

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "D", MUMBAI**

**BEFORE JUSTICE (RETD.) SHRI C.V. BHADANG, PRESIDENT
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No. 3758/Mum/2023
Assessment Year : 2012-13

DCIT-13(1)(2), Room No. 218, Aayakar Bhavan, Mumbai.	vs.	Qyuki Digital Media Pvt. Ltd., 7/8, Hari Niwas Building, 30 th Cross Road, Off S.V. Road, Bandra (W) Mumbai. PAN : AAOCS4185R
(Appellant)		(Respondent)

For Assessee :	Shri Prateek Jha & Shri Prayag Jha,
For Revenue :	Smt. Sanyogita Nagpal, CIT-DR

Date of Hearing :	10-12-2024
Date of Pronouncement :	10-12-2024

ORDER

PER B.R. BASKARAN, A.M :

The Revenue has filed this appeal challenging the order dated 23-08-2023 passed by the Ld.CIT(A)-NFAC, Delhi and it relates to the Assessment Year (AY.) 2012-13. The grounds of appeal raised by the Revenue give rise to the following two issues:

- a. Addition made u/s. 68 of the Income Tax Act, 1961 ('the Act') – Rs. 27.04 crores;
- b. Disallowance of claim of business loss – Rs. 4.10 crores

2. The facts relating to the case are stated in brief. The assessee-company is engaged in the business of production and development of internet programmes, products, services, applications etc. During the course of assessment proceedings, the AO noticed that the assessee has issued shares to four persons, namely, Mr. Sekhar Kapur, Mr. A.R. Rahman, Mrs. Nishith Desai and M/s CSI BD Mauritius. It is noticed that the assessee has issued shares at par value of Rs. 10/- each to the first three persons and at Rs. 302.80 to M/s CSI BD Mauritius.

3. Before the AO, the assessee furnished copies of income tax returns and Balance Sheet of Mr. Sekhar Kapur and Mr. A.R. Rahman. With regard to two other investors, the assessee did not furnish any details. Aggregate amount of share capital received from Mr. Nishith Desai and M/s CSI BD Mauritius was Rs. 27.23 crores and the AO assessed the same as unexplained cash credit u/s. 68 of the Act.

3.1. The AO also noticed that the assessee has claimed expenses of Rs. 4.36 crores in the Profit & Loss Account, but did not show any operative income. Accordingly, the AO took the view that the assessee has not started its business activities till date. Accordingly, the AO took the view that the expenses of Rs.4.36 crores claimed by the assessee cannot be treated as revenue expenses. Accordingly, he disallowed the same.

4. Before Ld.CIT(A), the assessee furnished the following documents in respect of CSI BD Mauritius and Mrs. Nishith Desai:

“(1) Documents pertaining to the shareholder CSI BD Mauritius [Share Capital of Rs.27,04,50,968/-]

> Letter dated 5th October 2016 from CSI BD Mauritius confirming investment made in the Appellant Company [Appearing on Page 7 of Paper Book]

> Set of Certified Copy of Financial Statements of CSI BD Mauritius for the year ended 31st July 2011 (Pages 1 to 22 of the set) wherein Share Application Moneys are shown on Page 6 of that set [Page 15 of Paper Book] and the name of the Appellant Company is mentioned on Page 20 of that set [Page 29 of Paper Book] under Note No.6 titled "Share Application Moneys" [Entire set appearing on Pages 8 to 31 of Paper Book]

> Set of Certified Copy of Financial Statements of CSI BD Mauritius for the year ended 31st July 2012 [Pages 1 to 25 of the set] wherein the name of the Appellant Company along with number of shares etc. is mentioned on Page 21 of that set [Page 54 of Paper Book] under Note No.5 titled "Available for sale Financial Assets". [Entire set appearing on Pages 32 to 58 of PaperBook]

(ii) Documents pertaining to the shareholder Mr. Nishith M. Desai [ShareCapital of Rs. 18,39,990/-]

> Letter dated 17th October 2016 from Mr. Nishith Desai confirming investment made in the Appellant Company. [Page 59 of Paper Book]

ITR Acknowledgment for A.Y.2012-13 of Mr. Nishith Desai for A.Y.2012-13 showing income of Rs. 17,52,41,710/- [Page 60 of Paper Book]

Balance Sheet along with Investment Schedule (Schedule VI) of Mr. Nishith M.Desai as on 31st March 2012. [Page 61 & 62 of Paper Book]

Copy of Ledger Account of Investment in the Appellant Company in the books of Nishith Desai Associates for the period 1st April 2010 to 31st December2012. [Pages 63 of Paper Book]

> Copy of Ledger Account of Investment in the Appellant Company in the books of Nishith Desai Associates for the period from 17 January 2013 till date.”

4.1. Since these documents were filed as additional evidences before the Ld.CIT(A), he called for a remand report from the AO. In the remand report, the AO objected to the admission of additional evidences. However,

he proceeded to give his comments on the additional evidences filed by the assessee. With regard to CSI BD Mauritius, the AO observed that the assessee was unable to provide Balance Sheet and tax records of CSI BD Mauritius. With regard to documents furnished by Mrs. Nishith Desai also, the AO observed that the assessee has provided only PAN and address. The Ld.CIT(A) confronted the remand report with the assessee.

4.2. In reply, thereto, the assessee pointed out that the AO has not examined the relevant documents furnished to prove the creditworthiness of both the investors. The Ld.CIT(A), however, took the view that that the assessee has discharged its onus placed upon it under the section 68 of the Act. Accordingly, he deleted the entire addition made u/s 68 of the Act.

4.3. With regard to the disallowance of expenses, the Ld CIT(A) accepted the contentions of the assessee that the business has been set up and the assessee is carrying on work in accordance with its objectives. Accordingly, the Ld CIT(A) held that the non-generation of income after setting up of business cannot be a ground to disallow expenses. Accordingly he deleted the disallowance of expenses.

5. The Revenue has accepted the relief granted in respect of share application money received from Mrs. Nishith Desai, but objecting to the relief granted in respect of share application money received from CSI BD Mauritius. The revenue is also objecting to the relief granted in respect of disallowance of expenses.

6. We heard rival contentions and perused the record. The first issue relates to the addition made u/s 68 of the Act. The Ld.AR invited our attention to the documents furnished in respect of CSI BD Mauritius and submitted that the assessee has furnished all the details to prove the cash credit in terms of sec. 68 of the Act. Accordingly, he contended that the

order passed by the Ld.CIT(A) on this issue does not call-for any interference.

6.1. However, on perusal of the relevant documents, we notice that there are certain deficiencies, viz.,

(a) the Director's report has been signed by Company Secretary. It is not understandable as to why the directors have not signed the Director's report.

(b) though the auditor has given audit report, he has not signed the financial documents. Hence it is not clear as to whether the audit report refers to the financial documents furnished by the assessee or not.

Further, we notice that the Ld.CIT(A) has not examined the deficiencies pointed out above. Accordingly, we are of the view that the financial statements filed by the assessee in respect of M/s CSI BD Mauritius requires proper examination. Accordingly, we set aside the order passed by the Ld.CIT(A) on this issue and restore the same to the file of the AO for the limited purpose of examining the financial statements filed by CSI BD Mauritius. After affording adequate opportunity of being heard to the assessee, the AO may take appropriate decision in accordance with law.

7. The next issue contested by the Revenue relates to disallowance of expenses claimed by the assessee treating the same as pre-operative expenses. We notice that the AO had disallowed the entire expenses claimed by the assessee in AY.2013-14 also on the very same reasoning and the said has been adjudicated by the Co-ordinate Bench of the Tribunal in assessee's own case in ITA No. 3499/Mum/2019, dt. 09-01-

2022; wherein it has been held that the assessee has set up its business and hence, the entire expenses are allowable as deduction. For the sake of convenience, we extract below the operative portion of the said order:-

“6. Heard both the sides and perused the material on record. Without reiterating the facts as elaborated above in this order the assessing officer disallowed the claim of business loss of Rs. 13,04,62,517/- on the ground that assessee has not commenced its business and income has been derived by it from its regular business activity. During the course of assessment vide submission dated 22.01.2016 assessee has explained that it was in the business of production and development of internet program, products, contents, services, and application for creating and providing independent interactive platform for various purposes including for business, social group, entertainment, education and knowledge networking and other information through the internet or any other known or unknown means of communication and to produce, acquire distribute or purchase or license any audio & visual content including any edited or/remixed content for multimedia television, under working mobile, radio, cable started online platform and other networking mobile, radio, cable, satellite, online platform or other network or media etc. The output services of the assessee company was in the form of advertisements within the content (mainly video content) which can be telecasted/uploaded on any platform like you tube, television, face book, mobile etc. and then the revenue is generated from sponsors. As a start-up company, the assessee has incurred cost for branding of the company which creates popularity which helps promotion of contents at the time of its product launch. The assessee company has also appointed a chief Marketing officers during the financial years. During the course of assessment vide letter dated 16.02.2016 the assessee has also explained nature of various expenses incurred along with reason for incurring these expenditure The reason for incurring some of such expenses are given as under:

Nature of Expenses	Amount in INR	Reason for incurrence
Platform Maintenance Fees	105,21,556	It was incurred by the company to resolve the further queries and to get post development maintenance services of the platform. <u>We have enclosed herewith the copy of platform Maintenance Services Contract for your kind perusal.</u>
Hosting Service	97,46,387	It was incurred towards the rental services of Servers which were needed to provide the smooth access to expected number of subscribers. <u>We have enclosed herewith the copy of Hosting Service Contract for your kind perusal.</u>
Marketing Consultancy Fees	83,55,362	Marketing cost was also incurred to promote the platform and to reach targeted subscribers base.
Artist and Curation Fees	72,41,774	Contract entered into with Artist like Imtiaz Ali, Chetan Bhagat, etc. were obligatory in the nature which required payment to Artist irrespective of the service rendered by them. The fees were paid as an endorsement for attracting subscribers to the creative network. <u>We have enclosed the copy of the few contracts entered into with the Artist and Curators.</u>
Content Creation Fees	56,21,171	Content creators had provided services to develop the content which was used for publishing on online platforms and it was also used for to get visitors to the company created network. <u>We have enclosed the copies of few contracts entered into with the content creators.</u>
Recruitment Charges	45,27,572	These are mainly in the nature of regular operating services which were required to be incurred to operate the regular business of the company in compliance with all regulatory norms applicable to the company.
Legal Consultancy Fees	25,58,630	
Accounting, Payroll & Compliance Services	21,21,978	
IT Consultancy Services	15,20,919	
Other Professional Fees	27,16,502	
Total	5,49,31,851/-	

The assessee explained that these expenses were incurred by the company in expectation of generating revenue but even after spending all these expenses company could not manage to achieve the expected number of subscriber as a result it did not generate revenue in F.Y. 2012-13. However, the assessee also explained that on failure of earning revenue did not mean that assessee company has not commenced its business. The assessee has also explained that during the year it has raised its first invoice of Rs.5 lac for running an advertisement campaign for intel project. This invoice was raised on Result Service Private Ltd. which demonstrate that the company had commenced its business. However, the services for the same were rendered in the month of July 2003 and the client has considered the same in their books of account for F.Y. 2013-14 and accordingly deducted TDS thereon. Therefore, the assessee had disclosed the transaction as trade receivable and unearned revenue under the head current asset and current liability respectively. The assessee also explained that incurring of various expenses in the form of payments to own employees and outside agencies for starting development of various program and video contents during the year and also in the previous year for the purpose of business clearly suggests that the assessee has already set up its business at an early stage of F.Y.

2011-12. We have also perused the judicial pronouncements referred by the Id. Counsel. In the case Western India Vegetables Products Ltd., as referred above the Hon'ble High Court of Bombay wherein held that when a business has established and is ready to commence business then it can be said that business is set up and the expenses incurred in the business can be claimed as permissible deduction.

In the decision of Daimler India Commercial Ltd., the Hon'ble High Court of Madras held that assessee has already commenced various activity, merely because manufacture and sale of vehicle did not take place during the relevant year due to non-completion of construction of plant it could not be concluded that business of assessee has not been set up so as to assessee claim of deduction.

In the case of Axis (P) Equity Ltd (2017) as referred supra the Hon'ble jurisdictional Bombay High Court held that where assessee, an asset management company, had taken steps for commencing business of Venture Capital Fund, it had engaged legal and financial advisors incurred expenditure to decide appropriate tax efficient structure for funds and employed necessary personnel for purpose of running its business, Tribunal was justified in holding that assessee had set up its business during relevant assessment year.

In the case of L.G. Electronics Ltd. (2006) 282 ITR 545 (Delhi) it is held that there is distinction between commencement of business and setting up of business and the two dates need not necessarily overlap and (b) of Sec. 3 referred to date of setting up of business and as such it is only thereafter that previous year of newly set up business would commence and therefore, expenses incurred prior thereto could be taken into account for purpose of determining profit of newly set up business.

In the case of PPFAS Asst. Management (P) Ltd. the ITAT, Mumbai held that in case of assessee at asset management company, date of approval given by SFBI was to be recorded as date on which assessee set up its business and was ready to commence said business and therefore, expenses incurred for the purpose of business after said date of approval were eligible for deduction u/s 37(1) of the Act.

In the case of Orient Green Power Com. Ltd. Vs. ACIT the ITAT, Chennai held that where assessee company engaged in business of investing owing and operating renewable energy sources had already acquired land to carry out business activities, obtained various approvals permission in hand deployed technical personnel, placed purchase orders and also signed long term power purchase agreement with clients it could be said that business had been set up and was ready to commence and hence business expenditure claimed towards employees cost, depreciation etc. was to be allowed as deduction.

In the case of Bengal Shriram Hitech City (P) Ltd, the ITAT, Bangalore held that in the case of the assessee a real estate developer had started acquiring land in 2007 itself acquired it could be concluded that business of assessee had already been set up and thus expenses incurred in running business of assessee was allowable u/s 37(1) of the Act.

We have also gone through copies of Audited Accounts and balance sheet filed by the assessee pertaining to assessment year 2012- 13 to A.Y. 2015-16. On perusal of the balance sheet of the assessee as on 31.03.2013 it is noticed that assessee has shown fixed asset under the head tangible assets of Rs.45,46,616/- and intangible assets of Rs.11,30,761/- and also shown current asset under the head trade receivable at Rs.5,61,800/-, cash and cash equivalent Rs.7,97,69,045/- short term loan and advances Rs.33,70,647/- and other current assets at Rs. 17,09,240/-. The assessee has also shown current liabilities and trade payable at Rs.2,13,02,280/- other current liabilities at Rs.41,32,033/- and short term provision of Rs.3,07,217/-. As on 31.03.2014 and as on 31.03.2015 the assessee has shown tangible assets and intangible assets under the fixed assets at Rs. 35,46,970/- and Rs. 5,68,537/- for assessment year 2014-15 and Rs.16,92,491/- and Rs.11,86,381/- for assessment year 2015-16. The assessee has generated revenue from operation in the assessment year 2014-15 of Rs. 10,20,000/- and in the assessment year 2015-16 of Rs.55,44,264/- The assessee has demonstrated from the copies of profit and loss account and balance sheet that it had set up its business. Therefore, looking to the above facts and circumstances and after following the judicial pronouncements as discussed supra, we consider that decision of Id. CIT(A) is not justified in not allowing the claim of deduction of expenses therefore, we direct the assessing officer to allow the claim of business loss of Rs.13,04,62,517/ of the assessee. Therefore, the ground no. 1 of the assessee is allowed.”

7.1. Since the facts relating the disallowance are identical, following the decision rendered by the Co-ordinate Bench of the Tribunal for the AY.2013-14, we hold that the Ld.CIT(A) was justified in deleting the addition.

8. In the result, the appeal of the Revenue is partly allowed.

Order pronounced in the open court on 10-12-2024

Sd/-
(JUSTICE (RETD.) C.V. BHADANG)
PRESIDENT

Sd/-
(B.R. BASKARAN)
ACCOUNTANT MEMBER

Mumbai,

Date: 10-12-2024

TNMM

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT concerned
- 4) The D.R, "D" Bench, Mumbai
- 5) Guard file

By Order

Dy./Asst. Registrar
I.T.A.T, Mumbai