

INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "D: NEW DELHI  
BEFORE SMT BEENA A PILLAI, JUDICIAL MEMBER  
AND  
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 2937 & 2773/Del/2011  
(Assessment Year: 2004-05 & 2005-06)

ITO, Ward-16(3), New Delhi	Vs.	Times A & M (India) Ltd, D-6/5, Vasant Vihar, New Delhi PAN: AABCT0382Q
(Appellant)		(Respondent)

Revenue by :	Ms. Naina Soil Kapil, Sr. DR
Assessee by:	Shri C. S. Agarwal, Sr. Adv Shri Ravi Pratap Mall, Adv
Date of Hearing	31/01/2019
Date of pronouncement	04/04/2019

ORDER

PER PRASHANT MAHARISHI, A. M.

1. These are two appeals filed by the ld Assessing officer against the order of the ld CIT (A)-XIX, New Delhi dated 16.03.2011 and 07.03.2011 for the Assessment Year 2004-05, and 2005-06 respectively involving similar issues, therefore, both the parties advanced their arguments for both the years on the similar lines. Hence, this consolidated order covering all the issues for both the above assessment years is passed.
2. The revenue has raised the following grounds of appeal in ITA No. 2973/Del/2011 for the Assessment Year 2004-05:-
  - “1. *On the facts and in the circumstances of the case, the Ld.CIT(A) has erred in deleting the disallowance of web advertisement expenses of Rs.37,70,000/- by not adjudicating entirely on merits and by mostly ignoring the various contentions of t AO discussed in detail in the assessment order.*
  2. *The Ld. CIT(A) has erred on facts and in law by deleting disallowance of depreciation of Rs.9,00,000/- in respect of software, by not adjudicating entirely on merits the contentions of the AO in the assessment order and by ignoring that :*
    - (i) *The assessee was not able to establish during the assessment proceedings, t genuineness of purchase of software in respect of which depreciation was claimed.*

- (ii) *The assessee was not able to establish during the assessment proceedings, the actual use to which the software on which depreciation was claimed was put.*
  - (iii) *Admission of additional evidence relating to purchase of the said software is in contravention to the provisions of Rule 46A.*
3. *On facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance of Rs.12,81,569/- made u/s 40A(2)(b) on account of excessive and unreasonable high salary paid to Smt. Monila Goel, MD holding 14.29% shares in the assessee company and to Smt. Mamta Goel, Joint MD also holding 14.29% shares in the assessee company by not deciding entirely on merits the contentions of the AO discussed in detail in the assessment order.*
  4. *On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in deleting the addition of Rs.4,17,809/- made by the AO u/s 69C of the Act on account of alleged salary paid to Smt. Monila Goel held by the AO as unexplained expenditure by not deciding entirely on merits the contentions of the AO discussed in detail in the assessment order.*
  5. *On the facts and in the circumstances o the case, the Ld. CIT(A) has erred in deleting the disallowance of commission payments of Rs.90,238/- claimed as paid to Smt. Monila Goel by not deciding entirely on merits the the contentions of the AO discussed in detail in the assessment order.*
  6. *On the facts and in the circumstances of the case, the Ld. CIT (A) has erred in deleting the disallowance of Rs.53,525/- claimed as paid to Smt. Monila Goel on account of earned leave encashment by not deciding entirely on merits the contentions of the AO discussed in detail in the assessment order.”*
3. The revenue has raised the following grounds of appeal in ITA No. 2773/Del/2011 for the Assessment Year 2005-06:-
- “1. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting disallowance of web advertisement expenses of Rs. 43,50,000/- by not adjudicating entirely on merits and by mostly ignoring the various contentions of the AO discussed in detail in the assessment order.*
  2. *The Ld. CIT(A) has erred on facts and in law by deleting disallowance of depreciation of Rs. 4,50,000/- in respect of software, by not adjudicating entirely on merits the contentions of the AO in the assessment order and by ignoring that :*
    - (i) *The assessee was not able to establish during the assessment proceedings, the genuineness of purchase of software in respect of which depreciation was claimed.*
    - (ii) *The assessee was not able to establish during the assessment proceedings, the actual use to which the software on which depreciation was claimed was put.*

- (iii) *Admission of addition evidence relating to purchase of the said software on 31/03/2005 is in contravention to the provisions of Rule 46A.*
- (iv) *The purchase of software by the assessee, if at all any on 31/03/2005 i.e. on the last day of The year clearly proves that the same was not put to use during the year and therefore depreciation thereon is not allowable."*
3. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance of Rs. 8,27,688/- made u/s 40A(2)(b) on account of excessive and unreasonably high salary paid to Smt Monila Goel, MD holding 14.29% shares in the assessee company and to Smt. Mamta Goel, Joint MD also holding 14.29% shares in the assessee company by not deciding entirely on merits the contentions of the AO discussed in detail in the assessment order."*
4. As the learned CIT – A, has allowed the appeal of the assessee for assessment year 2004 – 05 following the order passed by him for assessment year 2005 – 06, Therefore, it is necessary to first deal with the appeal of the revenue for assessment year 2005 – 06. The decisions so reached therein and reason for the same shall then be applied in appeal for assessment year 2004 – 05.
5. Assessee is a public limited company incorporated in the year 1998, engaged in the business of advertisement and publicity since its incorporation. The company is part of 'FIIT JEE' group of companies in print media. For assessment year 2005 – 06, assessee filed its return of income on 30/10/2005 declaring income of INR 1856100/-. The assessment under section 143 (3) of the act was passed on 28/12/2007 assessing the total income of INR 7483788/-. Ld AO made three different types of additions/disallowances as under:-
- I. disallowance on account of bogus web advertisement expenditure of INR 4 350, 000/-
  - II. disallowance on account of bogus software purchase of Rs 15 Lakhs and depreciation thereon disallowed of INR 450,000/-
  - III. Disallowance on account of excessive salary paid to managing director and joint managing director of INR 827688/-.
6. The assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned CIT – A – XIX, New Delhi who passed an order dated 7/3/2011 deleting all the disallowances. Therefore, revenue is in appeal before us on all three grounds.

7. Similarly for assessment year 2004 – 05, where the assessee filed its return of income at INR 137280/- and the learned assessing officer has made seven additions/disallowance and determined the total income of INR 11931642/-. The learned assessing officer made disallowance of INR 4670,000/- on account of bogus web advertisement and depreciation on software purchased, depreciation disallowed of INR 17051/-, disallowance under section 40A (2) of INR 1281569/- as in the earlier years. Some other disallowances were also made on account of salary paid to its employees.
8. The assessee challenged the same before the learned CIT – A, who passed an order on 16/3/2011, following his decision for AY 2005-06 , he deleted the addition of INR 4670000/- on account of bogus web advertisement expenditure and also consequent disallowance of depreciation of INR 17051/-. The learned CIT – A also deleted the disallowance of INR 1281569/- on account of salary paid to its managing director and to joint managing director. He also deleted the disallowance of Rs. 417809 made by the learned assessing officer on account of alleged salary paid to employee and held as unexplained expenditure under section 69C of the income tax. He also deleted the addition on account of alleged commission payable at 3% to the employee of INR 90238 and the addition made on account of alleged leave encashment of INR 53525/-. Accordingly, the learned AO aggrieved with the order of the learned CIT – A, has preferred appeal before us.
9. Now we 1<sup>st</sup> come to the ground number 1 of the appeal for assessment year 2005 – 06 which is against the deleting the disallowance of web advertisement expenses of INR 4350000/-. The learned assessing officer noted that assessee has shown total income of INR 90687060/- as gross revenue against which it has debited expenses of INR 87549682/- which resulted into major expenditure towards advertisement cost. On examination of the details, He found that assessee has paid web advertisement expenditure of Rs. 43,50,000/- and dealt with the same after making due enquiries. He also made similar inquiry for software purchases of INR 15,00,000 for development of customized animation software. The findings of the learned assessing officer are elaborately

discussed in his order. Therefore, in nutshell the learned assessing officer found that

- I. These charges were not for the advertisement of “FIITJEE” but for its own advertisement in the name of M/s Times A &M Advertisement Company. During the year and had done work only for its group company i.e. FIITJEE.
- II. AO was of the view that despite making such a huge expenditure on its own advertisement the company could not garner any new clients.

Therefore, it leads AO to make further inquiries about the genuineness of the expenditure incurred. Therefore, he carried out further inquiries.

The enquiry showed that the

- (i) Notices sent under section 133 (6) of the act were issued to all the web advertisement service providers and software developer to submit

- 1) Confirmed copy of account as on 31.3.2005
- 2) Details of the transactions entered into with M/s Times A & M (India) Ltd in financial year 2004-05.
- 3) Documentary evidence of work done for M/s Times A & M (India) Ltd in respect of which payments were received e.g. Copies of advertisements made in newspaper, etc
- 4) Any other relevant details pertaining to M/s Times A & M (India) Ltd. New Delhi for the above period.
- 5) Income Tax particulars i.e. PAN / Ward / Circle

Notice to one company returned unserved with comments that no such firm exist. From other four companies no replies were received.

- (ii) Thereafter the ld AO asked assessee to explain the above facts about notice u/s 133(6) and asked assessee to provide the current address of the parties.
- (iii) Meanwhile learned assessing officer on the basis of the company ultimately found that these entities are group concerns of Mr. SK Gupta group, which had been using them to provide accommodation bills to various beneficiaries. He further found that the survey was conducted on 18/10/2006 on Shri SK Gupta, who is controlling the

number of companies and is operating a number of bank accounts through himself and his family members and employees and also controlling number of concerns for issuing accommodation bills.

- (iv) Meanwhile as the assessee provided new address of the parties, stating that those parties about the correctness of the address have confirmed it, AO issued summons to them. None of the parties complied with it.
- (v) The learned assessing officer further deputed the inspector of income tax to enquire about existence of these companies. Inspector reported that no such companies existed at the addresses given by the assessee.
- (vi) Therefore the learned assessing officer of the view that these concerns are not genuine concern but were paper companies who have no actual work would neither have books of accounts or other documents or even technically qualified persons who can produce before the Department. He also carried out enquiry into the genuineness of the work done by these concerns. Interestingly, the learned AO noted that these companies have provided web advertisement at various websites maintained by them. He also carried out the detailed enquiry of what kind of services assessee has shown allegedly obtained from these companies and what is stated in the bills of that advertisement.
- (vii) Copy of advertisement submitted by the assessee was also found by AO that it could be taken from a normal standalone computer. This was demonstrated by the AO in his assessment order also.
- (viii) The company, which registered the domain names of all those companies to whom web advertisement charges have been paid, was also found to be of the same address, which was of one of the concern to whom the charges were paid. That address was found to be a residential address with no business concern. Therefore, the AO noted that even the details of web hosting of all those companies are also bogus.
- (ix) The learned assessing officer further carried out an enquiry about the domain name registered of all these companies. He found that result of all the websites on which the advertisements are claimed to have

been made by the assessee were negative except in case of Travelhind.com, which showed only one entry in the domain history in June 2004 and was discontinued later. Therefore, the learned assessing officer noted that, as the various domain names on which the advertisement has been hosted did not exist at all and found to be negative result. This shows that the websites not at all existed and therefore there was no reason to believe that assessee placed advertisement on such non-existent websites is a genuine expenditure.

- (x) The learned assessing officer also noted that the invoices produced by the assessee as proof of registry of those companies of one M/s Omega Technologies, which is also controlled by Mr. SK Gupta having the same address. The learned assessing officer interestingly noted that Omega Technologies who provided the registry of these websites have issued the invoices dated 12/11/1998 providing Java server pages to the website. The learned assessing officer noted that the first version of Java server Pages was out only in June 1999 and upgraded in December 1999. He therefore held that that how that company could provide such support before such facilities even existed in the domain. Therefore, he held that these are the invoices, which are not genuine.
- (xi) He further referred to the details of the software purchases from High-tech Computech Ltd. This is also the company, which is controlled by Sri SK Gupta. The AO asked the assessee to submit a copy of the project report, license of the software, to produce technical person associated with the development of software and produce the copy of the software. The assessee could only produce a copy of user manual of one software which had name of M/s High-tech Computech written on some pages. According to the AO, it did not show that the supplier has developed the software. He also noted a shocking feature of the purchase that the assessee was having a valid license for only one year for a cost of Rs 15 lakhs. Therefore, the AO asked the assessee to produce the original copy of the user manual and some technical person associated with the development of the software, which was

never produced. With respect to the technical person of the software supplier, assessee named one person and asked AO to conduct enquiry from that gentleman. The AO also asked about the need and uses, which were specified at the time of customization of software or development of the software and the user acceptance test, but no answer was submitted. The AO also noted that in some other assessment also this company was found to be an accommodation entry provider in the name of software supplier. Thereafter, the AO referred to the statement of Sri SK Gupta, where at page number 16 – 21 He mentioned several companies operated by him for providing accommodation entries. On this basis, the assessing officer issued show cause notice to the assessee on 17/12/2007, which is placed at page number 21 – 24 of the assessment order. Therefore, for customized software purchase by the assessee, on technical side assessee could only show the photocopy of the user manual. The assessee was specifically asked to produce the original of user manual as well as the agreement, which assessee never produced. Assessee has also denied the availability of any project report for the customized software purchased by it. When the assessee has not prepared the requirement document for the purpose of purchasing customized software from this software supplier, the learned assessing officer doubted the existence of the purchase of this software. The AO further referred to the inspector's enquiry report confronting it to the assessee who did not rebut any of the finding of the inspectors report.

- (xii) He further stated that merely the incorporation of the companies as well as filing with the registrar of companies or return of income tax does not prove the capabilities of the web advertisement service provider or software developer.

Accordingly, he held that the payment made by the assessee for web advertisement and software development is merely an accommodation entry and bogus for the reason that

- i. such parties are not available at the address

- ii. assessee also could not produce such persons despite repeated opportunities
- iii. Neither such concerns attended and responded to the summons not submitted any reply to any of the notices of the department.
- iv. The report of inspector shows that they do not exist
- v. The assessee also failed to show that any website advertisement appeared and those parties were having any domain name registration to host such advertisement.
- vi. No details of the software which was allegedly purchased by the assessee was produced
- vii. no evidence was shown about the actual work and its genuineness
- viii. all the companies were found to be operated by Sri SK Gupta accommodation entry provider who confessed his activities

Therefore, he disallowed a sum of Rs. 43,50,000 debited as web advertisement expenditure and INR 450,000 claimed as depreciation of software purchased from M/s High-tech computer private limited.

10. The assessee preferred appeal before the learned CIT – A. With respect to the issue of web advertisement expenditure of rupees 43,50,000 as well as on the depreciation of INR 450,000 and purchase of software of INR 1,500,000. The learned CIT – A noted that the assessee has submitted the evidences such as
  - i. copy of invoices,
  - ii. copy of letter to the advertiser by the appellant company,
  - iii. copy of advertisement provided by the appellant company,
  - iv. copy of letter dated 1/4/2004 from the advertiser confirming that the advertisement has been placed on their websites and
  - v. copy of confirmation account of the advertiser with respect to the expenditure incurred on the advertisement
  - vi. further, with respect to the existence of the company, master details of the company, permanent account number, copy of the affidavit from advertiser,

vii. With respect to genuineness copy of advertisement given by the advertiser, copy of the bank account cheque number, copy of tax deduction certificate.

viii. With respect to the purchase of software, copy of confirmation of account from the software developer, copy of master detail from the site of registrar of companies, copy of letter of software developer from assessee, copy of letter to the assessee from software developer along with the affidavit and its annexures., copy of manual of M/s High-tech computer private limited and copy of the license agreement with respect to the purchase of software.

He noted that the assessee has produced ample evidences and further the payment to the above parties are also through cheques and after making adequate deduction of tax and source and such evidences are not at all controverted. He further held that cross-examination of Sri SK Gupta on 30/11/2009 Clarified the position with regard to the services rendered by the advertisement companies wherein he has stated that those companies actually provided the services and they have enough infrastructures to provide those services. He also refused to have accepted any cash for the purpose of providing accommodation entries. Thereafter the learned CIT – A, stated and relied upon the order in case of FIITJEE limited of the learned CIT appeal, wherein according to him on identical facts and circumstances, the addition has been deleted. Therefore, he also deleted the above addition of Rs. 43,50,000/- for the purpose of web advertisement expenditure and disallowance of depreciation of INR 450,000 on software purchases. The revenue aggrieved with the order of the learned CIT – A, preferred an appeal before us.

11. The learned departmental representative vehemently submitted that the order passed by the learned CIT – A is grossly erroneous and contrary to the fact and shocking revelation and outcome of the investigation brought out by the learned assessing officer has been completely ignored by. He submitted that the learned CIT – A has simply relied on the face value of what was appellant stated and payment by banking channel and various unimportant letters of correspondence, confirmation and the income tax returns filed by the parties. He conveniently ignored the real investigation

made by the assessing officer, which proved that the whole transaction is sham. She submitted that the learned CIT – A, has not made any reference on the findings of the learned assessing officer about non-compliance of notices under section 133 (6) of the income tax act issued by the learned assessing officer to those parties. She further stated that the inspectors report stating that the entities does not exist at all at given address was also not commented by the learned CIT – A. She further stated that the assessing officer issued summons to those parties, which did not remain present before the assessing officer to show that they have any ability of web advertisement and producing the software. She further stated that the statement recorded on oath of Sri SK Gupta, wherein he categorically stated that no services were provided and stated that the companies were dummy companies was completely ignored by the learned CIT – A. She further stated that on cross-examination of SK Gupta, he has merely given answer in 'yes' and 'no'. However, he did not demonstrate any of the capacities for development of the software development or web advertisement on behalf of the companies. Therefore, she stated that the learned CIT – A, has grossly ignored the real findings and the real issue in the appeal of the assessee and deleted the addition. She therefore stated that now the coordinate bench must consider each and every enquiry of AO and the above evidences collected by the assessing officer and failure of the assessee to produce anything in support of purchase of software or of obtaining web advertisement services from these companies. She further stated that with respect to the advertisement expenses, all companies who provided the services to the company allegedly are operating from the same premises, which belongs to Sri SK Gupta. She further stated that notices u/s 133 (6) was issued was received under the same companies' stamp at the address of Sri Gupta. She submitted that non-compliance of summons, non-compliance of notices u/s 133 (6), no confirmation by any of the parties, report of the inspector and the telling finding of the learned assessing officer, with respect to the web advertisement made at various website for which an elaborate technical research made by the assessing officer on domain name, there is no finding of CIT (A). She further stated that CIT A ignored web address provided as to whom the payments were made did not

exist. This was proved by AO by searching the history of domains. She specifically referred to page number 11 and 13 of the assessment order. She further referred that the copy of advertisement and printouts furnished by the assessee could be made from any standalone computer as has been shown by the assessing officer even with the dates mentioned therein. She further stated that the learned assessing officer has also conclusively held that any webpage can be designed using HTML tools and standalone computer and the date of the computer can be changed very easily demonstrated by him in the order itself. She further stated that the proof of registry of these websites submitted is also explained at page 13 of the order of the AO. It was further stated that the omega technologies could not have provided support because such facility never existed at that time so invoices were dated 12/11/1998, whereas the technology support was developed in June 1999. She submitted that the learned CIT – A has not given any answers to these questions and the investigation of the assessing officer.

12. With respect to the software purchased by the assessee of INR 1,500,000 and on which the depreciation has been claimed at INR 450,000, it was stated that the company also belong to Sri SK Gupta. She stated that the original reports, licenses of the software, production of the technical person were never produced before the assessing officer. Even the compact disc (CD) of the software was also not shown to the assessing officer. She stated that only some random user manual was submitted which was also not original. She further stated that the agreement was made for one year for use and the assessee, which proves that is an accommodation entry, which is also corroborated by the statement of Sri Gupta, paid INR 1,500,000. She stated that the cross-examination of S K Gupta has stated that they have provided such services. However, he could not demonstrate any capability of developing such software. Even otherwise, the assessee did not have any information about the software. She further stated that even user acceptance test report was also not shown before the assessing officer. She further stated that if the software is customized then there is a requirement document, the software development document, the software testing document, and software trial or pilot test et cetera. She also referred to the software development life cycle and stated that assessee has never shown

any of the steps of such process. In view of this she submitted that the learned CIT – A, has grossly ignored all the relevant details, that an assessee must produce for establishing that it has purchased software. In view of this she submitted that the learned assessing officer has correctly made the addition in the hands of the assessee as it is completely bogus expenditure incurred by the assessee for which assessee does not possess any evidence except mere paperwork such as confirmation, bank statement, et cetera. She stated that all accommodation entry providers provide this kind of information, which is merely paper information, but in substance, it does not have real transaction. She further stated that the learned CIT – A, has allowed the claim of the assessee merely on the copies of the cheque, payment by the bank, and tax deduction at source certificate as well as normal communication which does not have any evidentiary value. So far as the payment for web advertisement services and for purchase of the software. In view of this, she submitted that the order of the learned assessing officer with respect to the above might be confirmed.

13. The learned authorised representative, Shri C. S. Agarwal, senior advocate first stated that in assessment year 2004 – 05 assessing officer had originally accepted the return of income as no notice under section 143 (2) of the income tax had been issued. However, by a notice on 31/3/2009 proceedings under section 147 of the act was initiated. The copy of the reasons recorded has been placed at page number 38 of the paper book and he submitted that the initiation of proceedings on the reasons stated are untenable and is based on no valid material. He further stated that the learned assessing officer while framing assessment has held that the expenditure incurred is claimed since it has been paid to such of the companies which were controlled by Sri SK Gupta, who in his statement recorded during the course of survey had stated that the said companies has merely issued accommodation bills, he thus, on the basis of the aforesaid reason held that the expenditure claimed are bogus expenditure. He stated that despite assessee's repeated requests SK Gupta had never been produced for assessee's cross-examination. Even copy of the statement had not been provided to it for its rebuttal. He further stated that assessee has claimed expenditure incurred in respect of the payments made by the

assessee for obtaining web advertisement charges paid to the four different companies along with the purchase of the software. He further stated that the assessing officer has made the disallowance for various reasons. However the learned CIT – A, after the appreciation of the entire evidences has held in his order in para number 8.15 at page number 9 that the expenditure incurred claimed has been incurred for the purpose of the appellant's business and had genuinely been incurred by it. He further stated that it would be seen from the said order that in arriving at the aforesaid conclusion the learned CIT – A followed appellate order in the case of M/s FIITJEE Ltd where similar expenditure has been disallowed on the same grounds, but were held by him as an allowable expenditure. He further stated that the above order of the learned CIT – A, has been upheld by the honourable High Court on appeal filed by the revenue. Therefore, he held that the basis of making disallowance by the assessing officer does not survive anymore and the issue is squarely covered in favour of the assessee by the decision of the honourable High Court. He further stated that AO had drawn adverse inference against the assessee merely on the basis of statement of Sri SK Gupta with statement had never been confronted to the assessee despite repeated requests. However, Shri SK Gupta at the direction of the learned CIT – A, in the case of M/s FIITJEE Ltd appeared when he was cross examined and stated that he had never alleged that such expenditure incurred are mere accommodation entries. He further stated that in M/s ECI rapiscan has also incurred similar expenditure which too had been disallowed by the learned assessing officer while framing the assessment. In that case, that company had paid a web advertisement charges to M/s Centenary software private limited and to M/s high-tech computers private limited; such sum has been held allowable as deduction by the coordinate bench by an order dated 7/4/2016. He further stated that in that case the tribunal has held that disallowance made was unsustainable. He further placed on record four orders of the coordinate bench in case of FIITJEE Ltd where such disallowances were deleted. He therefore stated that learned CIT – A, was fully justified in holding that the expenditure incurred for the purposes of the business and he placed reliance on the finding of the learned CIT – A.

He stated that the order of the learned CIT – A, clearly reflects that he has considered all the documentary evidences placed on record and after appreciating the evidences has held that disallowances made were entirely untenable, both on facts and in law. He further stated that assessing officer has not disputed the correctness of the books of accounts, which have been maintained in the course of the business. Therefore, he stated that having accepted the books of accounts as correct and complete and without bringing any contrary material, the learned assessing officer could not have disallowed the above expenditure. He further stated that when learned CIT – A examined entire material and has come to a conclusion that the expenditure has been genuinely incurred and had been incurred for the purposes of the business, Therefore, he submitted that unless material is brought on record to rebut the findings of the learned CIT – A, as held by the honourable Calcutta High Court in case of Prahlad Bhattacharya vs. CIT 386 ITR 708 the order of the learned CIT – A, deserves to be upheld.

14. The learned departmental representative vehemently contested the argument of the learned Senior Advocate and submitted that the issue is not at all covered. She submitted that the orders of the coordinate benches for assessment year 2002 – 03 to assessment year 2006 – 07 are five different orders concerning the same assessee delivered on the same date do not cover the issue at all. She referred to each of the order and stated that it does not deal with the enquiry carried on by the learned assessing officer at all and therefore such facts are not there before the coordinate benches in the case of group concern. She further stated that the addition is not at all been made on the basis of the statement of Sri SK Gupta. Only his statement has led the learned assessing officer to make the further enquiry. Therefore, the issue of the cross-examination of the SK Gupta also does not arise. In view of this, she submitted that the claim of the learned Senior Advocate that the issue is squarely covered in favour of the assessee is absolutely devoid of any merit.
15. We have asked the Learned Senior Advocate to provide us with the balance sheet of all the companies who provided web advertisement services and the company who customize the software for the assessee, and also the source code of the software. For all these details, the Learned Senior Advocate

expressed his inability for the reason that the companies who provided the web advertisement services were the service provider and the source code of the software is now not available as it was used only for one-year.

16. We have also put to the kind attention of the learned Senior Advocate the decision of the honourable Delhi High Court in case of Chintels India Limited V DCIT 2017-TIOL-1366-HC-DEL-IT wherein on identical circumstances the depreciation on the software was disallowed by the AO was confirmed. However, the learned Senior Advocate submitted that the software purchased by the assessee is not proved to be bogus but is a genuine purchase.
17. We have carefully considered the rival contention and perused the orders of the lower authorities. For assessment year 2005 – 06 assessee has booked expenditure of web advertisement charges in the name of 4 companies amounting to Rs. 43,50,000 and in case of 3 companies in assessment year 2004 – 05 amounting to Rs. 2270,000/-. On questioned by the AO to prove the genuineness of the web advertisement charges, assessee could submit the copies of invoices and allotment domain name. To explicitly make it clear that GlobexTech India private limited has been paid a sum of INR 750,000 by the assessee for provision of web advertisement charges. To support and substantiate the allowability of the above expenditure, assessee submitted following details::-
  - I. invoice copies to GlobexTech India Ltd from Omega Technologies Ltd dated 12/11/1998 to show the allotment of domain name GlobexTechin.com
  - II. letter dated 26/3/2004 by assessee to Globex Tech India Ltd for giving advertisement
  - III. advertisement provided by the appellant company to the advertiser
  - IV. Letter dated 1/4/2004 from the advertiser confirming that the advertisement has been placed on the website.
  - V. Confirmation of account from advertiser
  - VI. Master detail of the company of the recipient on registrar of companies website
  - VII. pan and CIN number

- VIII. Affidavit from the advertiser in response to letter issued by the appellant company.
  - IX. Bank account, cheque numbers 700 666 dated 31/3/2005
  - X. invoice issued by Globextech India Ltd to the assessee dated 31/3/2005
  - XI. tax deduction at source certificate dated 30/5/2005
18. Similar details were provided for the other three recipients of the web advertising charges. The learned assessing officer noted that all the companies, which provided the web advertisement services to the assessee, are stationed at the same address. Therefore, AO issued notices u/s 133 (6) of the act asking for comprehensive details. In case of one company notice returned back unserved, with comments that no such firm exist. In case of other concerns, there was no response. Therefore, assessee was asked to provide the current addresses of these companies. Later on, he found that one Shri SK Gupta, who is an accommodation entry provider who was also surveyed by the income tax department and stated earlier that he is an accommodation entry provider, controls these companies. Therefore, summons under section 131 of the income tax act was issued to these companies. However, nobody complied with those summons. Therefore, the AO deputed the inspector to verify the existence of those companies who reported that no such companies existed at the new addresses given by the assessee. Therefore, further summons were also issued under section 131 to these companies for the compliance, which was received by one person on behalf of all the companies. However, in response to the summons also there was no compliance. Therefore, the assessing officer did not have any other option but to enquire into the genuineness of the claim of the deduction of the above expenditure. The assessing officer noted the various websites stated by those service providers. Detailed enquiry conducted by the AO is mentioned at page number 11 to 16 of the assessment order which conclusively proves that the services could not have been provided by these companies as domain names does not exist, the JSP ( java Server page ) technologies based on which the website of the services providers is claimed to have been launched, did not exist at that time, The learned AO

specifically noted that the invoice letters of Omega Technologies dated 12/11/1998, says that they would provide JSP support to the website. (Java server Pages). However, such technology came out with its first version only in June 1999 and upgraded in December 1999. This fact is neither controverted by the assessee nor by the learned CIT – A. Therefore, it is apparent that such services were not at all in existence in the whole world on 12/11/1998. There is no answer in the order of the learned CIT – A, on all these observations of the learned assessing officer.

19. With respect to the software purchase, the assessee could not produce even a single piece of evidence that how the software was developed as it was customized software. There is no answer about the requirement document of the software, about the development cycle, about the project phases, testing phases, running phases etc. There was no backup copy available with the assessee. Only precious thing available with the assessee was an obscure user manual copy. Even the original user manual was also not available. The assessee could not produce the technical person who was associated with the development of the software. To scuttle the enquiry of the AO, merely a name was thrown and AO was asked to make necessary enquiry from the said person of the company who sold the software. It is the duty of the assessee to prove that it owns the software and uses it for its business purpose. On both the conditions, the assessee has miserably failed. Without looking into this requirement, the learned CIT – A, has deleted the disallowance of depreciation on the software. Therefore, the learned CIT appeal did not have any answer about the various issues raised by the learned assessing officer in his assessment order. In view of this, we do not have any reason to sustain the order of the learned CIT appeal, but looking at the order of the learned assessing officer, we have every reason to restore the order of the learned assessing officer.
20. Now we come to the findings of the learned CIT appeal that on identical facts and circumstances in case of some other group concern, the additions have been deleted, and therefore he deletes the addition in case of the assessee for this year too. Firstly, the learned CIT appeal failed to notice a startling difference in the level of enquiries made by the learned assessing officer in the present case. With respect to the website advertisement

expenditure, the Ld. Assessing officer has conclusively proved that Java server page on which the website of the service provider is maintained, such technology was never in existence. The learned CIT appeal did not have any answer about the same. Further, with respect to the software development the questions raised by the AO about the project and various development cycle for development of the software were never answered by CIT appeal. Leaving aside even the order of the learned CIT appeal, there was no answer from the side of the assessee before any of the lower authorities on these issues but in fact, there was a complete stoic silence. During the course of hearing, we have also asked about the several details of the software development and website advertisement. However, except the information provided to the lower authorities, No fresh information was put to our notice. It was not shown to us how CIT appeal has recorded that how above observations of the AO in the impugned order are met with in the order of sister concern on which he placed heavy reliance in deleting the disallowance. On careful reading of page number 14 of his order, wherein he has quoted para number 5.4 of such order on which he relied, he has simply stated that the payments were made by account payee cheques and the assessee supported it with the necessary evidences. He further stated that the learned assessing officer disallowed the claim out rightly without making any effort of examining any of the companies. However, looking at the facts of the case of assessee, The learned assessing officer issued summons to each of the companies, deputed the inspector who submitted a report about the nonexistence of this companies and further 133 (6) notices remained unserved and unanswered. Perhaps these facts, the learned CIT appeal has lost sight of. The learned CIT – A further stated that the AO relied upon the statement of Sri SK Gupta, without affording any opportunity for cross-examination. This finding is devoid of any merit as the AO has not at all issued any summons or enquired anything from Sri SK Gupta during the course of assessment proceedings. The learned assessing officer has merely taken as a support material of the statement of Shri SK Gupta dated 13/12/2006 during the course of search proceedings on Sri SK Gupta. Therefore, it is totally incorrect for CIT Appeal to have mentioned that the AO has made the addition on the basis of statement of Shri SK

Gupta and A O has not granted an opportunity of cross-examination to the assessee. Even otherwise, the addition has not been made solely on the basis of the statement of Sri SK Gupta, but for the reason of failure of assessee to produce even the basic details about the claim of the expenditure as well as the ownership and use of the software. Further the learned CIT – A, was swayed by the fact that the assessee has made payment by account payee cheques. It is a matter of common knowledge that whenever there is an allegation of accommodation entries the transactions are always through account payee cheques.

21. With respect to the software purchase by the assessee and claim of depreciation thereon is squarely covered against the assessee by the decision of the honourable Delhi High Court in case of Chintel (supra) wherein the assessee could not prove the purchase of the software as genuine transaction as it was also developed by an entry operator controlled company, the honourable Delhi High Court confirmed the disallowance of depreciation on the same held as under :-

**“AYs 2009-10 and 2010-11**

24. Turning to the appeals for AYs 2009-2010 and 2010-11 the short question involved is whether the Assessee was able to demonstrate that it was the Assessee which, in fact, purchased the software for a value of over Rs. 4.24 crore from MIL whose address has not been able to be verified by the AO.

25. The Court finds that the ITAT has re-examined every shred of evidence to come to clear conclusion that the Assessee was not able to demonstrate the genuineness of the purchase software. Further the story put forth by the Assessee that the software having been handed over to Sobha was also not substantiated by any documentary evidence or even otherwise. On facts, therefore, the concurrent opinions of the AO, CIT(A) and the ITAT to the effect that the purchase of the software was, in fact, a bogus transaction not entitled to depreciation cannot be said to suffer from any legal infirmity warranting interference.”

22. Now we come to the various decisions relied upon by the learned Senior Advocate submitting that the issue squarely covered in favour of the assessee by quoting the decision of the coordinate benches which also confirmed by the honourable High Court in case of FIITJEE Ltd.

23. We first refer to the decision of the coordinate bench in ITA number 4946/del/2010 for assessment year 2002 – 03 where in para number 9 of the order it is stated that the assessing officer did not make any effort of examining any of the companies and evidences produced by the assessee and in that case, the addition was only made by the assessing officer on the statement of Shri SK Gupta, without affording any opportunity for cross-examination. In the Present case, the assessing officer has made detailed enquiry. De hors the statement of Shri SK Gupta, assessee has failed to show that it has incurred expenditure for web advertisement and purchased the software. Further, we did not find the observation of the coordinate bench with respect to the non-availability of technology on which websites were developed, as well as the nonexistent websites of the advertisers and also the basic details called for by the AO with respect to software development lifecycle. In the present case, order of the assessing officer has clearly made further allegations and proved conclusively that the expenditure is bogus.
24. Coming to the order for assessment year 2003 – 04 in ITA number 3651/del/2013, above order of the coordinate bench has quashed the reassessment proceedings and therefore it did not discuss anything on the merits of the issue. In para number 10.5 of the order stated that as the reopening was quashed and the CO of the assessee was allowed, coordinate bench did not thought it fit to go into merits of the appeal of the revenue at all. Therefore, that decision does not cover the issue on merit.
25. On the order of the coordinate bench in ITA number 3650/del/2013 and referred to para number 10.4 of the order facts are identical to the decision in 2003-04, where the reassessment has been quashed and the appeal of the revenue was dismissed without considering the merits.
26. Similarly, order of the coordinate bench for assessment year 2005 – 06 in ITA number 4947/del/2010 in paragraph number 6 of that order says that there was no addition on account of web hosting advertisement charges as well as purchase of software and disallowance of depreciation thereon. Further addition has been deleted in para number 6.1 merely on the on the

fact that cross-examination of Sri. SK Gupta was not granted to the assessee.

27. In view of this we are not inclined to agree with the argument of Id AR that issue is squarely covered in favour of the assessee is absolutely devoid of any merit.
28. Now we come to the issue of the cross examination of Shri S K Gupta. Presently there is no statement recorded of Shri SK Gupta by the learned assessing officer during the course of assessment proceedings of the assessee. Further, the learned assessing officer has not made the disallowance on the basis of the statement of Shri SK Gupta but on account of failure of the assessee to substantiate that, it has incurred for web advertisement development charges as well as purchase of customized software on which depreciation is claimed.
29. As the facts for assessment year 2005 – 06 and 2004 – 05 are identical except the amounts in the respective appeal, we allow one and two of the appeal of the AO for assessment year 2004 – 05 and 2005 – 06.
30. Now we come to the ground number 3 of the appeal for assessment year 2005 – 06 where the learned CIT – A has deleted the disallowance of INR 8 27688/- made under section 40A (2) (b) on account of excessive and unreasonable a high salary paid to the managing Dir as well as the joint managing director. The learned assessing officer in para number 4 has noted that though the director was working for the company however, how much work did she do for the company and how much salary should be paid to her for that work is the issue. Therefore he disallowed and excessive salary of INR 650,000 in case of managing director and INR 1 77688/- in case of joint managing director. The learned CIT – A deleted the disallowance because the managing Dir was also paid salary in earlier year also and she is a qualified professional.
31. The learned departmental representative reiterated findings of the learned assessing officer.
32. The learned Senior Advocate vehemently stated that for the provisions of section 40A (2) (b) the learned assessing officer should have given a clear-cut finding that the expenditure is excessive or unreasonable having regard

to the fair market value of the facilities, the legitimate needs of the business and the benefit derived to the assessee.

33. We have carefully considered the rival contention and find that M/s Monila Goel and Mrs Mamta Goel both are technically qualified as B Tech graduate and BA LLB. Further there is no finding given by the learned assessing officer that expenditure is excessive or is unreasonable having regard to the business need of the assessee as well as the fair market value of the services and the benefit derived or accruing there from to the assessee. In absence of clear-cut findings with respect to the expenditure on these counts, the disallowance u/s 40 A (2) (b) cannot be made. In the result ground number 3 of the appeal of the AO for assessment year 2005 – 06 and ground number 3, 4, 5 and 6 for assessment year 2004-05 are dismissed.
34. Accordingly, appeals of the learned AO for both the years are partly allowed. Pronounced in the open court on 04/04/2019.

-Sd/-

(BEENA A PILLAI)  
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)  
ACCOUNTANT MEMBER

Dated: 04/04/2019

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR  
ITAT, New Delhi