INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI

BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 184/Del/2023
Asstt. Year: 2017-18

ACIT, Circle 22(2) New Delhi.	Vs.	Snapdeal Ltd. Sproutbox Suryavilas, Suite 181-TR4 First Floor, Phase-1 Tehkhand, New Delhi – 110 020 PAN AABCJ8820B
(Appellant)		**(Respondent)**

Assessee by:	Shri Salil Kapoor, Advocate Ms. Ananya Kapoor, Advocate Shri Shivam Yadav, Advocate
Department by:	Shri Dharamvir Singh, CIT-DR
Date of Hearing:	04.04.2024
Date of pronouncement:	.04.2024

O R D E R

PER ASTHA CHANDRA, JM

The appeal filed by the Revenue is directed against the order dated 31.03.2022 of the Ld. Commissioner of Income Tax (Appeals), NFAC, Delhi **("CIT(A)")** pertaining to Assessment Year **("AY")** 2017-18.

2. The Revenue has raised the following grounds:-

"1. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the disallowances made by the Assessing Officer of Rs. 3,22,39,50,102/- on account of Business Promotion Expenses & Advertisement being capital in nature.

2. Whether on the facts and circumstances of the case, the Ld. CIT(A) erred in deleting the above disallowances of expenditure which is towards

brand building and thus a marketing intangible without considering the facts and circumstances of the case."

3. The appeal is late by 242 days. The Revenue has sought condonation of the delay vide application bearing F. No. ACIT/ Cir 22(2)/ Condonation/ 2022-23/ 1293 dated 10.02.2023. After hearing the Ld. Representative of the parties, we hereby condone the delay and proceed to decide the appeal of the Revenue.

4. Briefly stated, the assessee company is engaged in the business of working on market place model wherein the company owns and operates an online market place website namely, www.snapdeal.com **("website")** which brings together vendors (primarily for electronics, apparel, personal care and various other categories) and customers who want to avail these services or purchase these products. For AY 2017-18, it e-filed its return on 31.11.2017 declaring loss of Rs. 2108,61,07,616/-. Its case was selected for scrutiny under CASS. Statutory notice(s) were issued/served upon the assessee, in response to which assessee filed replies electronically from time to time.

5. During the course of assessment proceedings, the Ld. Assessing Officer **("AO")** found that the assessee claimed expenses of Rs. 644,79,00,204/- (on account of advertisement and publicity- Rs. 430,54,54,059/- and business promotion- Rs. 214,24,46,145/-). The Ld. AO asked the assessee to explain why on the line of past history of the case, expenditure claimed by the assessee towards creation of digital infrastructure and market intangibles be not treated as "capital expenditure". The assessee submitted its reply vide letter dated 23.12.2019. Relevant portion thereof has been reproduced by the Ld. AO in para 3.2 at pages 2 to 13 of his assessment order.

6. The explanation of the assessee was considered by the Ld. AO but he did not find much force in the arguments of the assessee (para 3.4) for the following reasons:-

"3.5...There is no dispute or doubt that advertising, marketing and business promotion increases the awareness, popularity and the visibility of the "Snapdeal" brand and will lead to better sales and turnover and therefore, increased profit and revenues for the assessee. But this benefit will flow to the assessee in long run and thus give an enduring benefit. It is clear that these expenses are not incurred wholly and exclusively for the business of the assessee. Expenditure is incurred for establishment and promotion of the brand "Snapdeal". The trademarks, brands stand for reputation of a Company; they represent the achievements, solidity. innovativeness, the goals and the financial power of the Company. It is important to note that how the return attributable to marketing activities can be identified. A marketing intangible may obtain value as a consequence/ advertising and other promotional expenditures, which can be important to maintain the value of the trademark. However, it can be difficult to determine what these expenditures have contributed to the success of a product. For instance, it can be difficult to determine what advertising and marketing expenditures have contributed to the production or revenue, and to what degree. It is also possible that a new trademark or one newly introduced into a particular market may have no value or little value in that market and its value change over the years as it makes an impression on the market (or perhaps loses its impact). A dominant market share may to some extent be attributable to marketing efforts of distributors. The value and any changes will depend to an extent on how effectively the trademark is promoted in the particular market. More fundamentally, in many cases higher returns derived from the sale of trademarked products may be due as much to the unique characteristics of the product or its high quality as to the success of advertising and other promotional expenditures. 4.3 The assessee spends money on advertisement and marketing Therefore, it is the efforts of assessee which has built a formidable marketing network in India. It has an assured Quality Control mechanism in place to ensure strict adherence to its laid down norms on products quality. This in brief itself, indicates the kind of efforts involved in creating Marketing Intangible without which the Company would not have been a market competitor in the segment.

3.5. The expenses incurred by the assessee are of Rs. 430,54,54,059/- (on account of advertisement marketing and business promotion expenses). However, there is no denial to the fact that these expenses have substantially benefited the "Snapdeal" brand and have enhanced the image of this brand in the market. Thus, these expenses have given the enduring nature benefit to the assessee. Thus, these expenses cannot be said to have incurred on "revenue account".

3.6 This is a fact that the Advertisement, Marketing and Business Promotion Expenses to the tune of Rs. 644,79,00,204/- have been incurred by the assessee and claimed against the taxable income in connection with the advertisement marketing and business promotion. It cannot be denied that benefit of such huge expenses in the initial years which is nearly substantial of the total expenditure of the assessee would flow to the Company in long run and the Brand-Image would ultimately result in better sales prospects of the assessee company Such aggressive advertisement and business promotion in the nature of blitzkrieg creates an enduring advantage to the Company and its main owner, as the image gets imprinted in the minds of the customers which is not very easy to dislodge.

3.7 Details of these expenditure show that the expenditure is incurred on the advertisement and marketing, which are nothing but capital in nature and were incurred to promote their brands and products, the benefit of which is enduring in nature which goes beyond the previous year relevant to assessment year under consideration. There no dispute or doubt that it increases the awareness, popularity and the visibility of the brand in market which will lead to better sales and turnover and therefore, increased profit and revenues for the assessee. Therefore, the benefit of advertisement and marketing are of enduring nature available over a much longer period of time the accounting period relevant for A.Y. under consideration alone. In view of this, expenditure on advertisement and publicity becomes capital in nature as it is leading to the creation of the intangible assets being goodwill, reputation and creditability. It has been held by various courts in their decisions that when expenditure is made with a view to bring into an assets or advantage for the enduring benefit of the business, such expenditure is not revenue but a capital expenditure."

7. The Ld. AO placed reliance on the following decisions:-

(i) Assam Bengal Cement Company Ltd. vs. CIT 27 ITR 34 (SC)

(ii) Taparia Tools Ltd. vs. JCIT 126 Taxman 544 (Bom)

(iii) Dalmia Jain & Co. 81 ITR 754 (SC)

(iv) Avery India Ltd. vs. CIT 199 ITR 745 (Cal)

(v) M.K. Bros Pvt. Ltd. vs. CIT 86 ITR 38 (SC) & Travancore Sugar and Chemical Ltd. vs. CIT 62 ITR 566 (SC)

(vi) D.F. Woodrofe and Company Ltd. vs. CIT 102 ITR 665 (Mad)

(vii) CIT vs. J.K. Synthetic Ltd. 309 ITR 371 (Del)

8. The Ld. AO considered 50% of the expenditure claimed as capital in nature. This resulted in disallowance of Rs. 322,39,50,102/-. The total loss

was thus determined at Rs. 1786,21,57,510/- vide order dated 30.12.2019 under section 143(3) of the Income Tax Act, 1961 **(the "Act")**.

9. On appeal filed by the assessee, the Ld. CIT(A) deleted the impugned disallowance, after appreciating the submissions made by the assessee before the Ld. AO and recording his observation and finding in para 5.1.2 as under:-

"5.1.2 In this regard, out of entire submission of the appellant reproduced in para no. 4 supra of this order, following points being relevant for adjudication of addition of Rs. 322,39,50,102 [as 50% of Total claim of Rs. 644,79,00,204] on account of disallowance of 50% of total claim of Business Promotion expenses (of Rs. 214,24,46,145) and 50% of disallowance of expenses related to advertisement and publicity (of Rs. 430,54,54,059) are enumerated as under:-

1. *That, expenses on advertisement do not create any intangible asset; do not provide any enduring benefit;*
2. *That, similar issues were already covered by decision of another Ld. Commissioner of Income Tax (Appeals) in Appellant's own case for AY 2012-13 and AY 2013-14."*

10. The Revenue is dissatisfied and is before the Tribunal and both the grounds relate thereto.

11. The Ld. CIT-DR relied upon the order of the Ld. AO and submitted that the Ld. AO has rightly disallowed 50% of the claim holding it to be of capital in nature. He filed written submissions laying emphasis on the proposition that aims and objects of making expenditure is a determining factor in deciding whether an expenditure is revenue or capital in nature. He has explained the distinction between the online market place industry business and traditional businesses. Other arguments are only reiteration of what has been stated by the Ld. AO in the assessment order. As an alternative plea, he urged that the matter be set aside to the file of the Ld. AO with requisite directions.

12. The Ld. AR submitted that similar disallowance had been made in AY 2012-13 by the Ld. AO which was deleted by the Ld. CIT(A).The appeal of the Revenue filed against the order of the CIT(A) has been dismissed by the Tribunal. A copy thereof was placed before us.

13. We have heard the Ld. Representative of the parties, considered their submissions and perused the records. There is no dispute on facts which continue to remain the same in AY 2017-18 as in AY 2012-13. The case laws relied upon by the Ld. AO do not render any help to the Revenue as they are rendered in the light of their peculiar facts.

14. No doubt, the aim and object of incurring expenditure is an important criteria as submitted by the Ld. CIT DR. It is, however, well established that no test is paramount or conclusive for distinguishing the capital and revenue expenditure. Every case has to be decided on its facts keeping in mind the broad picture of whole operation in respect of which the expenditure has been incurred. The contention of the assessee has been that advertisement and publicity expenses are in the nature of promotional activities for the purpose of carrying the routine business of the assessee. The business promotion expenses are in the nature of various promotions run on assessee's website in the form of cash back and the other discount schemes offered to the customers to promote the product of seller. No adverse comments have been made by the Revenue on the above contentions. On the contrary, the Ld. AO himself observes in para 5.3 of his order that there is no dispute or doubt that advertising, marketing and business promotion expenses increases the awareness, popularity and visibility of "Snapdeal" brand and therefore, increased profit and revenues for the assessee. His only objection is that this benefit will flow to the assessee in long run and thus gave an enduring benefit. We do not agree. The nature of assessee's business involves operation in a highly competitive market. There is no likelihood of the advantages being enduring in nature.

We are aware of the distinction between the emerging online market industry business and traditional businesses. In our humble opinion, no useful purpose will be served in setting aside the matter to the file of the Ld. AO as suggested by the Ld. CIT DR.

15. We have gone through the order of the Tribunal rendered on 10.11.2021 in Addl. CIT Special Range: 5 New Delhi vs. M/s. Jasper Infotech Pvt. Ltd. (now Snapdeal Ltd., New Delhi) in ITA No. 2605/Del/2017 for AY 2012-13 wherein the Tribunal recorded the finding that the impugned expenses claimed by the assessee are purely revenue in nature and disallowance of 50% thereof holding it to be of capital in nature is not justified. We reproduce the observation and findings of the Tribunal hereunder for ready reference:-

"7. We have carefully considered the rival contentions and perused the orders of the lower authorities. The fact shows that the assessee is a web-based platform of 'Snapdeal', which treats together vendors and customers for online purchase of goods. The assessee has incurred expenditure on advertisement, sales promotion and publicity claiming it to be a revenue expenditure whereas the ld. Assessing Officer held that 50% of such expenditure are capital expenditure as it has helped the assessee in maintaining and creating 'Snapdeal' brand.

8. On appeal before the ld. CIT (Appeals) he held that the above expenditure cannot be said to be a capital expenditure. He decided the whole issue in para Nos. 3.4.3 to 3.4.7 as under:-

> *"3.4.3 I have perused the nature of expense claimed vis-a-vis the business model of the appellant. The appellant functions in the ecommerce space which is a new- online platform, breaking away from the brick and mortar model of business of sale of goods. The web based platform of Snapdeal brings together the vendors (in electronics, apparent, personal care and various other categories) and customer who prefer to purchase products at the convenience of their homes. The appellant is not a trader and the way the system works is that a service fee is charged from the sellers of the merchandise at an agreed percentage. Since this a completely revolutionary model vis-a-vis the earlier business models of merchandising, a very high degree of yisibility is required in order to attract more and more customers to this platform. During the year the appellant has incurred Rs. 53.51 crores*

by way of advertisement and publicity, the major chunk (Rs. 30.99 crores) of which represents advertisement on social media websites namely Google, Facebook, Ebay, Yahoo etc Another Rs. 8.96 crores represents payment to T.V channels and . ad agencies for promotion. The website run by the appellant is in tough competition with other players in the field namely Flipkart, Amazon India etc. (these two companies along with the appellant are estimated to control 80% of the market) and many other players in limited fields of merchandising such as Big Basket, Grofers, etc. (in the area of groceries), Myntra, Jabong, Limeroad, Koovs, 99labe!s etc. (clothing and accessories), lmg, Netmeds, Medplusmart etc (medicines). Hence, it is entirely necessary on the part of the appellant company to incur expenditure on promoting the business model and even the brands to be able to not only retain customers but also to attract more customers and expand its outreach. It is understood that the appellant has also hired Sh. Aamir Khan as its brand ambassador in the year 2015. In the past, Aamir Khan has been associated with brands like Coca Cola, Samsung, Godrej, Tata Sky and Titan watches.

3.4.4 Having discussed the nature of expenses, it is also necessary to now examine 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 was explained many years ago by Hon'bie Supreme Court in Empire Jute Co. Ltd. (125 ITR 1). 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 aii 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 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 expenses would be revenue in nature. When the above test is applied in the appellant's case, it can be seen that heavy promotional advertising expenses are required to be made, and indeed have been made, with a view to facilitate the business operations and also to expand the same. It is no one's case that an online platform does not demand a very high degree of visibility, (almost to the point of harassing a customer!) so that he or she is induced to enter the area of online shopping. The business model also demands that customers be induced to shop online through inducements offered by way of free merchandise, cash discounts, freebies etc. In the fast emerging but competitive market such as the appellant's, it is also true that advertising expenses have no enduring nature/value.

3.4.5 The jurisdictional Delhi High Court has taken a view in many decisions that advertisement, publicity and business promotion

expenditure should normally be treated as revenue expenditure unless there are special circumstances to hold that said expenditure was capital in nature. The gist of these decisions are discussed as under:

(i) Citi Financial Consumer Finance Ltd. (335 ITR 29) (in this case SLP filed by the department also stands dismissed)

> *"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 was 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."*

(ii) Casio India Ltd. (335 ITR 196)

> *"4. Challenging this order, the instant appeal is preferred by the, Revenue under section 260A of the Act. Having regard to the facts narrated above, we are of the opinion that no question of law arises in this case. According to the Revenue, the expenditure on account of advertisement and sales promotion is capital and not revenue in nature. Such an expenditure on account of advertisement and sales promotion is held by this court to be revenue in nature by answering this question in a batch of appeals with the lead case being I. T. A. No. 1820 of 2010 entitled CIT v. Citi Financial Consumer Fin. Ltd. [2011] 335 ITR 29 (Delhi) (decided on March 30, 2011). It was held that the expenditure on advertisement and sales promotion is to be treated as business expenditure allowable under section 37 of the Act. "*

(iii) Spice Distribution Ltd. (374 ITR 30)

> *"4. The Tribunal has rightly noticed and referred to the decision of the Delhi High Court in CIT v. 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. v. 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 should 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 product 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 referred 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 v. Salora International Ltd. [2009] 308 ITR 199 (Delhi) and CIT v. Casio India Ltd. [2011] 355 ITR 196/[2012] 20 taxmann.com 449 (Delhi)."

(iv) SBI Cards and Payment Services (P) Ltd. (229 Taxman 356)

"13. The Delhi High Court has repeatedly held that advertisement expenditures in the present day context should normally be treated as revenue expenditure, unless there are special circumstances and reasons to hold that the expenditure was capital in nature. The reason is that the advertisements do not have a lasting and long term effect and the memory of the customers or targeted audience is short lived. The advertisements fade away and do not have an enduring impact. If there is a lack of advertisement by one, the vacuum and space is taken over by others with benefit and advantage to the detriment of the first. Reference can be made to CIT i/. Salora International Ltd. [2009] 308 ITR 199 (Delhi) and the subsequent decision in ITA No.597/2014 titled CIT v. Spice Distribution Ltd. decided on 19th September, 2014."

3.4.6 As discussed in para 3.4.4 it may also be noted that the presumption drawn by the AO regarding the building of a brand image has also not been approved by the courts, which have 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. I may in this regard cite the decisions of the Punjab and Haryana High Court in the case of Liberty group marketing division (315 ITR 125), the Bombay High Court in the case of Geoffrey Manner and Co, Ltd. (315--ITR 13d), the ITATMumbai decision in the— case of Kaya Ltd. (ITA no. 3175/Mum/2013), Asian Paints Ltd. vs. Addl. CIT (ITA 78Q1/MUM/2010), Fine Jewellery (I) Ltd. (19 ITR 746), Warner Lambert India Ltd. (ITA 954 & 3063/Mu m/2006), Delhi ITAT decisions in Spice Communications Ltd. (35 SOT 78) and CIT v. Modi Revlon Pvt. Ltd. (78 DTR 342). 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. The necessity (or lack of it) is not something which income tax authorities can go into; as long as it is voluntarily undertaken by the business enterprise for profit earning, it Would be entitled to claim relief under section 37(1). Similar view has been taken by the Jurisdictional High Court in the case of Modi Revlon Pvt.ltd. (210 Taxman 161) wherein similar 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, and the AO has not denied the same, 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."

3.4.7 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. The disallowance made by the AO is thus directed to be deleted. Ground no. 2 is allowed."

9. We also find that the ld. CIT (Appeals) considered in allowing the claim of the assessee on 4 decisions of the Hon'ble High Courts. Further the ld. 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 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 ld AO Having accepted the fact that the assessee could spend amounts for these activities to the extent of 50 % as revenue expenditure the ld 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 ld. 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 ld. 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 ld. 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 ld. Assessing Officer are dismissed."

16. Facts and circumstances of the case being identical in AY 2017-18, respectfully following the Tribunal's order (supra), we hold that the grounds taken by the Revenue are not sustainable. We reject them.

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

Order pronounced in the open court on 26th April, 2024.

Sd/-	**Sd/-**
(G.S. PANNU)	**(ASTHA CHANDRA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 26/04/2024
Veena
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