

IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'E' BENCH,
NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND
SHRI YOGESH KUMAR, JUDICIAL MEMBER

ITA No. 4902/DEL/2005 [A.Y 2002-03]

M/s Modi Entertainment Ltd
49, Community Centre
Friends Colony, New Delhi

Vs.

The Dy. C.I.T
Central - 5(1)
New Delhi

PAN: AAACM 8283 G

(Applicant)

(Respondent)

Assessee By : Shri Rohit Jain, Adv
Shri Deepesh Jain, Adv

Department By : Shri Amit Shukla, Sr. DR

Date of Hearing : 04.08.2022

Date of Pronouncement : 08.08.2022

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER:-

This appeal by the assessee is preferred against the order of the CIT(A), New Delhi dated 31.10.2005 pertaining to Assessment Year 2002-03.

2. The grievances of the assessee read as under:

"1. That on the facts and in the circumstances of the case the CIT upholding the action of the assessing officer in not allowing interest of Rs. 6,17,581/-..

2. That on the facts and in the circumstances of the case the CIT erred in upholding disallowance of software development expenses amounting to Rs. 19,93,650/- alleging the same to be capital in nature.

3. That on the facts and in the circumstances of the case the CIT (A) erred in upholding the action of the assessing officer in increasing the amount of long term capital gains computed by the appellant by an amount of Rs. 4,92,611/- alleging that benefit of indexation is not available to the appellant.

3.1 That on the facts and in the circumstances of the case the CIT (A) erred in not holding that Explanation to section 73 of the Act was not applicable to the facts of the appellant's case.

4. That on the facts and in the circumstances of the case the CIT (A) erred in not directing the assessing officer to allow set off of brought forward losses as claimed by the appellant."

3. Ground No. 1 was not pressed before us and, therefore, the same is dismissed as not pressed.

4. Ground No. 2 relates to the disallowance of software development expenses amounting to Rs. 19,93,650/-.

5. Facts on record show that during the course of scrutiny assessment proceedings, the Assessing Officer noticed that the assessee had incurred expenditure on purchase, development of software and other upgradation charges included under the head EDP expenses.

6. The Assessing Officer was of the opinion that such expenses confer enduring benefit to the assessee and, therefore, disallowed the same as capital expenditure.

7. The assessee carried the matter to the ld. CIT(A) but without any success.

8. Before us, the ld. counsel for the assessee stated that the expenses incurred by the assessee were towards purchase of MS Office Software Rs. 6,24,650/-, modem and UPS purchase Rs. 1,09,200/-, software development charges Rs. 25,000/-, server upgradation charges Rs. 68,000/- and billing software development charges Rs. 11,30,400/- with miscellaneous expenses of Rs. 36,400/-.

9. It is the say of the ld. counsel for the assessee that these expenses do not bring into existence any new asset in as much as the same were related to replacement of existing parts of computer and upgradation/modification. The ld. counsel for the assessee stated that these expenses were incurred in order to adapt various functions relating to billing in view of the latest technological changes for more efficient and smooth usage of the same in the running of the business operations.

10. The ld. counsel for the assessee further stated that these expenses did not add to the profit earning apparatus of the assessee and only facilitated carrying on the business more efficiently and profitably. In support of his contention, strong reliance was placed on the decision of the Special Bench of the Tribunal in the case of Amway

India Enterprises 111 ITD 112 and Asahi India Safety Glass Ltd 346 ITR 329.

11. Per contra, the ld. DR strongly supported the findings of the Assessing Officer/ld. CIT(A). It is the say of the ld. DR that expenses incurred on Modem and UPS purchases and billing software development charges give enduring benefit to the assessee and therefore, the same are of capital in nature,

12. We have given thoughtful consideration to the orders of the authorities below. In so far as expenses incurred on purchase of MS Office software, server upgradation charges and software development charges are concerned, we are of the considered view that the same were incurred to keep update with change in technology and therefore, the assessee had to incur such expenditure to upgrade his software.

13. In our humble opinion, element of upgradation does not automatically make the expenditure capital. However, the same cannot be said for purchase of Modem & UPS amounting to Rs. 1,09,200/- and billing software development charges Rs. 11,30,400/-.

In our considered opinion, expenses incurred on these items give advantage in capital field and, therefore, the same cannot be Revenue expenditure.

14. Billing software development charges are part of the profit earning apparatus of the assessee and, therefore, would be regarded as capital in nature. Considering the facts in totality, we restrict the disallowance to the extent of Modem & UPS purchases of Rs. 1,09,200/- and billing software development charges of Rs. 11,30,400/- and direct the Assessing Officer to delete the other disallowances. Ground No. 2 is partly allowed.

15. Ground No. 3 relates to the upholding of the action of the Assessing Officer in increasing the amount of long term capital gains computed by the assessee by an amount of Rs. 4,92,611/- by denying benefit of indexation.

16. During the course of scrutiny assessment proceedings and on perusal of computation of income, the Assessing Officer found that the assessee has shown long term capital gain of Rs. 35,14,290/-. On further examination, the Assessing Officer came to know that the

assessee has purchased 1,42,400 shares of Design Expo Network [P] Ltd on 16.05.2000 at cost price of Rs. 1 crore.

17. The Assessing Officer further noted that the assessee sold these shares on 07.08.2001 for a consideration of Rs. 1,40,06,901/- on which the assessee has shown cost of indexation of Rs. 1,04,92,611/-. The Assessing Officer denied cost of indexation and made addition of Rs. 4,92,611/-.

18. The assessee challenged the decision of the Assessing Officer before the Id. CIT(A) and strongly contended that the Assessing Officer has grossly erred in imputing the Explanation to Section 73 for denying benefit of indexation but the Id. CIT(A) was not convinced and confirmed the action of the Assessing Officer.

19. Before us, the Id. counsel for the assessee vehemently stated that rigours of Explanation to Section 73 of the Act are attracted in case of those companies which carries out business of purchase/sale of shares and there is loss from such business and pursuant to Explanation to Section 73 is deemed to be of the nature of speculation business.

20. It is the say of the ld. counsel for the assessee that in the case of the assessee, there is, in fact gain on sale of shares and the assessee is not in business of trading in shares and, therefore, Explanation to Section 73 is not at all applicable.

21. Per contra, the ld. DR supported the findings of the Assessing Officer.

22. We have given thoughtful consideration to the orders of the authorities below. In so far as computation of capital gain is concerned, there is no quarrel. The quarrel is in respect of denial of benefit of indexation. Though the assessment order is completely silent on the invocation of Explanation to section 73, but the same finds place in the findings of the ld. CIT(A).

23. In our considered opinion, Explanation to Section 73 of the Act is not at all applicable on the facts of the case in hand. Firstly, because the assessee is engaged in marketing and distribution of entertainment software and production of TV serials and is also engaged in distributing pay channels and secondly, admittedly, there is no loss in

the transaction of sale of shares. In fact, there is long term capital gain returned by the assessee.

24. On these facts, we do not find any merit in the application of Explanation to Section 73 of the Act. The Assessing Officer is directed to delete addition of Rs. 4,92,611/-. Ground No. 3 is, accordingly, allowed.

25. Ground No. 4 relates to the denial of set off of brought forward losses as claimed by the assessee.

26. The assessee claimed brought forward losses of Rs. 4,34,30,299/- but without any discussion, in the body of the assessment order, the Assessing Officer allowed only Rs. 2,66,87,767/-.

27. In our considered opinion, it is incumbent upon the Assessing Officer and also on the Id. CIT(A) to explain why the claim of set off of brought forward losses are not allowed to the assessee. Therefore, in the interest of justice, we restore this issue to the file of the Assessing Officer. The Assessing Officer is directed to allow the claim of set off of brought forward losses as per the relevant provisions of the Act and

after affording reasonable opportunity of being heard to the assessee.

Ground No. 4 is allowed for statistical purposes.

28. In the result, the appeal of the assessee in ITA No. 4902/DEL/2005 is partly allowed.

The order is pronounced in the open court on 08.08.2022.

Sd/-
[YOGESH KUMAR]
JUDICIAL MEMBER

Sd/-
[N.K. BILLAIYA]
ACCOUNTANT MEMBER

Dated: August, 2022.

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr.PS/PS	
Date on which the final order is uploaded on the website of ITAT	10.08.2022
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	