IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
SHRI SANDEEP SINGH KARHAIL, JM

ITA No. 2601/Mum/2022

(Assessment Year: 2018-19)

ITA No. 2941/Mum/2022

(Assessment Year: 2016-17)

DCIT Central Circle-2(4), Room No.802, 8th Floor, Pratishtha Bhavan, M.K. Road,, Churchgate, Mumbai-400020 **(Appellant)**	Vs.	Cleartrip Private Limited Unit No.4, City offices, 10th Floor, LBS Marg, Ghatkopar West, Mumbai-400086 **(Respondent)**

PAN No. AACCC6016B

ITA No. 2598, 2599/Mum/2022

(Assessment Years: 2016-17 & 2018-19)

Cleartrip Private Limited Unit No.4, City offices, 10th Floor, LBS Marg, Ghatkopar West, Mumbai-400086	Vs.	DCIT Central Circle-2(4), Room No.802, 8th Floor, Pratishtha Bhavan, M.K. Road,, Churchgate, Mumbai-400020

Assessee by	:	Ms. Fereshte D. Sethna & Mr. Mrunal Parekh, ARs
Revenue by	:	Mr. Manish Sareen, CIT DR

Date of hearing: 22.06.2023
Date of pronouncement : 15.09.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. These are the four appeals filed by the assessee and the learned Assessing Officer for A.Ys. 2016-17 and 2018-19.

AY 2016-17

02. ITA No.2598/Mum/2022 is filed by Cleartrip Pvt. Limited (Assessee / Appellant) and ITA No.2941/Mum/2022 is filed by The Dy. Commissioner of Income Tax, Central Circle 2(4), Mumbai (The Learned Assessing Officer) against the appellate order passed by The Commissioner Of Income-Tax (Appeals)-48, Mumbai [The Learned CIT (A)] dated 5th September, 2022. By this appellate order appeal filed by the assessee against the assessment order passed under Section 143(3) of the Income-tax Act, 1961 (the Act) dated 3rd July, 2019, by The Assistant Commissioner of Income Tax, Circle 6(2)(1), Mumbai, was allowed partly.

03. In ITA No.2941/Mum/2022, the learned Assessing Officer is aggrieved by the deletion of the addition made by the learned Assessing Officer on account of Share issue receipt of ₹33,33,15,000/- received by Assessee from its Holding Company Cleartrip Inc. Mauritius. Addition is made by the LD AO based on past assessment years and deleted by the LD CIT (A) based on past years appellate orders.

04. Following solitary ground was taken as under:-

"Whether on the facts and in the circumstances of the case and in law, the Learned CIT (A) erred in deleting the addition made by the Assessing Officer on the issue of share premium ₹33,33,15,000/-, considering that genuineness & creditworthiness of foreign entities/ ultimate investors were not properly established by the assessee and considering further that the assessee failed to discharge its onus to prove the genuineness of these transactions as the Cleartrip Inc. (Mauritius) did not have its own fund to invest and money trial revealed that main source of these funds were routed through various accounts."

05. In ITA No. 2598/Mum/2022, the assessee is aggrieved on disallowance of advertisement and sales promotion expenses of ₹22,77,70,391/- being 20 % of Total Advertisement and publicity expenses u/s 37 (1) of the Act confirmed by the learned CIT (A). Disallowance is made by the LD AO based on past assessment years and confirmed by the LD CIT (A) based on past years appellate orders.

06. The brief facts of the case shows that

i. Assessee is a company engaged in the business of travel agency and providing travel related services through its Web portal to various customers. It is a wholly owned subsidiary of Cleartrip Inc., Mauritius. Cleartrip Inc., Mauritius is a wholly owned subsidiary of Cleartrip Inc., Cayman Island. Several individuals and private equity funds have invested in Cleartrip Inc. Cayman Island.

ii. Assessee filed its return of income on 26 November 2016 at a loss of ₹59,95,10,511/-. The learned Assessing Officer picked up return of income for scrutiny.

iii. The learned Assessing Officer found that assessee has received ₹33,33,15,000/- as share premium from Cleartrip Inc., Mauritius. The assessee has issued 1,66,65,750 equity shares at a face value of ₹10 each at a premium of ₹10 having total issue price of ₹20 per share on 29 March 2016.

iv. The allotment was made to the holding company namely Cleartrip Inc., Mauritius [address international financial services court, 28 Cyber city Ebena, Mauritius].

v. The learned Assessing Officer found that the above share consideration has come from Cleartrip Inc., Mauritius, which in turn received the same from Cleartrip, Cayman Island, in which the funds are flowing from the private equity investors from USA.

vi. The learned Assessing Officer also noted that the assessee company is constantly incurring losses and therefore, ordinary business prudent suggests that none would invest in a company after paying a premium.

vii. Therefore, assessee was issued show cause notice to provide the details of the investors.

viii. The assessee furnished the necessary information showing the identity, creditworthiness and genuineness of the investment. The assessee submitted

i. Copy of tax residency certificate of Cleartrip Inc., Mauritius.

ii. Copy of certificate of incorporation of holding company.

iii. Copy of shareholders registered by Cleartrip Mauritius showing issue of shares to Cleartrip Inc., Cayman Island.

iv. Copy of certificate of current outstanding of cleartrip Inc. Mauritius.

v. Copy of foreign inward remittance certificate issued by its authorized dealer bank on receipt of money from cleartrip Inc., Mauritius.

vi. Copy of form number FCGPR filed with Reserve Bank of India.

vii. Copy of return of allotment of shares filed with the Registrar of Companies.

viii. Copy of the valuation report justifying the fair price of the share.

ix. Copy of bank statement of the assessee

x. Copy of bank statement of Cleartrip Inc., Mauritius.

xi. Copy of financial statement of cleartrip incorporation Mauritius.

ix. The learned Assessing Officer asked the assessee to show the ultimate source of the funds. The learned Assessing Officer also referred matter to FT&TR to ascertain the real nature of these transactions and actual source of the funds.

x. The learned Assessing Officer further verified the valuation report and found that assessee has used Discounted Cash Flow (DCF) and Net Asset Value (NAV) method for valuation of shares. He noted that assessee is making constantly losses, which are increasing. He noted that assessee has determined the premium at ₹9.40 per share to bring in conformity with the issue price of ₹20.

xi. He noted that the original valuation report is a cryptic two-page report and it did not state the basis of projected figures. As the assessee is constantly making loses in increasing trend, the premium of ₹9.40 per share is not justified. He rejected the same.

xii. He also rejected the contention of the assessee that the proviso to Section 68 of the Income-tax Act, 1961 (the Act) does not apply to a non-resident investors.

xiii. He further held that proviso to Section 56(2) (viib), is also applicable, as assessee has failed to give any justification for the huge premium.

xiv. Accordingly, the addition was made of ₹33,33,15,000/- under Section 68 of the Act.

xv. The second issue in the appeal is that the assessee has debited advertisement and sales promotion expenses of ₹103,88,51,955/-. The learned Assessing Officer issued show cause notice dated 14th June, 2019, asking why disallowance made in the earlier year should not be repeated.

xvi. The assessee submitted and objected to the above disallowance stating that assessee has incurred expense wholly and exclusively for its own business. Incidental benefit allegedly does not exist and even if it exists it does not result in to disallowance u/s 37 (1) of the Act. Assessee also submitted details of such expenditure.

xvii. The learned Assessing Officer noted that assessee is engaged in the online business of providing facilities for booking of air tickets and hotels in India through website.

xviii. The benefit of the assessee company activities is also derived by other entities.

xix. He further held that Cleartrip is a global brand and these expenses has co-relation with both the

assessee as well as Cleatrip brand, accordingly, it has a direct benefit of cost incurred by the Indian assessee to its group entities.

xx. Accordingly, as in A.Y. 2012-13 up to A.Y. 2015-16, he held that 20% of the expenditures are disallowable. Accordingly, he disallowed of ₹20,77,7,391/-.

xxi. Certain disallowance under Section 40a (ia) of the Income-tax Act, 1961 (the Act) of ₹2,84,69,733/- was made by the learned Assessing Officer.

07. Accordingly, assessment order under Section 143(3) of the Act was passed on 3rd July, 2019, determining the total income of the assessee at a loss of ₹2,99,59,387/- against the returned loss of ₹59,95,10,511/-.

08. Aggrieved by the assessment order, assessee preferred an appeal before the learned Commissioner of Income tax (Appeals). The learned CIT (A)

i. vide Para no.6.3 deleted the addition of ₹33,33,15,000/- following his own finding for A.Y. 2017-18. He followed his predecessor order for A.Y. 2012-13 to A.Y. 2014-15, while deciding the deletion of the addition for A.Y. 2017-18. Thus, the addition of ₹33,33,15,000/- was deleted and the learned Assessing Officer is in appeal before us against this issue.

ii. With respect to the disallowance of advertisement and sales promotion expenses under Section 37 of the Act amounting to ₹20,77,77,391/-, the learned CIT (A) vide paragraph no.7.2 held that identical issue has been decided by him for A.Y. 2015-16 confirming the disallowance of 20% of advertisement and sales promotion expenses. Accordingly, he confirmed the above disallowance and assessee aggrieved with that is in appeal before us.

09. The learned Departmental Representative arguing the appeal of the learned Assessing Officer on the issue of the deletion of addition of ₹33,33,15,000/- u/s 68 of the Act on issue of shares to assessee's holding company cleartrip Inc. Mauritius, supported the order of the learned Assessing Officer. He referred to paragraph no. 4.1 to paragraph no. 4.6 of Assessment order and vehemently supported the same. He submitted that

i. The learned Assessing Officer has asked the assessee to submit the details of the actual investors.

ii. Money has been routed through Private equity funds in Cayman Island Company, from Cayman Island Company to the Mauritius Company and there from, assessee has received the huge share capital.

iii. As the assessee is constantly making losses no prudent person would invest in such loss making company at premium.

iv. Cash credit is required to be tested every year on the principle of identity, creditworthiness and genuineness of the transaction. He therefore submitted that assessee has failed to show the same for this year.

v. Therefore, the learned CIT (A) has clearly erred in deleting the addition based on earlier year's decision.

010. The learned Authorized Representative submitted that

i. Identical issue arose in case of the assessee for A.Y. 2012-13, 2013-14 and 2015-16. She referred to the order of the co-ordinate Bench in assessee's own case in ITA No.2540 to 2542 and 6964/Mum/2019 dated 13 April 2023, where the addition is deleted. She referred to Para No. 5 to 14 of the order. She further referred to Para No.20 to show that identical grounds were raised for A.Y. 2012.13, wherein the addition of ₹36.02 crores was deleted by the learned Commissioner of Income tax (Appeals). She referred to paragraph no.21 to 24 of the order wherein the co-ordinate Bench has decided the issue upholding the order of the learned CIT (A) deleting the addition under Section 68 of the Act.

ii. Even independently, the assessee has proved identity, creditworthiness of the investor holding company and genuineness of the transaction of the share issue to its holding company.

iii. Referred to the paper book volume-1, starting from page no.39 to page no.156 of the Paper Book.

iv. It was stated that to substantiate the identity of investors, the assessee has submitted a certificate of incorporation, certificate of incumbency and tax residency certificate issued by Mauritius revenue authorities of investor. She further referred to various documents to substantiate identity of Cleartrip Inc., Cayman of Island by submitting certificate of incorporation and shareholder register of Mauritius entity evidencing the issue of shares to its Cayman Island holding company.

v. To substantiate the identity of ultimate shareholders, she submitted the list of shareholders in Cayman Island Company and their profiles.

vi. She referred to the financial statements of Cleatrip Inc., Mauritius and the bank statement of Mauritius entity along with the bank statement of Assessee to show the sources of fund in the bank account of Mauritius Company. This was shown to prove the creditworthiness of the investors.

vii. To show the genuineness of the transaction, she referred to the foreign inward remittance certificate issued by the banks being an authorized dealer, form no. FCGPR filed with the Reserve Bank of India and Valuation Report issued by SLM Company LLP Chartered Accountant. She referred to the valuation

report stating that NAV of the assessee company is derived at ₹2.42 per share for which the balance sheet of the assessee is used. For the valuation, according to Discounted Cash Flow method, she stated that valuation is ₹16.38 per share. She referred to Paragraph no.3.4 to show that how the valuer has derived at fair value of shares. She stated that the valuer has arrived at the valuation of an average of Net Asset Value method and Discounted Cash Flow method. Accordingly, the fair value of share of the company is ₹9.4 per share. With respect to the valuation as per Discounted Cash Flow method, she explained the valuation methodology, various discounting factors and the terminal growth value of the shares. She submitted that the valuation report is rejected without any cogent reason.

viii. Further, the addition is made by disregarding all the evidences placed before the learned Assessing Officer.

ix. Provisions of section 56 (2) mentioned by LD AO does not apply to a non-resident shareholder and explanation section 68 do not apply to the facts of the case.

x. Therefore, she submitted independently for this year, the addition could not have been made under Section 68 of the Act and further identical addition made in earlier assessment years have also been deleted by the co-ordinate Bench in assessee's case and

therefore, the appeal of the learned Assessing Officer deserves to be dismissed.

011. We have carefully considered the rival contentions and perused the orders of the lower authorities. We find that the issue is squarely covered in favour of the assessee by the decision of the co-ordinate Bench in assessee's own case for earlier years, wherein on identical facts and circumstances, issue of shares to same holding company, addition is deleted. The co-ordinate Bench has dealt with this issue for A.Y. 2012-13 (which is the lead year) as under:-

> "**21.** With regard to Ground No. 1 which is in respect of addition u/s. 68 of the Act, Ld.DR heavily relied on the order of the Assessing Officer. Ld.DR submitted that the genuineness and creditworthiness of foreign entities were not properly established by the assessee. Further, Ld.DR submitted that assessee had failed to discharge its onus to prove the genuineness of these transactions and had failed to explain the source of these investments as M/s Cleartrip Inc (Mauritius) did not have its own fund to invest and that the money trail revealed that main source of these funds were routed through various accounts. Ld. DR prayed that the order of the Ld.CIT (A) be set-aside and that of order of the Assessing Officer be restored.
>
> **22.** On the other hand, Ld. AR of the assessee reiterated the submissions made before the Ld.CIT (A) and submitted that assessee provided supporting documents such as certificate of incorporation, certificate of incumbency, etc. to establish the identity of Cleartrip Inc, Mauritius and Cleartrip Inc, Cayman Island. Ld. AR submitted that to prove "Source of Source" assessee has submitted

documents to establish identity of immediate and ultimate investors. It's not required to establish source of source. Further, Ld. AR submitted that transactions are genuine as they have been undertaken through normal banking channels. Copies of FIRCs and bank statements of Assessee and Mauritian entity submitted. Copies of FC-GPR and Form 2 filed before regulatory authorities submitted to establish genuineness. Ld. AR further submitted that issuance of shares at a premium is a commercial decision. Companies Act, 1956 also does not prescribe any limit on premium. Financial statements of Cleartrip Mauritius submitted to establish its Creditworthiness.

23. Considered the rival submissions and material placed on record. We observe from the various documents and submissions made before us that the assessee has received Share Capital along with Share premium from its holding company based in Mauritius. The Holding company in turn received the relevant funding from its related concern in Cayman Island. The assessing officer doubted the sources of these funds with the allegation that these funds are routed funds came back to the assessee company. The assessing officer has no proof of such allegation merely based on his suspicion and nothing on record. On the other hand, the assessee has brought on record to submit that these funds are received through proper banking channels and it has filed the relevant documents before RBI and ROC. It has submitted relevant documents like Copies of FIRCs and bank statements of Assessee and Mauritian entity, Copies of FC-GPR and Form 2 filed before regulatory authorities to establish genuineness of the transaction.

24. Further, we observe that the assessing officer proceeded to evaluate the valuation method adopted by the assessee and tried to evaluate the difference between the projected financials with the actual financials. The assessing officer made the

> disallowance u/s 68 and there are no such procedures laid down to evaluate the share valuations. It is fact on record that the assessee has received the share capital from its Holding Company and there is no doubt of its existence, the assessing officer cannot reject the whole legal and proper documentation submitted before him about the existence of holding company. The receipts were all routed through the proper banking channels. Therefore, we do not see any reason to interfere with the findings of Ld CIT(A). Accordingly, the ground raised by the revenue in this regard is dismissed."

012. Looking the issue independently, as the ld DR has correctly stated that though the identity of assessee decided in earlier years can be accepted but how the creditworthiness of the investor and genuineness of transaction needs to be tested with respect to each transaction independently, we find that assessee has received US$5 lakhs towards investment under the Foreign Direct Investment Scheme [FDI] in the equity shares from cleartrip incorporation Mauritius on various dates in three trenches. Assessee issued 1,66,65,750 equity shares having face value of ₹ 10 per share to its holding company Cleartrip incorporation Mauritius at a premium of ₹ 10 per share raising sum amounting to ₹ 333,315,000/–. Assessee submitted before the learned assessing officer the details of share issued during the year showing the name of the shareholder, number of shares issued, face value of such shares and issue price etc. To prove the identity of the investor assessee submitted certificate of incorporation issued by Republic of Mauritius of the investor dated 23rd day of September

2005. Assessee also submitted the certificate of current standing of the entity showing that Cleartrip incorporation Mauritius was duly incorporated under the provisions of The Companies Act 2001 on 23rd day of September 2005 as Category 1 Global Business Company. The certificate was dated 18th day of September 2017. Assessee also submitted the Tax Residency Certificate dated 27/11/2015 of the investor having tax account number 25078149 which was valid for the period of 25 November 2015 – 24 November 2016. The assessee also submitted the identity of holding company of the investor company i.e. Cleartrip incorporation Cayman Island by submitting the certificate of incorporation dated 23 September 2005. Shareholder register of the various investors in the investor company as well Cayman Island was also submitted. It was shown that Cleartrip incorporation Cayman Island is the major shareholder in the investor. The assessee also submitted the details of ultimate shareholders in Cayman Island holding company of the investor stating that name, number of ordinary shares held by them, series and number of preference shares held by them and percentage of voting rights held by each of the investors in Cayman Island Company. Assessee also submitted copies of the various share certificate issued to the ultimate shareholders of Cayman Island Company. To substantiate the valuation of the share assessee submitted valuation report of SLM and company LLP, chartered accountants dated 4 February 2016. According to the valuation report, the valuation

was arrived at by taking into consideration the average of the net asset value method and discounted free cash flow method. Assessee also submitted the copies of certificate of foreign inward remittance received by the assessee, which clearly shows that the remittance is from Cleartrip incorporation Mauritius, and purpose of the remittances payment towards investment under foreign direct investment scheme in equity shares of the assessee. To substantiate the receipt of sum, assessee submitted the bank account statement of the assessee with Kotak Mahindra bank and bank statement of Cleartrip incorporation Mauritius having account number XXXXX32033 with Afrasia bank. Assessee produced form number FC – GPR submitted before the reserve bank of India through its authorized dealer wherein the name of foreign investor, issue of equity shares, pricing of equity shares and pattern of shareholding post and pre-allotment was shown. To show the creditworthiness of the private equity investors in Cleartrip incorporation Cayman Island assessee submitted their profile and the annual financial statements of Cleartrip incorporation Mauritius. The learned assessing officer did not have any material, which controverts above submission and information. There is information about FT7TR reference made by LD AO. Therefore, for this assessment year assessee has proved identity and creditworthiness of investor as well as the genuineness of the transaction of investment in equity shares of the company. Apparently, assessee has discharged its initial onus cast upon the

assessee under the provisions of section 68 of the income tax act. Therefore, we find that the assessee has fairly demonstrated the identity, creditworthiness and the genuineness of the transition by producing extensive material independently for this year also. Proviso to section 68 does not apply to a non-resident investor. Even otherwise assessee has shown nature and source of funds in the hands of Nonresident 100 % holding company investor also independently. Hence, we confirm the order of the learned CIT (A) deleting the above addition. Accordingly, we do not find any merit in the appeal of the learned Assessing Officer. Hence, the solitary ground of appeal against the deletion of addition of ₹33,33,15,000/- is dismissed.

013. Accordingly, ITA No.2941/Mum/2022 filed by the learned Assessing Officer is dismissed.

014. In the appeal of the assessee in ITA No. 2598/Mum/2022, the solitary ground raised is disallowance of advertisement and sales promotion expenses of ₹20,77,70,391/-. Facts show that assessee has incurred Advertisement and publicity expenses. The LD AO held that assessee along with its fellow subsidiaries of cleartrip is doing worldwide business, so the benefits of this expense have gone to subsidiaries. Hence, 20 % if such expenses were disallowed by the LD AO and CIT (A) confirmed it. Both the lower authorities confirmed their action based on the findings in earlier Assessment Years. The matter reached coordinate

bench, it rejected the 20 % adhoc disallowance but set aside the matter to the file of the LD AO to lift corporate veil and decide the issue by obtaining details of foreign fellow subsidiaries and then disallow the expense in proportion to turnover.

015. The learned Authorized Representative submitted that identical issue first arose in the case of the assessee for A.Y. 2012-13, which have been decided by the co-ordinate bench; vide order dated 13 April 2023. She referred to paragraph no.9 to 10 of the appeal to show that identical disallowance was made. She referred to paragraph no.15 of the order to show that how in that year the learned CIT (A) confirmed the addition. She further referred to paragraph no.16, 17 and 18 to show that the learned CIT (A) identically confirmed the 20% of such expenditure. She further referred to the appeal of the assessee before ITAT for A.Y. 2012-13 vide Para no.29 to 35 of the order, wherein the issue was remitted back to the file of the learned Assessing Officer. It was submitted that the co-ordinate Bench rejected the adhoc disallowance made by the learned Assessing Officer and sustained by the learned Commissioner of Income tax (Appeals). However, the co-ordinate Bench directed the learned Assessing Officer to lift the corporate veil and collect all the information related to advertisement and sales promotion expenses as well as the expenses incurred by the sisters concern and apportion the same in the basis of the turnover.

016. She reiterated her submission made before lower authorities.

017. The learned departmental representative vehemently supported the order of the learned lower authorities and submitted that that though the coordinate bench in assessee's own case has decided that ad hoc disallowances not proper however restored the matter back to the file of the learned assessing officer for disallowance of appropriate proportion based on the turnover on examination.

018. We have carefully considered the rival contention and perused the orders of the lower authorities as well as perused the order of the coordinate bench in assessee's own case for earlier years. It held as under :-

> **"33.** Considered the rival submissions and material placed on record. We observe that the assessee is web based service provider and all its services are rendered through website: www.cleartrip.com and it is not meant to service only the Indian customers. It is a global web site and unlike territory based "sites" which provides the services only to the extent of Indian territory. We also observe that anybody would like to use the facility anywhere in the world has to book through the common web site as stated above. It was also informed and submitted that the services are provided mainly to the customers in India and UAE. For UAE customers, there is separate website called www.cleartrip.ae. We observe that even to use

the above said site the customers has to utilize the main site www.cleartrip.com and it will reroute the customers to other sites. Therefore all the services are rendered through main web platform i.e., www.cleartrip.com. It is also observed that all the cost relating to the above platform are recorded in the books of the assessee. It was also submitted that the relevant cost of advertisement made in the UAE are separately booked in the subsidiary entity in the UAE. There is no connection for the services offered in the Indian platform. However, we observe that the business of the entire group concerns are carried through this one platform for which the whole cost of advertisement and maintenance are recorded and charged to the profit and loss account of the assessee. We also observe that the assessee has shared the financial statement of the holding company and never shared the financial statement of the other group concerns based in "UAE". It is the duty of the assessee to share the information and disclose that the profit of the Indian entity are not shifted to the other subsidiaries, considering the fact that the subsidiary in the UAE are tax heaven and the profits of these entities are tax exempt.

34. Further, it was submitted that even if some benefit may endure to the third party still the eligibility of claim of the expenses should not be disturbed in the case of assessee. However, the benefits are enjoyed by the sister concern which is

existing in the tax exempt country and relevant benefit of the sister concern which is not resident in India, cannot be ignored, the submissions and plea of the assessee cannot be entertained. The case law relied on this aspect is not relevant to the present fact on record.

35. Further it was submitted Ld CIT(A) has not followed the twin test and commercial expediency. Further relied on the various case law on this issue which was submitted before CIT(A) and before us. After considering them, in our view these are distinguishable to the facts under consideration. With the above observation, we are incline to accept the findings of the Ld CIT(A) however, we are not incline to accept the adhoc disallowances made by the assessing officer and sustained by the Ld CIT(A). The disallowance has to be made on certain basis. Therefore, we direct the Assessing Officer to lift the corporate veil and collect all the information relating to Advertisement and sales promotion expenses including the expenses incurred by the sister concerns based in other countries and apportion the same on the basis of revenue (on the basis of Turnover) of the group. Accordingly, we are remitting this issue back to the file of Assessing Officer to disallow the above said expenses based on the above direction and we direct assessee to provide all the relevant information to the assessing officer to apportion the expenses. For abundance

caution, in case assessee fails to provide the informations within the time provided by the assessing officer, the addition may be sustained as per the direction of the Ld CIT(A)."

019. During the year the assessee has debited the advertisement and sales promotion expenses of ₹ 1,038,851,955/–. The learned assessing officer following the assessment order is for assessment year 2012 – 13 and 2013 – 14 to 2015 – 2016 made disallowance of 20% of such expenditure amounting to ₹ 207,770,391/–. When the matter reached before the learned CIT – A he also following his own order in assessee's own case for earlier years confirm the above disallowance. The coordinate bench has also decided the issue for assessment years 2012 – 13, 2013 – 14, 2014 – 15 and 2015 – 16. Before the coordinate bench, the assessee submitted that the conditions for allowance of expenditure under section 37 of the Income Tax Act are satisfied in the case of the assessee. Assessee has incurred this expenditure for its own benefit and its own business. It was further that stated that the even if there is an incidental indirect third-party benefit, it would not result into characterization of expenditure as not incurred wholly and exclusively for the business of the assessee, no disallowance in the hands of the assessee can be made. The coordinate bench considered the argument of the assessee that ultimately held that assessee is a web-based service provider and all its services are rendered through its own website which is not only meant for the

Indian customers but it is a global website. It was further observed that anybody would like to use the facility anywhere in the world to book through the common web portal. Though assessee submitted that the relevant cost of advertisement made in the United Arab Emirates are separately booked in the subsidiary entity in that country and there is no connection for the services offered in the Indian platform. However, the coordinate bench held that the business of the entire group concerns are carried through this one platform for which the whole cost of advertisement and maintenance are recorded as charge to the profit and loss account of the assessee. The coordinate bench further held that assessee has never shared the financial statement of the other group concerns to show that UAE Company has incurred its own expenditure. The coordinate bench held that benefits are enjoyed by the sister concern which is existing in the tax-exempt country and relevant benefit to the sister concern which is not resident in India cannot be ignored. Accordingly the coordinate bench directed the learned assessing officer to lift the corporate veil and collect all the information relating to advertisement and sales promotion expenses including the expenses incurred by the sister concern based in other countries and apportion the same on the basis of the revenue of the group. The learned authorized representative reiterated the submission made before the coordinate bench in that case. We do not find that during this year there is any such evidence brought on record by the learned assessing

officer that expenditure incurred by the assessee is not for the business of the assessee. Each year is an independent assessment year, to assess the income of the assessee, the revenue is duty-bound to analyze the fact of each case and then deal with the amount of income and expenditure offered and claimed by the assessee respectively for determination of taxable income for that AY. During this year, there is merely an allegation without pointing out failure on the part of the assessee. Accordingly, the facts of the present year are different from the finding of the facts given by the coordinate bench for assessment year 2012 – 13. Firstly, the ad hoc disallowance made by the learned assessing officer and confirmed by the learned CIT – A is not sustainable. The coordinate bench in assessee's own case also confirms this for earlier year. Now coming to the disallowance of expenditure, we find that assessee has submitted the details of such expenditure to the assessing officer. Assessing officer straightway issued show cause notice that why the identical disallowance should not be made in the present assessment year which was made in the earlier assessment years. As per letter dated 20 June 2019, assessee submitted the details of advertisement and sales promotion expenditure categorized party wise into various heads. Assessee specifically objected that disallowance might not be made in the assessment of current year on account of several reasons. The learned assessing officer despite having the complete detail of such expenditure could not give any

independent finding on examination of such detail that the expenditure incurred by the assessee is not wholly and exclusively incurred for the purpose of the business of the assessee. Though assessee denied that there is any benefit to the third parties, however, even if there is an incidental indirect benefit to the some other parties, that would not entitled to revenue to disallow the expenses incurred by the assessee for its own business purposes. We find that if the expenditure is incurred by the assessee for the purposes of the benefit of the third party or its overseas sister concern, it becomes an international transaction which could not have been resulted into disallowance under section 37 (1) of the act, but determination of Arm/s length price of such transaction under Chapter X of The Act. In absence of any evidence placed by the learned assessing officer that these expenditure has resulted into benefit to the third-party and these are not incurred wholly and exclusively for the purposes of the business of the assessee, we do not find any reason to sustain the disallowance. Accordingly, solitary ground raised by the assessee against the disallowance of expenditure of advertisement and sales promotion expenditure of ₹ 207,770,391/– being 20% of the total expenditure of advertisement and sales promotion expenses incurred by the assessee is allowed.

020. Accordingly ITA number 2598/M/2022 filed by the assessee is allowed.

Assessment year 2018 – 19

021. ITA number 2599/M/2022 is filed by the assessee and ITA number 2601/M/2022 is filed by the learned assessing officer for assessment year 2018 – 19 against the appellate order passed by THE COMMISSIONER OF INCOME TAX (APPEALS) – 48, Mumbai (the learned CIT – A dated 29/8/2022.

022. The facts shows that assessee filed its return of income on 28 November 2018 declaring loss of ₹ 504,090,907/–. The return of income was selected for the scrutiny. During the course of assessment proceedings following issues emerged:-

i. The learned assessing officer noted that assessee has issued share capital along with the premium of ₹ 387,547,500 received by Assessee from Cleartrip Inc. Mauritius. The learned assessing officer referred to the FT &TR division on 17 March 2021 to ascertain the real nature of the transaction of issue of shares issued by the appellant and to establish the actual source of the sum so invested by the cleartrip incorporation Mauritius. The assessee submitted identical details, which it submitted in the earlier assessment years whenever the shares were issued to the cleartrip incorporation Mauritius. The learned assessing officer based on the assessment orders of its earlier year made an addition of ₹

387,547,500/– under section, 68 of The Income Tax Act and applied the provisions of section 115BBE of the act.

ii. The assessee has also incurred the advertisement and sales promotion expenditure amounting to ₹ 1,097,769,117/–. Based on the earlier years assessment order the learned assessing officer disallowed 20% of such expenditure amounting to ₹ 219,553,823/–.

iii. The assessee has also debited a sum of ₹ 6,065,232/– to the profit and loss account because of employee stock option scheme cost. The AO noted that it has been granted by the ultimate holding company i.e. clearTrip incorporation Cayman Island. The assessee explained that wherever the holding entity grants such benefit to the employees of the subsidiary entity, the cost of such ESOP needs to be recorded as an expense in the profit and loss account of the subsidiary entity. It was further stated that such benefit granted to the employees of the assessee entity in order to compensate them and ensure continuity of the services to the assessee. It is a salary or employees compensation. Accordingly these expenditure are allowable under section 37 (1) of The act. The learned assessing officer held that such expenditure are capital expenditure

and cannot be allowed as revenue expenditure to the assessee. Accordingly, the above sum was disallowed.

iv. The reasons for selection of the return of income for the purpose of scrutiny was to examine the large payments made under section 194H to persons who have not filed return of income in comparison to total payments on TAN corresponding to PAN in form number 26Q. On examination, it was found that assessee has made payment to four different entities. The assessee submitted the preliminary details. The learned assessing officer issued notices under section 133 (6) of the act to those four parties to submit their income tax returns. Three parties replied to the notices issued and submitted the income tax return. However, no reply was received from two parties and no confirmation was received from that party. The assessee was informed accordingly. On investigation, it was further found that Tech process payment services Ltd and Avenues India private limited have not filed the return of income for assessment year 2018 – 19. Therefore, the assessee was further questioned about the genuineness of the parties to show as to why the commission paid to the above party should not be treated as unexplained expenditure. Assessee submitted

copies of the agreements entered into with the above said parties along with the copies of invoices issued by them. The learned assessing officer for the reason that those parties did not file the return of income for assessment year 2018 – 19 despite being the recipient of the huge amount of commission, and despite assessee being granted enough opportunity could not filed necessary confirmation from these parties, disallowed a sum of ₹ 156,467,346/– paid to Techprocess payment services Limited and Rs 418,16,851 to avenues India private limited.

023. Accordingly, against the returned income of a loss of ₹ 501,490,907/–, the assessment under section 143 (3) of the act was passed on 21/3/2022 determining the total income of the assessee at ₹ 387,547,500. The assessee was aggrieved by the following additions/disallowances made by the learned assessing officer in the assessment order: –

i. disallowance of advertisement and sales promotion expenditure of ₹ 219,553,823

ii. disallowance of employee stock option expenses claimed of ₹ 6,065,232

iii. disallowance of payments made to tech process payment services Ltd and M/s

Avenue India private limited of ₹ 198,284,197/–

iv. addition on account of unexplained share capital and premium received from holding company under section 68 of the income tax act of ₹ 387,547,500

024. Assessee aggrieved with assessment order preferred an appeal before the learned CIT – A. He passed an appellate order dated 29/8/2022. The learned that CIT – A

i. deleted the addition under section 68 of the income tax act of ₹ 387,547,500 based on the findings given in the appellate order in assessee's own case by the learned CIT – F for assessment year 2017 – 18 holding that assessee has proved the identity, creditworthiness of the investor and genuineness of the transaction.

ii. With respect to the disallowance of advertisement and sales promotion expenses under section 37 of the income tax act of ₹ 219,553,823, he followed his own decision in assessee's own case for earlier years and confirmed the disallowance being 20% of the advertisement and sales promotion expenditure incurred by the assessee.

iii. With respect to the disallowance of employee stock option expenses of ₹ 6,065,232, he confirmed the disallowance for the reason that the assessing officer

has issued a show cause notice to the appellant to explain as to why these expenses should not be disallowed under section 37 (1) of the act being capital expenditure in nature, assessee did not furnish any substantial material to establish the revenue nature of such expenditure.

iv. With respect to the disallowance of payment made to Techprocess payment, services Ltd and Avenue India private limited were confirmed. Though assessee submitted before the learned CIT – A that Tech process private limited ceased to exist as the entity because of the reason of its amalgamation with another company. It was also stated that the return of income was also filed by the amalgamated company, the learned CIT – A held that though the above company might have merged however no confirmation of the said amount was brought on record either before the assessing officer or the CIT – A. Accordingly he confirmed the disallowance of expenditure of ₹ 156,467,346/– on account of payment made to Techprocess payment services Ltd.

v. With respect to the payment of ₹ 41,816,851/– two avenues India private limited, the assessee submitted that this company did not exist as it got amalgamated into Infibeam incorporation Ltd, thus the return of income for assessment year 2018 – 19 was filed by the amalgamated company, the learned CIT – A held that assessee did not furnish the

confirmation and therefore the addition was confirmed. Both the parties are aggrieved with the above appellate order and are in appeal before us.

025. As per ITA number 2601/M/2022 the learned assessing officer is aggrieved with the order of the learned CIT – A wherein the addition of ₹ 387,547,500/– being the amount of share capital issued to its holding company was added by the learned assessing officer under section 68 of the income tax act but deleted by the learned CIT – A.

026. Both the parties confirmed that identical issue arose in the assessee's own case for earlier years wherein the coordinate bench has confirmed the order of the learned CIT – A deleting the addition.

027. The ld DR reiterated the findings of the ld AO and submitted that there is reference made to FT & TR division but it is still awaited.

028. The learned authorized representative submitted that identical details are available in paper book filed for assessment year 2018 – 19 containing 63 pages wherein complete details with respect to the identity of the investor, identity of the ultimate holding company, identity of ultimate shareholders in ultimate holding company to prove the identity of the investor. To prove the creditworthiness of the investor, the financial statement and bank statement of the investor along with the source of the funds available with the investor are

also evidenced. With respect to the genuineness of the transaction, assessee submitted the valuation report, foreign inward remittance certificate as well as the relevant declarations filed with the reserve bank of India or allotment of the shares was also placed. She referred to the several documents referred to in the paper book to show the identity, creditworthiness of the investor is proved and genuineness of the transaction is also established. Therefore, it was submitted that assessee has discharged initial onus cast upon the assessee to prove the identity and creditworthiness of the investor as well as the genuineness of the transaction. It was also stated that the reference made by the learned assessing officer to the foreign tax division has not yet been responded to. It was further stated that the learned assessing officer has not made any independent enquiry which has thrown any adverse facts and therefore the order of the learned CIT – A and the order of the coordinate bench in earlier assessment years in assessee's own case have correctly deleted the addition.

029. We have carefully considered the rival contention and perused the orders of the lower authorities. The fact shows that the assessee has issued 1,93,77,375 equity shares having a face value of ₹ 10 per share which holding company Cleartrip . Incorporation Mauritius at a premium of ₹ 10 per share is amounting to ₹ 387,547,500. The assessee submitted that the investor company is a company Incorporated under the laws of Mauritius on 23 September 2005 [tax file number 58711]

and holding commercial license 1 GBL having registered office at IFA score, bank Street, 28, cyber city, Ebene, Mauritius. To substantiate the identity of the investor, certificate of incorporation, certificate of current standing and the tax residency certificate issued by the Mauritius authorities were also placed. It was also stated that the investor is also having Indian permanent account number. To substantiate the creditworthiness of the party assessee furnished the confirmation letter issued by the investor and the bank statements of the investor were furnished to the assessing officer. The assessee also submitted its own bank statement to show the remittance received and bank statement of investor. The assessee further substantiated the foreign inward remittance certificate issued by its authorized dealer bank with respect to each of the remittances. To comply with the foreign direct investment guideline the assessee filed form number FC – GPR filed with the reserve bank of India for allotment of shares to a non-resident entity. Respective details of the investor of the ultimate holding company and their brief profile was provided. Assessee also substantiated the valuation at which the shares have been issued by furnishing the valuation Report of a chartered accountant dated 1 March 2018 holding that the fair value of the shares of the company is of ₹ 6.81 are fully paid up equity shares. The valuation was derived at by taking into consideration the average of the net asset value method and the discounted free cash flow method. In view of the above facts independently for

assessment year 2018 – 19 assessee has established identity and creditworthiness of investor and genuineness of the transaction. Further orders of the coordinate bench in assessee's own case on identical facts and circumstances with respect to the allotment of share to the holding company of the assessee in earlier Assessment Years, we do not find any infirmity in the order of the learned CIT – A in deleting the addition of ₹ 387,547,500. Accordingly, solitary ground of appeal raised by the learned AO in his appeal is dismissed.

030. In the result, appeal of the learned assessing officer in ITA number 2601/M/2022 is dismissed.

031. Assessee has filed appeal against the confirmation of the following three disallowances by the learned CIT – A: –

i. ground number 1 ad hoc disallowance of advertisement and sales promotion expenses being 20% of the total expenditure

ii. ground number 2 disallowance of ESOP expenses holding it to be a capital expenditure

iii. ground number 3 disallowance of payment made to Tech process payment services Ltd and M/s Avenue India private limited

032. with respect to the ground number 1 where the disallowance of sales promotion and advertisement expenditure of ₹ 219,553,823/– made by the learned assessing officer and confirmed by the learned CIT – A,

the learned authorized representative submitted that the facts relating to this case are identical to the issue in case of appeal of the assessee for assessment year 2016 – 17 and her argument are also similar.

033. The ld AR repeated submission made for AY 2016-17.

034. The learned departmental representative vehemently supported the orders of the lower authorities and submitted that in case of the assessee in earlier years the coordinate bench set-aside the issue back to the file of the learned assessing officer with certain directions.

035. We have carefully considered the rival contention and perused the orders of the lower authorities. No adverse facts or finding of the ld AO was drawn to our attention. Lower authorities did not attempt to show that the assessee for its own business not wholly and exclusively incurs expenses. We find that the issue in this appeal is identical to the ground number 1 in appeal of the assessee for assessment year 2016 – 17. While deciding the appeal of the assessee for assessment year 2016 – 17, we have directed the learned assessing officer to delete the disallowance of the expenses. The facts in this case are no different. Therefore, according to our decision in assessee's appeal for assessment year 2016 – 17, we direct the learned assessing officer to delete the disallowance of advertisement and sales promotion expenses of ₹ 219,553,823. Ground number 1 of the appeal is allowed.

036. Ground number [2] is with respect to the disallowance of employee stock option expenses of ₹ 6,065,232, which is held to be capital expenditure. We find that in view of the decision of the honourable Karnataka High Court in CIT versus Biocon Ltd 430 ITR 151 and of honourable Delhi High Court in case of Lemon Tree Hotels Ltd 104 taxmann.com 26 and honourable Madras High Court in case of PVP Ventures limited, this expenditure are revenue in nature. Accordingly we direct the learned assessing officer to delete the disallowance of employee stock option expenditure of ₹ 6,064,232/–. Accordingly, ground number 2 of the appeal of the assessee is allowed.

037. Ground number [3] of the appeal of the assessee is with respect to the disallowance of expenditure paid to two parties [1] Techprocess process payment services Ltd and [2] Avenue India private limited amounting to ₹ 15.64 crores and ₹ 4.18 crores. These expenses are disallowed by the learned assessing officer holding that the assessee has failed to substantiate these expenditure as both these parties did not respond to the notices under section 133 (6) of the act and assessee also failed to file confirmation of the above parties. Further, the learned assessing officer found that both these entities did not file the return of income despite being huge amount paid by the assessee to them. Therefore the disallowance resulted under section 37 (1) of the act. Before the learned CIT – A assessee explained that both these entities of amalgamated with other entities and for

this reason perhaps, the parties could not respond to the notices under section 133 (6) of the act. Further, the returns of income after the amalgamation are required to be filed by the amalgamated companies. In view of corporate restructuring resulting nonexistence of those companies have resulted into non-compliance by these entities before the assessing officer. However when the details are submitted before the learned CIT – A, the assessee could not submit the confirmation of those parties.

038. After hearing the parties, we find that due to peculiar circumstances in the case of two parties the addition has been confirmed as those were non-filers and no confirmation was filed. However, it is apparent that assessee has filed the agreement with all those parties. Therefore in the interest of justice we set-aside this issue back to the file of the learned assessing officer with a direction to the assessee to substantiate, within 90 days from the date of receipt of this order, payment of the above expenditure to these 2 entities by submitting their confirmation along with necessary evidence to substantiate the expenditure and also the income shown by the companies subject to the time period [Pre and Post Amalgamation] by submitting their ROI. On furnishing such details, the ld AO may decide issue in accordance with law. Failure to submit information in time by assessee, may also result in identical disallowance. Accordingly, ground number 3 of the appeal is allowed with above direction.

039. In the result, appeal filed by the assessee is partly allowed.

Order pronounced in the open court on 15.09. 2023.

Sd/-	Sd/-
(SANDEEP SINGH KARHAIL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated: 15.09. 2023
Sudip Sarkar, Sr.PS/Dragon
Copy of the Order forwarded to:

1. The Appellant
2. The Respondent
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

True Copy//

Sr. Private Secretary/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai