which was a profit making company and there would be no loss of revenue.

3.9 It was submitted that salary expenses of Rs. 9,14,650/- and staff welfare expenses amounting to Rs. 6,04,935/- were also disallowed by the Assessing Officer on the ground that no activities had been undertaken by the assessee till February 2001. The Ld. Sr. Advocate submitted that the arguments on

this issue would also be the same as raised on the issue relating to advertisement expenses.

4. In response, the Ld. Sr. DR submitted that the Ld. Commissioner of Income Tax (A) has discussed the issues involved in detail before upholding the disallowances. He placed reliance on the observation and findings of the Ld. Commissioner of Income Tax (A) and vehemently argued that the disallowances needed to be upheld by the ITAT because the assessee had been shifting its stand before the various authorities and further, it was amply clear that the impugned expenses did not pertain to the assessee but were part of the composite cost of purchase and had been split up and shown as expenditure for the purposes of window dressing. It was also submitted that the assessee had itself treated the advertisement expenditure as deferred revenue expenditure in its books of accounts and, therefore, now the assessee cannot claim the same as revenue expenditure by shifting its stand. It was also submitted that the fact that the resolution of transfer of business was passed after nine months from the month of incorporation itself puts the *bona fides* of the assessee under doubt. The Ld. Sr. DR also submitted that the dispute in the present appeal did not pertain to setting up of

business but to incurring of expenditure. It was submitted that the disallowance as confirmed by the Ld. Commissioner of Income Tax (A) should be upheld by the ITAT.

5. We have heard the rival submissions and perused the material available on record. The facts are not in dispute. The only question for adjudication is whether the expenditure incurred under various heads being claimed by the assessee as having been incurred for and on behalf of the assessee by NIIT Ltd. can be considered as expenditure incurred for and on behalf of the assessee or the expenditure was incurred by NIIT Ltd. on its own account and was not to be allowed as a deduction in the hands of the assessee. A perusal of the orders of both the lower authorities reveals that both the authorities have proceeded with the notion that expenditure incurred prior to the date of signing of the MOU cannot be regarded as expenditure incurred for and on behalf of the assessee although there are numerous judicial precedents wherein it has been held that even pre-incorporation expenditure is allowable as a deduction. The Hon'ble Apex Court has held in the case of Marshall Sons & Co. vs. CIT reported in CIT 223 ITR 809 (SC) that a company can decide to hive off business subsequently from a retrospective date. There are also

numerous judgments on the proposition that expenditure incurred between the set up of business and earning of revenue are allowable. The Hon'ble Delhi High Court has also held so in CIT vs. Samsung Electronics Ltd. reported in 356 ITR 354 (Del). Similarly, there are also numerous decisions wherein it has been held that advertisement expenditure for promotion of a product is not capital in nature and noticeable amongst them is the judgment of the Hon'ble Delhi High Court in the case of CIT vs. Spice Distribution Ltd reported in 374 ITR 30 (Del). Further, it is also a settled judicial precedent that no disallowance u/s 40A (2) can be made without the AO recording a finding that the expenditure incurred was excessive or unreasonable having regard to the market value of the goods or services, the legitimate business needs and the benefit derived by or accruing to the assessee there from. However, both the lower authorities have not considered the submissions of the assessee in light of the settled judicial precedents as discussed above. It is further seen that the assessee had contended before the Ld. CIT (A) that NIIT Ltd was a profit making company and that the expenditure incurred on behalf of the assessee by NIIT Ltd. was duly accounted for by NIIT Ltd as income and that there was no loss of

revenue has not been considered at all by the Ld. CIT (A). The Hon'ble Apex Court has held in CIT vs. Glaxo Smithkline Asia (P) Ltd reported in 236 CTR 113 (SC) that no disallowance u/s 40A(2) can be made in revenue neutral cases. This aspect has also been overlooked by both the authorities below. Further, we are of the considered opinion that both the lower authorities have mis-directed the efforts and have not examined the impugned expenditure in light of the provisions of section 37 of the Act. Accordingly, this is a fit case for being restored to the file of the Ld. CIT (A) and we do so with the direction that the Ld. CIT (A) will examine the impugned issues afresh in light of the settled judicial precedents as discussed above as well as examine the expenditure in light of the provision of section 37 after giving a due opportunity to the assessee.

6. In the final result, the appeal of the assessee stands allowed for statistical purposes.

Order pronounced in the Open Court on 20.11.2017.

Sd/-

**(R.K. PANDA)**  
**ACCOUNTANT MEMBER**

Sd/-

**(SUDHANSHU SRIVASTAVA)**  
**JUDICIAL MEMBER**

DT. 20.11.2017  
'GS'

Copy forwarded to:-

1. Appellant
2. Respondent
3. CIT(A)
4. CIT
5. DR

By Order

Asstt. Registrar

Copy forwarded to:-

6. Appellant
7. Respondent
8. CIT(A)
9. CIT
10. DR

By Order

Asstt. Registrar

