IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, I: NEW DELHI

BEFORE SMT. KAVITHA RAJAGOPAL, JUDICIAL MEMBER
AND
SMT. RENU JAUHRI, ACCOUNTANT MEMBER

ITA No.- 6397/Del/2017
[Assessment Year: 2010-11]

Addl. CIT, Special Range-6, Room No. 352, C.R. Building, I.P. Estate, New Delhi.	Vs	M/s Makemy Trip India Pvt. Ltd., 243 Ground Floor, SP Infocity, Phase 1, Udyog Vihar, Gurugram-122016.
		PAN- AADCM5146R
Revenue		Assessee

Assessee by	Shri Somil Aggarwal, Adv. Shri Deepesh Garg, Adv. & Shri Saksham Aggarwal, CA
Revenue by	Shri Mahesh Kumar, CIT(DR)

Date of Hearing	**01.07.2026**
Date of Pronouncement	**31.07.2026**

ORDER

Per Renu Jauhri, Accountant Member:

This appeal by the Revenue is directed against the order dated 07.07.2017 of the Commissioner of Income-Tax (Appeals)-38, Delhi-110092, [hereinafter referred to as the 'Ld. CIT(A)] arising out of the Assessment Order dated 30.03.2014 passed under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the

Act') by the DCIT, Circle-6(1), New Delhi (hereinafter referred to as the 'AO') pertaining to Assessment Year (A.Y.) 2010-11.

2. The Revenue has raised the following grounds of appeal: -

"1. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of Rs. 70,47,390/- on account of excess depreciation i.e., @ 60% instead of 25% claimed by the assessee on website development cost even when higher appellate authority had allowed depreciation @ 25% on website development cost in earlier year in the assessee's own case?

2. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting disallowance of Rs. 29,33,23,694/- u/s 40(a)(ia) of the Act by holding that the assessee was not under any obligation to deduct tax u/s 194H of the Income Tax Act, 1961 on the payment of gateway charges made to Banks during the year without giving any clear findings in this regard?

3. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting the disallowance of Rs. 23,09,53,687/- on account of expenditure on advertisement, marketing and publicity (AMP) by ignoring the findings of fact recorded by the Assessing Officer (the AO) that the expenditure was incurred to generate intangibles by way of building and promoting brand 'MakeMyTrip'?

4. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of Rs. 79,32,20,107/- u/s 40(a)(ia) of the Act without considering the fact that the sum paid by the assessee to MMT-USA was liable to tax u/s 9 of the Act and TDS u/s 195(1) of the Act was mandatory in nature?

5. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in deleting disallowance of Rs. 79,32,20,107/- u/s 40(a)(ia) of the Act without considering the language of section 195(1) of the Act and a fact that prayer/recipient has not filed an application before the AO u/s 195(2), 195(3) and 197 of the Act?

6. Whether on facts and in circumstances of the case, the Ld. CIT(A) is legally justified in deleting the disallowance of Rs. 79,32,20,107/- u/s 40(a)(ia) of the Act made by the AO for payments made to MMT-US by ignoring the findings of the AO that the said payments were not in the nature of reimbursement of expenses, as claimed by the assessee, but was fee for technical services as per the provision of Section 9(1)(vii) of the Income Tax Act, 1961 therefore liable for deduction of TDS as per provisions of section 195 as there is element of income embedded in these payments.

7. Whether on facts and in circumstances of the case, Ld. CIT(A) is legally justified in allowing relief to the assessee on the basis of earlier orders in the assessee's own case *despite the fact that principle of res-judicata is not applicable to Income Tax proceedings as each assessment year is a separate proceedings year?*

8. That the appellant craves leave to add, amend, alter or forgo any ground/(s) of appeal either before or at the time of hearing of the appeal."

3. Brief facts are that the assessee is Private Limited Company, is a travel agent and tour operator. It is a wholly owned subsidiary of International Web Travel Pvt. Ltd., Mauritius, which is owned by SB Asia Infrastructure Fund II, Ltd. partnership, Cayman Islands. For A.Y. 2010-11, return declaring NIL income was filed by the assessee on 09.10.2010. The case was selected for scrutiny and notice was issued u/s 143(2) of the Act. After making several disallowances / additions, the assessment was completed u/s 143(3) at an income of Rs. 147,39,83,860/-.

3.1 Aggrieved, the assessee preferred an appeal before the CIT(A). Vide order dated 07.07.20217, the assessee's appeal was partly allowed by the CIT(A). Aggrieved with the order of the CIT(A), Revenue has filed appeal before the Tribunal.

4. At the outset, before us, the Ld. AR has submitted that all the issues raised by the Revenue are legacy issues and stand covered in assessee's favour by the orders of the coordinate benches in earlier years.

Ground no. 1: Disallowance of Depreciation) Rs. 70,47,390/-)

4. Brief facts are that the assessee had claimed depreciation on website development cost at 60%. The AO has allowed the depreciation at 25% resulting in

disallowance of Rs. 70,47,390/-. Following the orders of the coordinate benches in assessee's own case for earlier years as well as of the jurisdictional High Court in the case of *DCIT vs. Amway India Enterprises [2012] 346 ITR 341 (Del),* the CIT(A) has allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal before us.

4.1 We have heard the rival submissions and perused the material on record, as well as the order of the coordinate bench for A.Y. 2005-06. We are of the considered view that the Ld. CIT(A) has rightly allowed the assessee's claim of depreciation by holding as under:

> *"3.2 I have carefully considered the assessment order and the submissions of appellant on this issue. It has been submitted by appellant that the issue stands fully covered by the order of Special Bench in the case of Amway India Enterprises vs. DCIT reported in [2008] 114 TTJ 476 (Delhi) (SB), wherein it has been held that expenditure incurred on the software is eligible for depreciation @60% and aforesaid order of the Tribunal has also been affirmed by the Hon'ble High Court of Delhi and is reported in [2012] 346 ITR 341 (Delhi). It has been further submitted by appellant that the order passed by the Hon'ble Tribunal in appellant's own case for the AY 2005-06, in favour of the appellant, allows depreciation on website development cost at the rate of 60% instead of 25%. Respectfully following the above decision of Hon'ble Delhi High Court and ITAT Delhi in appellant's own case, assessing officer is directed to allow depreciation on website development cost and correctly compute the depreciation allowable to appellant. Accordingly, these grounds of appeal are allowed."*

Hence, we find no infirmity in the order of CIT(A) on this issue and this ground of appeal by Revenue is therefore rejected.

<u>Ground no. 2: Disallowance u/s 40(a)(ia)- [Rs. 29,33,23,694/-]</u>

5. Brief facts are that the assessee had claimed payment of gateway charges of Rs. 29,33,23,694/- on which no TDS had been made. The AO, following the assessment order for A.Y. 2009-10, and that of AO(TDS) u/s 201 dated 22.03.2012

for F.Y. 2009-10, held that TDS u/s 194H was required to be deducted and therefore entire payment of Rs. 29,33,23,694/- made on account of gateway charges was disallowed u/s 40(a)(ia) of the Act.

5.1 Before us, Ld. AR has pointed out that the issue is squarely covered by the order of the Hon'ble Jurisdictional High Court in assessee's own case for A.Y. 2009-10 and therefore, the decision of CIT(A) deserves to be upheld.

5.2 We have heard both the parties. We note that the CIT(A) has allowed relief to the assessee, following the decision of Hon'ble jurisdictional High Court in its own case. We further note that the issue stands covered in assessee's favour in immediately year by the decision of the Hon'ble Delhi High Court, wherein the order of the coordinate bench has been upheld as under:

> *"7. The ITAT has in the impugned order allowed the Assessee's appeal on this issue and held that the payment gateway charges were in nature of fees for banking services and not 'commission' or 'brokerage' and thus no TDS was deductible from the said charges under Section 194 H of the Act. In coming to the said conclusion, the ITAT relied on the judgment of this Court in Commissioner of Income Tax v JDS Apparels (P) Ltd. (2015) 370 ITR 454 (Del).*
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> *8. Ms. Vibhooti Malhotra, learned counsel for the Revenue, sought to distinguish the said judgment in Commissioner of Income Tax v JDS Apparels (P) Ltd. (supra) by pointing out that the Bank in question in that case had provided a swiping machine. When a credit card was swiped on it, the customer, whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realisation of payment. Subsequently, the acquiring bank realized and recovered payment from the bank which had issued the credit card. It is submitted that in the present case the transaction is virtual and the products are sold through website operated by the Assessee. The customer logs on to the website which uses the various products displayed at the website and once he makes a transaction, payment is made using the facility of 'internet payment gateway'. The customer is directed to a secure gateway of the bank which provides the facility. In effect, the payment gateway authenticates the transaction for which payment is made by using a credit card. Thus, it provides a facility of secure fund settlements without manual intervention. It is sought to be contended by the*

Revenue that the amount deducted by the Bank in this process is actually a commission earned by the payment gateway and, therefore, would attract Section 194-H of the Act requiring deduction of tax at source.

9. The decision in Commissioner of Income Tax v. JDS Apparels (P) Ltd. (supra) holds that in a similar kind of transaction, the amount retained by the bank is a fee charged for having rendered banking services and "cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods." The ITAT has, in view of this Court rightly, held that the services provided by the payment gateway is such that the charges collected by it has to be necessarily treated as fees and not as a commission. The payment in fact is made by one principal to another and it is only being facilitated by the payment gateway by providing a service. The following observation of this Court in JDS Apparels (P) Ltd. (supra) equally applies to the case on hand.

> *"16. The amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated. as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. The intention of the legislature is to include and treat commission or brokerage paid when a third person interacts between the seller and the buyer as an agent and thereby renders services in the course of buying and/or selling of goods. This happens when there is a middleman or an agent who interacts on behalf of one of the parties, helps the buyer/seller to meet, or participates in the negotiations or transactions resulting in the contract for buying and selling of goods. Thus, the requirement of an agent and principal relationship. This is the exact purport and the rationale behind the provision. The bank in question is not concerned with buying or selling of goods or even with the reason and cause as to why the card was swiped. It is not bothered or concerned with the quality, price, nature, quantum etc. of the goods bought/sold. The bank merely provides banking services in the form of payment and subsequently collects the payment. The amount punched in the swiping machine is credited to the account of the retailer by the acquiring bank, i.e. HDFC in this case, after retaining a small portion of the same as their charges. The banking services cannot be covered and treated as services rendered by an agent for the principal during the course of buying or selling of goods as the banker does not render any service in the nature of agency. "*

10. Further, the Central Government, by notification dated 31 December, 2012 has notified that no TDS shall be made on the following payments to the banks listed in the Second Schedule to the Reserve Bank of India Act:

(i) bank guarantee commission;

(ii) cash management service charges,

(iii) depository charges on maintenance of DEMAT accounts;

(iv) charges for warehousing services for commodities;

(v) underwriting service charges;

(vi) clearing charges (MICR charges),

(vii) credit card or debit card commission for transaction between the merchant establishment and acquirer bank.

11. The above notification was referred to in the order of the CIT (A) but not discussed. The assessee is right in contending that by virtue of the above notification no TDS is deductible from payments made towards "credit card or debit card commission for transaction between the merchant establishment and the acquirer bank". This applies to the charges paid to the Banks for providing payment gateway in the case on hand.

12. In that view of the matter, this Court finds that the ITAT has not committed any error in deleting the addition of Rs. 12,52,49,946/- made by the Assessing officer under section 40(a)(ia) of the Act [(as further educed by the CIT (A)] on account of non-deduction of TDS from the payment gateway charges paid to the Banks."

5.3 Respectfully following the decision of the Hon'ble Jurisdictional High Court, we hold that no TDS was required to be made u/s 194H in respect of payment of gateway charges made to the Banks and, therefore, revenue's appeal on this issue is dismissed.

Ground no. 3: Disallowance of advertisement, marketing and publicity of Rs. 23,09,53,687/-]

6. Brief facts are that the assessee had claimed expenses on account of advertisement and publicity of Rs. 4,19,07,373/-. The AO disallowed 50% of the expenditure on account of being capital in nature, which had benefitted the assessee as well as the entire group in the long term. CIT(A) allowed the appeal of the

assessee, following her predecessor's orders for earlier years and, hence, the Revenue is aggrieved.

6.1 Before us, the Ld. AR has submitted that this issue is covered in favour of the assessee by the orders of the coordinate benches for A.Y. 2007-08, 2008-9 and 2009-10 as well as in the succeeding years.

6.2 After hearing both the parties and on perusal of the orders of coordinate benches, we note that the issue stands covered in favour of the assessee. For A.Y. 2007-08 & 2008-09 in ITA Nos.- 2307, 4757,2692 & 4974/Del/2013, the coordinate bench has held as under:

"15. We further find from the submissions made by the Id. Counsel that from A.Y. 2010-11 onwards, the Department has accepted that such AMP expenses is not an international transaction and no addition has been made by the AO. From the various details furnished by the assessee, it is seen that the following AMP expenses were incurred by the assessee from A.Y. 2010-11 to 2016-11 and the TPO has not considered the same as an international transaction:-

Assessment Year	*AMP Expenses*	*Whether it was considered international transaction by TPO*
2010-11	*461,907,373*	*No*
2011-12	*577,466,197*	*No*
2012-13	*807,126,413*	*No*
2013-14	*604,210,658*	*No*
2014-15	*811,585,225*	*No*
2015-16	*690,400,000*	*No*
2016-17	*4,741,800,000*	*No*

16. So far as the ground the ground raised by the Revenue relating to acceptance of additional evidence is concerned, we find that the Ld. CIT(A), in the instant case, has called for a remand report from the and, thereafter, only has admitted the same and has given his finding on the basis of such additional evidence. The Hon'ble Delhi High Court in the case of Virgin Securities and Credits P. Ltd. (supra) has held that when the additional evidence was crucial to the disposal of the appeal and had a direct bearing on the quantum of the claim made by *the assessee, Rule 46A of IT Rules, 1962 permits the CIT(A) to admit the additional evidence if he finds that the same is crucial for the disposal of the appeal. The various other decisions relied on by the Id. Counsel for the assessee also support his case that when the evidences are very important for effective adjudication of the grounds raised by the assessee in the appeal and when the CIT(A) forwards these additional evidences to the AO for his comments in the shape of a remand report, then, the same is required to be admitted. It has also been held in various decisions that if the evidence goes to the very root of the matter and essential for rendering substantial justice, then, the same is required to be admitted. Since, in the instant case, the ld. CIT(A) has forwarded those additional evidences to the AO for his comments in the shape of a remand report and since the additional evidence goes to the root of the matter and are essential for rendering substantial justice, therefore, we do not find any merit in the grounds raised by the Revenue for admission of such additional evidence in violation of Rule 46A of the IT Rules.*

17. So far as the grievance of the Revenue that the AMP expenses incurred by the assessee is capital in nature is concerned, we find the Hon'ble Delhi High Court in the case of Salora International Ltd. (supra) has observed as under: -

> *"3. The first issue that is sought to be raised in this appeal pertains to advertising expenditure of approx. Rs. 3.08 crores. According to the AO, the expenditures was incurred for launching of its products. The AO was of the view that such expenditure was of an enduring nature and, therefore, treated one-third as "capital expenditure" and only allowed the two-thirds of the said amount as "expenditure, to the assessee". The CIT(A) allowed the entire amount after treating the expenditure as "revenue expenditure". The findings of the CIT(A) were confirmed by the Tribunal by virtue of the impugned order. Particularly, the Tribunal held that there was a direct nexus between the advertising expenditure and the business of the assessee and that the assessee had to incur such expenditure to meet the competition in the Indian market for selling its products in India. A finding was returned that unless the assessee made its products known to the market, its business would suffer. Consequently, the Tribunal held the entire expenditure on advertising to be of a revenue nature and allowed the same. The Tribunal also noted the decision of the Supreme Court in the case of Empire Jute Co. Ltd. vs. CIT (1980) 17 CTR (SC) 113: (1980) 124 ITR 1 (SC) wherein the Supreme Court held that there could be cases where the expenditure even if it was incurred for obtaining of a benefit of an enduring nature may, nevertheless, be on the revenue account and, in such cases, the test of "enduring benefit" may breakdown."*

18. We find the Hon'ble Delhi High Court in the case of Jubilant Foodwork Pvt. Ltd. (supra) has held that the expenditure incurred by the assessee on advertisement expenses is revenue in nature since no permanent character or advantage is achieved via the same and such expenses for advertising consumer products generally are a part of the process of profit earning and not in the nature of capital outlay. Similar view has been taken by the Hon'ble Delhi High Court in the case of CIT vs. Monto Motors Ltd. (supra).

19. In view of the above discussion and in view of the detailed order passed by the CIT(A) on this issue and considering the fact that the Revenue in assessee's own case for AYş 2010-

11 onwards has not considered such AMP expenses as international transaction, therefore, we do not find any infirmity in the order of the CIT(A) in deleting the addition of Rs. 31,81,07,110/- on account of adjustment of AMP expenses as computed u/s 92CA(3) of the IT Act."

In view of the above, we hereby hold that the CIT(A) was justified in allowing the claim of the AMP expenses and no interference is called for in his order. Hence, appeal of the Revenue is rejected on this ground.

7. **<u>Ground no. 4 & 5: Disallowance u/s 40(a)(ia) for non deduction of tax u/s 195(1) –[Rs. 79,32,20,107/-]</u>**

Brief facts are that the assessee had made payment of Rs. 70,95,23,923/- to M/s Make My Trip Inc. (MMT USA) on account of cost of tickets reimbursed, Rs. 40925528/- on account of reimbursement of advertisement ad business promotion expenses, Rs. 30697026/- on account of reimbursement of payment gateway charges and Rs. 120,73,630/- on account of reimbursement of business process outsourcing expenses (excluding the payment of Rs. 26,02,67,009/- which has been added back to income by assessee). No TDS was made on these payments. After considering the assessee's reply and following the assessment order of immediately preceding year (A.Y. 2009-10), the AO disallowed the payment of Rs. 7,93,22,01,107/- made to M/s MMT Inc. u/s 40(a)(ia) of the Act on account of non-deduction of tax at source.

7.1 Before us, the Ld. AR has submitted that the issue is covered in favour of the assessee by the orders of the coordinate benches for A.Y. 2009-10 and also for subsequent assessment years. Ld. DR has fairly accepted that the issue is covered by the decision of the coordinate bench of ITAT.

7.2 We have heard both the parties and perused the material on record. We note that the issue stands covered in assessee's favour and the coordinate bench while deciding the same in A.Y. 2009-10 has upheld the order of CIT(A), wherein after detailed discussion, appeal of the assessee was allowed. We further note that in this year, CIT(A) has allowed the assessee's appeal on similar reasoning on identical facts. In appeal, the CIT(A) which allowing the assessee's appeal held as under:

> *"7.2 I have perused the assessment order and the submissions of appellant on ground of appeal 9. During the year, appellant purchased air tickets amounting to Rs. 70,95,23,923/- for sale to third party customers in the US. These tickets were purchased by appellant through its group company, MMT US and subsequently such amounts were reimbursements to MMT US on cost-to-cost basis to be paid subsequently to the foreign airlines on account of purchase price of air-tickets issued by foreign airlines to overseas customers of the appellant. the amount of Rs. 70,95,23,923 representing net proceeds due to foreign airlines on account of sale of air tickets on their behalf is not an item of business expenditure' in the hands of the appellant. Also, such amount does not appear in the Profit & Loss account of the appellant for the relevant year and no deduction has been claimed by the appellant in this regard under the head "Profits and Gains of Business or Profession". Accordingly, the question of adding back such sum under provisions of Section 40(a)(i) of the Act does not arise. It is held that the provisions of Article 8 of the India-US DTAA are not applicable to the reimbursement of ticket costs by the appellant to MMT US as MMT US is not engaged in the business of running an airlines. Therefore, assessing officer is directed to delete this addition and ground of appeal 9 is allowed.*

7.3 We, accordingly, find no reason to interfere with the order of the Ld. CIT(A). Hence, this ground of the Revenue is also rejected.

8. In the result, appeal of the Revenue is hereby dismissed.

Order pronounced in the open court on 31.07.2026.

Sd/-	Sd/-
[KAVITHA RAJAGOPAL]	**[RENU JAUHRI]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated- 31.07.2026.
Pooja, Sr. Private Secretary

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi,