

IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH "E" NEW DELHI]

BEFORE SHRI G. S. PANNU, PRESIDENT
A N D
SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं./I.T.A No. 6295/Del/2018
निर्धारणवर्ष/Assessment Year: 2015-16

DCIT Circle : 16 (1), New Delhi.	<u>बनाम</u> Vs.	Magic Bricks Reality Services Limited, 10, Darya Ganj, New Delhi - 110 002.
		PAN : AAICM8228P
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारितीकीओरसे / Assessee by :	Shri Mukesh Gupta, C. A.; & Ms. Neha Gupta, C. A.;
राजस्वकीओरसे / Department by :	Ms. Garima Sharma, Sr. D. R.;

सुनवाईकीतारीख/ Date of hearing :	07/06/2022
उद्घोषणाकीतारीख/Pronouncement on :	29/08/2022

आदेश / O R D E R

PER C. N. PRASAD, J. M. :

1. This appeal filed by the Revenue is against the order of the Id. Commissioner of Income Tax (Appeals)-6 [hereinafter referred to as CIT (Appeals)] New Delhi, dated 30.07.2018 for the assessment year 2015-16.

2. The Revenue In its appeal challenged the order of the Id. CIT (Appeals) in deleting the disallowance made by the Assessing Officer in respect of advertisement and business promotion expenses while completing the assessment treating the said expenditure as capital in nature.

3. Brief facts are that the assessee company, which is engaged in the business in connection with development and maintenance of electronic/digital portal dedicated to real estate properties, filed its return of income on 28.09.2015 declaring loss of Rs.15,27,98,527/-. The assessment was completed under section 143(3) of the Income Tax Act, 1961 (the Act) on 25.12.2017 determining the loss at Rs.4,89,74,870/-. The Assessing Officer in the course of assessment proceedings noticed that assessee claimed expenses of Rs.20,76,47,319/- on account of advertisement and business promotion. As the Assessing Officer was of the view that these expenses have been essentially incurred for the purpose of brand building, maintenance, customer base and enhancing the revenue, required the assessee to explain as to why these expenses should not be capitalized. The assessee vide letter dated 15.12.2017 made the following submissions:-

“Assessee Company was incorporated on 19/08/2013. No business was conducted by the company during the period since incorporation till February, 2015. In the month of February 2015 running business of a property portal in the name of MagicBricks.com was acquired through slump sale from its holding company as part of the restructure of business. The holding company is hosting various websites such as indiatimes.com, simplymarry.com, timesjob.com,:toi,in,et.in etc. The real estate listing portal magicbrick.com was also hosted by the holding company however, *with a view to give focused attention to this business and to meet the challenge of competition from the rival real estate listing portal* such as 99acres.com and housing.com etc. and to get the further visibility and presence of the web

portal hosted by the assessee company in the name of magicbrick.com *an advertisement campaign was planned across all media format, as a result of which in a very short span MagicBricks.com became India's No 1 Property portal and has been adjudged as the most preferred property site in India, by independent surveys.* The portal provides a platform for property buyers and sellers to locate properties of interest and source information on the real estate space in a transparent and unambiguous manner. With a view to be everywhere at once and in order to maintain the confidence of existing as well as to attract new customers and real estate projects across the depth and breadth of India and to create magic brick as a credible and robust brand in this area, the advertisement and the brand promotion expenses were incurred during the year amounting to Rs.20.76 crores. Party wise and media wise details of the same has already been furnished.

Assessee is in the business of rendering services through the use of website. Website by itself is not a product or service that assessee is selling or marketing. It is selling various services through or on this website such as advertisement banner, various classified advertisement about the sale of renting of individual properties or projects. With a view to achieve and grow its revenue targets, assessee has to resort to advertisement to disseminate the information about such services rendered by the assessee through the use of its website. Since doing business through online portal is relatively a new concept in business in India, assessee needs to advertise and undertake country wide advertisement campaign to continuously remind the customer and be present first in various searches conducted by the customer online is the pre-requisite of attracting business through the online portal. Contrary to the traditional sale of product, sale of services, in this format of business through web portal requires a 360 degree reach and knock to a customer which was a business compulsion for the assessee company to undertake the media campaigns to disseminate the information about its services.

These expenses are revenue in nature as no enduring benefit is derived by the assessee and assessee has not just incurred the expenses on advertisement in the

subsequent year but in fact had the business compulsion to incur much more amount in the subsequent year i.e. 85.40 cores in FY 2015-16 and 50.08 in FY 2016-17, it can thus be seen had there been any enduring benefit out of the sum incurred during FY 2014-15 there should not have been any need to incur any further amount in the subsequent years, which is not the case. Further that no asset got created out of this expenses incurred by the assessee.

The assessee company has continued the advertisement and promotion campaign in the next year as well. A tabulation of the similar expenses in the next two years is given below:

Particulars	AY 15-16	AY 16-17	AY 17-18
Total Turnover	9.03	125.60	144.13
Total Expense	31.33	203.53	180.36
Advertisement Exp	20.76	85.40	50.08
Adv. Percentage of Total Exp.	66%	42%	28%

4. The assessee in its submissions stated that the expenses incurred towards advertisement and business promotion are revenue in nature and no enduring benefit is derived by the assessee. Assessee also placed reliance on the following decisions for the proposition that the expenses incurred by the assessee are only revenue in nature and these expenses are not capital in nature:-

- (i) CIT Vs. Discovery Communication India
56 taxmann.com 134 (Del);
- (ii) CIT Vs. Spice Distribution Ltd.
54 taxmann.com 325 (Delhi HC);
- (iii) CIT Vs. Pepsico India Holdings (P.) Ltd.
21 taxmann.com 165 (Delhi HC);
- (iv) DCIT Vs. Hitz FM Radio India Ltd.

82 taxmann.com 327 (Delhi-Trib.);

(v) DCIT Vs. Vodafone Mobile Services Ltd.

83 taxmann.com 7 (Delhi-Trib.)

5. Not convinced with the submissions of the assessee, the Assessing Officer held that the benefit of advertisement and publicity are of enduring nature available for the assessee or offered much longer period of time than the accounting period relevant for the assessment year under consideration. The Assessing Officer was of the view that this expenditure on advertisement and publicity becomes capital in nature as it is leading to creation of intangible assets being goodwill, reputation and creditability. Therefore, the Assessing Officer held that the expenses incurred by the assessee under the head 'Advertisement and Business Promotion' are capital in nature. The Assessing Officer, however, treated Rs.10,38,23,660/- being 50% of the expenditure on account of advertisement and business promotion of Rs.20,76,47,319/- as capital by assuming that in only 50% of the cases expenditure on advertisement and business promotion generated business within the relevant assessment year are in the capital field.

6. On appeal the ld. CIT (Appeals) placing reliance on the decision of the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. Vs. CIT (124 ITR 1) and various other decisions of Hon'ble Delhi High Court deleted the disallowance holding that the expenditure incurred by the assessee on advertisement and business promotion is fully necessitated for business purposes and it is advantage though enduring in long term cannot be termed as being in the capital field.

7. Before us the ld. DR strongly supported the order of the Assessing Officer. The ld. DR submits that the expenditure incurred by the

assessee towards advertisement and business promotion is only for brand building of the assessee company and such brand building creates an asset which is enduring in nature and, therefore, such expenditure is in the nature of capital expenditure and the Assessing Officer has rightly treated 50% of the advertisement and business promotion expenses as incurred in capital field.

8. On the other hand, the ld. Counsel for the assessee strongly placed reliance on the order of the ld. CIT (Appeals). The ld. Counsel for the assessee further submits that the co-ordinate bench of the Tribunal by order dated 10.11.2021 in ITA. No. 2605/Del/2017 in the case of Addl. CIT Vs. M/s. Jasper Infotech Pvt. Ltd., another e-commerce platform operator, having similar facts and operating conditions in e-commerce segment in respect of website, namely, "Snapdeal" deleted the disallowance made by the Assessing Officer towards advertisement and business promotion expenses who treated them as capital in nature. The ld. Counsel submits that the facts are identical to the facts of the assessee's case where the Assessing Officer disallowed 50% of the advertisement expenses incurred by the assessee just on the footing expenses incurred were providing enduring benefit to the assessee and the ld. CIT (Appeals) deleted the addition holding that the expenses were pivotal to the online industry in which the assessee operates. The ld. Counsel submits that the appeal filed by the Revenue before the Tribunal was dismissed. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of Alembic Chemical Works Co. Ltd. Vs. CIT (177 ITR 377).

9. It was contended by the assessee that it had to resort to advertisement to disseminate the information about services rendered through its website to be able to not only retain customers but also to attract more customers and expand its outreach resulting in more

advertisements and more revenue. It was contended that the assessee to make its presence felt in the competitive real estate market ran advertisement campaigns in all forms of media - online, print, radio, television etc. on all India basis to make consumers aware of its presence during the year under consideration. It was contended that Assessee continued the advertisement and promotion drive already undertaken during the year by selling entity wherein RK Swamy BBDO advertising agency to launched a high-pressure Marketing campaign with three TV commercials (**Vulture Vision (Giddh ki Aankh)**), **"Local Bond"** and **Mighty Hudumba'**) extending to radio, digital and several other mediums. **(Source : information openly available on: prnewswire.comf.** Further new and noble advertisement by working in tandem and communicating the proposition of "Property Sahi, Milegi Yahin" and these commercials build on the premise that Magicbricks helps you take the right decision - at every stage of the buying cycle. While the first commercial stressed on the need for choice, the second and third ads drive home the point that Magicbricks provides much more than just listings relevant locality information, going rates and price trends give the buyer the power of knowledge that helps him negotiate the best possible deal before agreeing to one's lifetime extremely expensive commitment. Thus catering to the young urban and semi urban customers.

10. The assessee is operating in a highly competitive consumer market, thus to stay ahead of its competition it engaged itself in aggressive advertisement and promotional activities which were a necessity and not a novelty. Furthermore there was a major slowdown in the real estate market in 2014-15, therefore the advertisement expenditure incurred by assessee was to attract customers not for creating any brand building as the real estate sector was already struggling to keep its business afloat.

11. Advertisements such as these to attract both sellers and buyer itself has a very short life span forcing each of such online player to continue to incur such advertisement and promotional expenses even at a higher scale on year-on-year basis, accordingly, assessee also had to incur similar advertisement and promotional expenditure in succeeding years also.

Sr No	Particulars	AY 2015-16	AY 2016-17	AY 2017-18	AY 2018-19	AY 2019-20
i)	Advertisement expenses	20.76	85.40	50.08	43.01	61.51
ii)	Total turnover	9.03	125.60	144.13	152.49	209.39
iii)	Total expenses	31.33	203.53	180.36	197.89	221.13
iv)	Loss	(22.30)	(77.92)	(35.60)	(45.40)	(11.74)

12. Further it was contended that the fact of business compulsion to advertise year on year basis in this kind of business is proved with analysis by a Florida-based content marketing agency which analyzed the marketing spend of Amazon, Amazon's total ad spent was \$2.6 billion on U.S. advertising and promotions in 2016, up 30% than previous year 2015, according to Ad Age's 200 Leading National Advertisers 2017 report. Indian players such as Flipkart, Amazon India etc., raised their marketing and advertising spends by over 57% in financial year 2014-15 over previous financial year 2013-14. In the three month period from September to November alone, these players spent about Rs.500 crore on advertising on account of the festive season compared with their total ad-spend budget of Rs.600 crore for 2014, which emphatically proves the requirement of advertising in case of online business especially in India.

13. Heard rival submissions perused the orders of the authorities below. The Assessee company was incorporated on 19.08.2013, no business was conducted since incorporation till February, 2015. The

Magicbricks portal was founded in 2006 and was hosted by Times Business Solutions Ltd. till 31.03.2013. That w.e.f 01.04.2013, Times Business Solution Ltd. got amalgamated with Times Internet Ltd. In February 2015, running business of a property portal in the name of MagicBricks.com was acquired through slump sale from Times Internet Limited (holding company) as part of the restructure of business. Therefore the instant year was the first year of active operations post slump sales of business.

14. The assessee is hosting a website 'magicbrick.com'. The website mainly sell its web-space for advertisement to various real-estate promoters to showcase their projects and retail properties for sale at the same time making efforts to promote its website amongst the buyers and customers to visit the website for their real estate buying need. Assessee provides web-based platform, brings together various property buyers and sellers to list and/or locate properties of interest and source relevant information to assist in their property buying decisions. Assessee functions in the service e-commerce space which is a new- online platform, breaking away from the traditional model of business of sale of services.

15. The assessee's main source of revenue is its income from sale of advertisement space on its web-site. Various real estate developers, brokers or individual owners of properties book advertisement space or listings to advertise their properties on the website. Since this is a completely revolutionary model with PAN India access to buyers, assessee is required to build a very high degree of visibility for its web-site in order to attract more and more customers to this platform.

16. The assessee company during the year under consideration incurred expenditure of Rs.20.76 crores under the head 'Advertisement

and Business Promotion'. Out of these expenses 50% amounting to Rs.10.38 crores was disallowed by the Assessing Officer treating the expenditure as incurred towards capital in nature as according to the Assessing Officer these expenses provided assessee company the enduring benefit and, therefore, these expenses were capital in nature.

17. It was contended that, reference to "enduring benefit" commonly refers to advantage in a commercial sense. If the advantage consists merely in facilitating assessee business operations or enabling business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, expenditure will be on revenue account, even though the advantage may endure for an indefinite future. It is submitted that; such advertisement provides a stimulus to the potential customer to buy services offered by assessee, no other enduring benefit in capital field as perceived by AO are derived by assessee. Hon'ble Apex Court in the case of **Alembic Chemical Works Co Ltd vs. CIT reported in 177 ITR 377**, has held an expenditure would be treated as being on capital account where an enduring advantage or benefit was received in the capital field.

18. The Id. CIT (Appeals) after considering the elaborate submissions made by the assessee and considering various decisions of High Courts and the decision of the Hon'ble Supreme Court in the case of **Empire Jute Company Vs. CIT 124 ITR page 1 (SC)** deleted the disallowance holding that the expenses incurred by the assessee towards advertisement and business promotion are not in the nature of capital, observing as under:-

"4.1.2 I have considered the assessment order and the submissions of the appellant. Considering the fact that there is huge competition in the said business, it was entirely necessary on the part of the appellant company to incur expenditure on

promoting the brand to be able to not only retain customers, but also to attract more customers and expand its outreach.

4.1.3 The issue is whether these expenses could be said to provide an enduring benefit to the appellant or whether these expenses create an intangible asset. The concept of enduring benefit has been discussed by the Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. vs. CIT [(1980) 124 ITR 1(SC)]. The court held that expenditure, even if incurred for obtaining a benefit for an indefinite future, may still be on revenue account and the test of enduring benefit may not work in all situations. According to the Supreme Court, what is material to consider in such situation is the nature of the advantage in the commercial sense and if the advantage is in the capital field, the same would be disallowable. If, however, the capital remains untouched and the expense only enables carrying out the business operations more efficiently and profitably, then despite the fact that there would be an advantage spread out over several years, the expense would be revenue in nature. When the above test is applied in the appellant's case, it can be seen that extensive advertising is required to be made. For this, expenses are required to be made and have been made, with a view to facilitate the business operations and also to expand the same.

4.1.5 As discussed above, the presumption drawn by the AO regarding the building of a brand image has also not been approved by the courts where it has been held that in a competitive environment, it would be difficult to assess the period of benefit derived from such advertisement and to ascertain whether any 'brand name' was created. Reliance is also placed on the decisions of the Punjab and Haryana High Court in the case of Liberty Group Marketing Division (315 ITR 125) and the Bombay High Court in the case of Geoffrey Manner and Co. Ltd. (315 ITR 134). The judgment of Delhi High Court in CIT v. Adidas India Marketing (P.) Ltd. [2010] 195 Taxman 256 (Delhi) recognized that brand promotion exercises undertaken through media campaigns, schemes, programmes etc are essential for propagation of the brand. Similar view has been taken by the Jurisdictional High Court in the case of Modi Revlon Pvt.ltd. (210 Taxman 161) wherein disallowance @50% of advertising expenses had been made by the AO. The Court held that so long as the expenditure was inextricably linked to business purposes, the expenditure was in the revenue field. The relevant portion of the High Court order is extracted as under:

“23. In the present case, the AO was conscious of the fact that brand promotion expenses are a necessary ingredient in marketing strategies. Therefore, he allowed about 50 per cent of those expenses. However, the reasoning for disallowance of the rest, i.e. that the assessee could claim only a proportion of such expenses, since advertising expenses were to be borne by the sister concern dealer, and that the proportion was in respect of its territory, was not upheld. This Court does not see any fallacy in the Tribunal's approach or reasoning, on this aspect. One is not unmindful of the concerns of a business which engages in sale of consumer items, and faces continuous competition. Brand promotion enhances the visibility of given products or services, and are often perceived as conferring a competitive advantage on those who adopt those strategies or schemes. Expenditure towards that end is based on pure commercial expediency, which the revenue in this case, ought to have recognised, and allowed. The revenue's arguments on this point too are insubstantial.”

4.1.6 Keeping in view the facts of the case and the judicial precedents narrated above, the conclusion is that the benefit resulting from the advertisement, publicity and sales promotion is wholly necessitated for business purposes and its advantage, though enduring in the long term, cannot be termed as being in the capital field. It is also noted that though it has been held that a benefit of enduring nature has been created by the advertising, the AO has not categorized the category of benefit created and at the same time held that the benefit created is not depreciable. The disallowance made by the AO is thus directed to be deleted. Grounds of appeal Nos. 1, 2 and 2.1 are allowed.”

19. We also further notice that almost identical issue came up for consideration before the co-ordinate bench of the Tribunal in the case of Addl. CIT Vs. M/s. Jasper Infotech Pvt. Ltd. In ITA. No. 2605/Del/2017 dated 10.11.2021 wherein the co-ordinate bench considered whether the CIT (Appeals) is right in deleting the disallowance of 50% of expenses incurred on advertisement, publicity and business promotion incurred on brand building of e-commerce portal 'Snapdeal' considering the same as revenue expenditure and not capital expenditure. The co-ordinate bench

of the Tribunal considering various decisions of the jurisdictional High Court held that the expenditure incurred by the assessee are purely in nature and cannot be considered as capital expenditure. While holding so, the Tribunal observed as under:-

“9. We also find that the Id. CIT (Appeals) considered in allowing the claim of the assessee on 4 decisions of the Hon’ble High Courts. Further the Id. CIT (Appeals) followed the decision of the Hon’ble jurisdictional High Court in the case of Modi Revlon Pvt. Ltd. 210 Taxman 161 [2012] 26 taxmann.com 133 (Delhi). There was nothing in the Income-tax Act; nor was there any material on record suggestive of Page | 6 the fact that the assessee could not claim these expenses as revenue expenditure. The fact remained that as assessee is operating in online marketing business as aggregator which is a highly competent consumer market the assessee had to stay ahead of its competition and thus engage itself in brand promotional activities and has necessarily to incur these expenses. The Id. AO having accepted the fact that the assessee could spend amounts for these activities to the extent of 50 % as revenue expenditure the Id AO could not have held that 50 % of such expenses are capital in nature, in absence of any contrary evidence. In view of this, we do not find any infirmity in the order of the Id. CIT (Appeals) in deleting the above disallowance. Further before us no evidence was placed on record to show that assessee has created any intangible asset and even after the details of expenses are placed before the Id. Assessing Officer, he held that ad-hoc percentage of certain expenditure are capital expenditure without pointing out that which nature of expenditure has resulted into creating an intangible asset. Accordingly, we find that the expenditure incurred by the assessee are purely revenue in nature and cannot be considered as capital expenditure. The Id. Assessing Officer also did not bring on record any evidence to prove his findings. In view of this, all the grounds raised in appeal by the Id. Assessing Officer are dismissed.”

20. In the case of CIT Vs. Citi Financial Consumer Fin. Ltd. (335 ITR 29) the Hon'ble Delhi High Court on analyzing various decisions including the decision of the Hon'ble Supreme Court in the case of Empire Jute Company Vs. CIT (124 ITR page 1) held as under:-

“14. Applying the aforesaid principle to the facts of this case, it clearly emerges that the expenditure on publicity and advertisement is to be treated as revenue in nature allowable fully in the year in which it is incurred. Concededly, there is no advantage which has accrued to the assessee in the capital field. The expenditure was incurred to facilitate the assessee's trading operations. No fixed capital was created by this expenditure. We may also add here that in the income-tax law, there is no concept of deferred revenue expenditure. Once the assessee claims the deduction for the whole amount of such expenditure, even in the year in which it is incurred, and the expenditure fulfils the test laid down under section 37 of the Act, it has to be allowed. Only in exceptional cases, the nature mentioned in Madras Industrial Investment Corporation Ltd. (1997) 225 ITR 802 (SC), the expenditure can be allowed to be spread over, that too, when the assessee chooses to do so.”

21. In the case of CIT Vs. Spice Distribution Ltd. (374 ITR 30) the Hon'ble Delhi High Court held as under:-

“4. *The Tribunal has rightly noticed and referred to the decision of the Delhi High Court in CIT Vs. Pepsico India Cold Drink Ltd. (2012) 207 Taxman 5/21 taxmann.com 165 wherein, the judgment of the Supreme Court in Madras Industrial Investment Corpn. Vs. CIT (1997) 225 ITR 802/91 Taxman 340 (SC) was examined and it was observed that the assessee is entitled to claim deferred revenue expenditure but the Assessing Officer cannot treat the revenue expenditure as deferred revenue expenditure The reason is that the Act itself does not have any concept of deferred revenue expenditure. Even otherwise, there are a number of decisions that the advertisement expenditure normally is and*

be treated as revenue in nature because advertisements do not have long lasting effect and once the advertisements stop, the effect thereof on the general public and customer diminishes and vanished soon thereafter. Advertisements do not leave a long lasting and permanent effect in the sense that the or service has to be repeatedly advertised. Even otherwise advertisement expense is a day to day expense incurred for running the business and improving sales. It is noticeable that every year, the respondent-assessee has been incurring substantial expenditure on advertisements. The Assessing Officer, in the assessment order, had deferred to the fact that similar additions were also made in the Assessment Year 2008-09. Keeping in view the nature and character of the respondent-assessee's business, every year expenditure has to be incurred to make and keep public informed, aware and remain in limelight. This requires continuous and repeated publicity and advertisements to remain in public eye, to do business by attracting customers. It is an expenditure of trading nature. The aforesaid aspect has been highlighted by the Delhi High Court in CIT Vs. Salora International Ltd. (2009) 308 ITR 199 (Delhi) and CIT Vs. Casio India Ltd. (2011) 355 ITR 196/(2012) 20 taxmann.com 449 (Delhi).”

22. Ratio of the above decisions are applicable to the facts of the assessee's case. Therefore, in view of the above discussion, we hold that the Id. CIT (Appeals) had rightly held that the expenditure incurred by the assessee on advertisement and business promotion are in the nature of revenue and not capital expenditure. Ground raised by the Revenue is rejected.

23. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open court on : 29/08/2022.

Sd/-
(G. S. PANNU)
PRESIDENT

Sd/-
(C. N. PRASAD)
JUDICIAL MEMBER

Dated : 29/08/2022.

MEHTA

Copy forwarded to :

1. Appellant;
2. Respondent;
3. CIT
4. CIT (Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi.

Date of dictation	25.08.2022
Date on which the typed draft is placed before the dictating member	26.08.2022
Date on which the typed draft is placed before the other member	29.08.2022
Date on which the approved draft comes to the Sr. PS/ PS	29.08.2022
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	29.08.2022
Date on which the final order is uploaded on the website of ITAT	29.08.2022
Date on which the file goes to the Bench Clerk	29.08.2022
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	