

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'E', NEW DELHI**

**BEFORE SH. R.K. PANDA, ACCOUNTANT MEMBER
AND
SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

ITA No.3812/Del/2015
Assessment Year: 2009-10

DCIT Circle 19 (1) New Delhi	Vs	Oxygen Services India Pvt. Ltd. Unit No.31, Tribhuvan Complex, Ishwar Nagar, New Friends Colony, New Delhi -110065 PAN : AABCI1405K
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Rinku Singh, Sr. DR
Respondent by	Sh. Satyam Sethi, Advocate

Date of hearing:	26/12/2018
Date of Pronouncement:	07/01/2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the revenue is directed against the order dated 09.03.2015 passed by the CIT (A)-7, New Delhi to A. Y. 2009-10.

2. Ground of appeal No.1 by the revenue reads as under :-

“1. On the facts and under the circumstances of the case, the Ld. CIT (A) has erred in deleting the disallowance of depreciation of

Rs.2,24,22,212/- claimed by assessee company at a higher rate of 60% on POS terminals by assessee company without appreciating the facts that Explanation (xi) to section 36 clearly defines the meaning of computer and the POS Terminals are not covered under the block of assets within the definition of the term “computer”.

3. Facts of the case, in brief, are that the assessee is a company and is engaged in the business of trading in Electronic recharge coupons and collection of payment of postpaid of various telecom operators. It filed its return of income on 26.09.2010 declaring Nil income and declaring current loss of Rs.28,38,93,095/-. The Assessing Officer during the course of assessment proceedings observed that assessee in its fixed asset schedule has shown addition during the year at Rs.6,22,20,081/- under the block of assets “POS TERMINALS”. The assessee has claimed depreciation to the tune of Rs.2,98,96,283/- on such POS TERMINALS. The assessee has shown the POS TERMINALS as part of block of computers since they are remote access devices connected to the assessee’s server through leased lines. According to the Assessing Officer POS is an electronic device and comes under the category of office equipment and eligible for depreciation @ 15% under the block “plant and machinery” as against 60% depreciation claimed by the assessee treating the same as part of block of computers. He, therefore, asked the assessee to explain as to why the depreciation should not be restricted to @15% under the block plant and machinery. Rejecting the various explanation given by the assessee the Assessing Officer restricted the depreciation to 15% as against 60% claimed by the assessee and made addition of Rs.2,24,22,212/-. The reasons for treating the same as plant and machinery by the Assessing Officer are as under :-

4.5 *The POS Terminal is a computer in itself and is eligible for depreciation @ 60% is not acceptable in view of the following:*

a) *POS terminal is clearly distinguishable from computer, as POS Terminal is not having CPU, Hard Disc, Mother Board, Monitor and other important ingredients attached to it.*

b) *Computer is a device having Input device, Processing the data under various software's and hardware inside it, and giving output and most importantly perform various activities and works on various software in one time .But POS is simply an electronic device, works on only one specific preloaded software.*

(c) *Compute! can perform on multiple software and can, be uploaded different data and software, whereas POS Terminal works on one software and cannot be uploaded with multiple software*

d) *As given by the assessee in its reply itself that The POS Terminal can be used only in conjunction with the server of the company. It has no alternate utility. It works as a terminal to the central host server of the company and needs to be connected to the host server for enabling transactions' Whereas computer can perform in multiple applicability without any restrictions and the scope of functioning is much wider.*

e) *The life span of computer is very short, reason being the depreciation is allowed @60% Whereas the life span and utility of POS Terminals are long and the usage is unspecified years.*

f) *The POS Terminal works on a specified usage like 'the company retailer enters the products details, quantity, customer mobile no etc through the keyboard, which the POS send the Host after validating the Retailer, It then receives back an encrypted response from the Host (Usually with pin for the service requested, for successful transactions), which it prints for the retailer/Customer's reference.". Whereas Computer works on multi functions and there is no specified software installed, but works on multiple software's*

g) *More Importantly, the exclusive rights to use such technology(including any process) or other know how or to*

perform or to give output in a desire manner has been vested with the assessee company on POS terminals; but the same is not the case of the computer, which cannot be controlled by any such manufacturer or producer.

h) The POS terminals are used for the exclusive purpose of business of the assessee company; whereas computer can perform different activities.

i) A computer is an electronic device that can perform variety of operations according to different set of program. A program is a set of instructions. Whereas POS Terminals works on a defined and pre set program.

j) A Computer has a very large memory, it can store a large amount of data in a very small space, the data stored can be retrieved instantly and correctly whenever desired. Whereas POS Terminals have a very-very small memory and cannot store any data on its own.

k) As per section 36 Explanation under (xi) 'Computer System'¹ means a device or collection of devices including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction and external files, or more of which contain computer programmes, electronic instructions, input data and output data, that performs functions including, but limited to logic, arithmetic, data storage and retrieval, communication and control,"

POS Terminals differs from Computer Definition given in explanation (xi) Sec 36.

- limited to arithmetic, data storage
- not in control of the operator i.e. ROs
- data retrieval for limited purpose only.

Limited to communication and control

- Device not consisting of collection of devices,
- united and unified programmes.

4.7 *In view of the above, it is held that POS Terminals are not falling under the block of asset 'Computer' but is held as 'plant and machinery 'as POS an electronic device. It contains integrated circuits (ICs) ranging from small scale integration to large scale integration as also discrete semi conductor devices. The usage of POS terminal are {specified and connected to the server of Assessee Company directly. More importantly, the POS terminal can be used only in conjunction with the server of the company, it has no alternate utility. It works as a terminal to the central host server of the company and needs to be connected to the host server for enabling transactions. Whereas computer can perform in multiple applicability without any restriction and the scope of functioning is much wider.*

4. In appeal the Ld. CIT(A) following the decision of the Tribunal in the case of Pr. CIT Vs. M/s. Connaught Plaza Restaurant (P) Ltd. allowed the claim of the assessee of depreciation @ 60% on such POS TERMINALS.

The relevant observation of the CIT(A) at para 8.4 and 8.5 of his order reads as under :-

8.4 I have perused the order of the Hon'ble ITAT in the case of ACIT vs. M/s. Connaught Plaza Restaurants (P). Ltd. The Hon'ble ITAT observed as under:

"6.1 Through the submissions made during the appellate proceedings the A.R.s for the appellant have contested the aforesaid action of the assessing officer. It has inter alia been submitted by the appellant that the features and specifications of the POS machines are similar to that of the computers. The POS machines are capable of performing the basic functions performed by a computer such as data processing, storage etc. The appellant also placed on record a copy of the POS brochure giving, inter alia, the technical specifications of the POS. The appellant further relied upon the following decisions:-

- CIT vs. BSES Rajdhani Powers Ltd. in ITA No. 1266/2010 (Del. HC)
- 1 TO v. Sami ran Majumdar: 98ITD 119 (Kol)
- DCITv. Data craft India Ltd. 133 TTJ 377(Spi Bench).

6.2 *Finding on Ground of Appeal No. 4 to 4.11 have considered the submissions made by the appellant and also perused the assessment order passed by the*

assessing officer. On perusal of the technical specification of POS as filed by the ITA NO. 5466/De/2013 appellant, it is noticed that POS terminal has a processor, minimum of 256 MB memory and also supports MS-DOS and Microsoft Windows. Further, the POS machines support data sharing through LAN (Ethernet) and also have two USB ports. That being so, I am of the opinion, that the POS terminal is akin to the computer in terms of basic features and can very well be categorized as 'Computers'.

I further find support from the decision of the Delhi High Court in the case of BSES Rajdhani Powers Ltd (supra), wherein the Court considered computer accessories and peripherals such as printers, scanners and server, etc., forming an integral part of the computer system and has allowed depreciation @ 60% on the same. The present case, in my view, stands on much better footing inasmuch as the POS in itself functions like a computer as against any peripheral devices. This ground of appeal is accordingly decided in favour of the appellant in the aforesaid terms and the assessing officer is directed to allow depreciation @ 60% on such POS.

7. Keeping in view the aforesaid finding given by the Ld. First Appellate Authority, in which he has respectfully followed the Order dated 3108.2010 of the Hon'ble High Court of Delhi passed in ITA No. 1266/2010 in the case of Commissioner of Income Tax vs. Rajdhani Powers Ltd., wherein issue in dispute has been decided in favor of the assessee and against the Revenue, no interference is called for in the valid and reasoned order passed by the Ld. First Appellate ITA NO. 5466/De/2013 Authority. Hence, we affirm the Order of the Ld. CIT(A) and dismiss the present appeal filed by the Revenue.

8. In the result, the Appeal filed by the Revenue stands dismissed."

8.5, In view of the above decision of the Hon'ble ITAT the appellant is allowed depreciation on POS Terminals at the rate of 60% which is the rate applicable for block of computers. The addition of Rs.2,24,22,212/- is deleted and the ground of appeal is ruled in favour of the appellant."

5. Aggrieved with such order of the CIT(A), the revenue is in appeal before the Tribunal

6. The Ld. DR strongly supported the order of the Assessing Officer. Referring to the decision of the Mumbai Bench of the Tribunal in the case of Venture Infotek Global (P.) Ltd. Vs. DCIT reported in 25 SOT 184 (Mumbai), he submitted that the Tribunal in the said decision has held that POS TERMINALS and ATMs are neither a data processing nor a composite system output of which is data processing and therefore they are not eligible for depreciation at rate of 60 percent as provided for computers' in Appendix I of the IT Act. Referring to the decision of Mumbai Bench of the Tribunal in the case of HDFC Bank Ltd. Vs. ACIT vide ITA No.908/Kochin/2008, he submitted that the Tribunal in the said decision following the above decision of Mumbai Bench of the Tribunal, has held that ATM cannot be granted depreciation at the rates applicable to

computers. She accordingly submitted that the order of the CIT(A) be reversed and that of the Assessing Officer be accepted.

7. The Ld. Counsel for the assessee on the other hand strongly supported the order of the CIT(A). Referring to the decision of the Delhi Bench of the Tribunal in the case of M/s. Connaught Plaza Restaurant (P) Ltd, he submitted that the Tribunal has considered the issue and has allowed higher depreciation @ 60% on POS TERMINALS. He submitted that on further appeal by the revenue the Hon'ble Delhi High Court vide ITA No.542/2016 dated 20.09.2016 has upheld the decision of the Tribunal and the ground raised by the revenue has been dismissed. Therefore, this being a covered matter in favour of the assessee by the Jurisdictional High Court the order of the CIT(A) be upheld and the ground raised by the revenue on this issue should be dismissed.

8. We have considered the rival arguments made by both the sides and perused the orders of the authorities below. We find the Hon'ble Delhi High Court in the case of Pr. CIT Vs. Connaught Plaza Restaurant has considered the issue i.e. Higher rate of depreciation on POS TERMINALS and has upheld the decision of the Tribunal where it has been held that assessee is entitled to depreciation @ 60% on POS TERMINALS. The relevant observation of the Hon'ble High Court reads as under :-

“The revenue’s appeal urges that a substantial question of law arises i.e. whether P.O.S. terminal, is a computer or alternatively falls within the classification of computer peripherals and accessories for the purpose of depreciation.

This court notices that for the relevant assessment year i.e. A. Y.2008-09 even though the Assessing Officer held that the equipment was neither computer not it could be computer accessories, the CIT(A) overturned that decision and held that the assessee was entitled to 60% depreciation. The CIT(A) was of the opinion that the equipment was akin to a computer. That determination has been concurred to the ITAT.

Given these circumstances, this court is of the opinion that no question of law, much less a substantial one arises for determination under section 260A.

The appeal is therefore dismissed.”

9. Since the issue has been decided in favour of the assessee by the decision of the jurisdictional High Court cited (supra), therefore, the order of the CIT(A) on this issue is upheld and the ground raised by the revenue is dismissed.

10. Ground of appeal No.2 by the revenue reads as under :-

“ On the facts and under the circumstances of the case, the Ld. CIT (A) has erred in disallowance of Rs.74,16,371/- on account of legal, professional and consultancy expenses treating it as business expenditure instead of expenses incurred in the nature of capital expenditure without appreciating the facts that the expenses so claimed are in the nature of software development services and the same is capital in nature giving enduring benefit to the assessee.”

11. Facts of the case in brief are that the Assessing Officer during the course of assessment proceedings observed from the legal and professional consultancy chart that the assessee company has made the following payments which according to him are capital in nature.

Sl. No.	Name of Party	Amount
1	Interglobe Technologies	33,40,400
2.	Wipro Ltd.	40,75,971

12. On review of the bills of the Inter Globe and Wipro Limited the Assessing Officer observed that these expenses are in nature of software development services and accordingly capital in nature and results in enduring benefits. Rejecting the various explanation given by the assessee the Assessing Officer treated the same as capital expenditure as against revenue expenditure claimed by the assessee and allowed depreciation @

60%. He accordingly made addition of Rs.7,16,371/- to the total income of the assessee.

13. Before the CIT(A) the assessee submitted that the services provided by Wipro are as under :-

- Server Management and Monitoring Services
- Backup and Restoration Management and Monitoring
- Network Management and Monitoring services
- Database Management services
- Anti virus Management and Monitoring services
- Security Management and Monitoring services
- Vendor Management and Monitoring services

Similarly the services provided by Interglobe Technologies Private Limited as under :-

- Uptime for IT platform
- Escalation of customer complaints
- Trouble shooting

Staff to providing requisite IT support services for efficient and smooth functioning of the business.

Better organization of the business : and Efficient utilization of the business resources.

14. It was argued the expenditure was of revenue in nature and was laid down wholly and exclusively for the purpose of its business and therefore is allowable u/s 37 (1) of the IT Act.

15. Based on the arguments advanced by the assessee the Ld. CIT(A) deleted the addition made by the Assessing Officer by observing as under :-

9.6 From the documents and details I note that the expenditure is a recurrent expenditure and not a one time expenditure which brings into existence an asset of an enduring nature and permanent nature.

9.7 It is apparent that the appellant has incurred the entire

expenditure for the purpose of his business. The appellant has quoted several judicial decisions which support the appellant's case e.g. CIT Vs. Asahi India Safety Glass Ltd. 15 Taxman.com 382 (Delhi). The deduction of Rs.74,16,371/- is therefore allowed as a business expenditure and the addition is deleted. The ground of appeal is ruled in favour of the appellant."

16. Aggrieved with such order of the CIT(A), the revenue is in appeal before the Tribunal.

17. The Ld. DR strongly supported the order of the Assessing Officer. He submitted that the Ld. CIT(A) has erred in treating the expenditure as revenue in nature as against capital in nature treated by the Assessing Officer. She also relied on the decision of Hon'ble Bombay High Court in the case of CIT Vs. UHDE India Private Limited reported in 46 Taxmann.com 259.

18. The Ld. Counsel for the assessee on the other hand strongly supported the order of the CIT(A). He submitted that Interglobe Technologies & Wipro Ltd did not provide software development services. They provided support services. Wipro Ltd. inter-alia provided server management & monitoring services, backup and restoration management, network, database management, antivirus and security management and vendor management services etc. Similarly, Interglobe provided IT support services. It placed its staff at assessee's disposal to provide uptime for IT platform, escalation of customer complaints and troubleshooting. Taking into consideration the nature of services, CIT(A) deleted the disallowance holding that the expenditure incurred was recurring and not one time expense to bring into existence an asset of enduring nature by relying on the decision in the case of CIT v. Asahi India Safety Glass Ltd. (2012) 346 ITR 329 (Del).

19. The Ld. AR further relied on the decisions in the case of CIT v. ACL Wireless Ltd. (2014) 361 ITR 210 (Del) and Oriental Bank of Commerce v. ACIT (2018) 256 Taxman 24 (Del). He submitted that in the later case, the assessee had acquired various categories of software, which were disallowed as capital expenditure. The disallowance was deleted by CIT(A)

and was upheld by the ITAT. The High Court dismissed the Revenue's appeal inter-alia observing that the objective of the bank was not to carry on software business, rather, it uses the computer software as a tool to maximize its performance and streamlining its efficiency. The ratio of aforesaid decision is squarely applicable and there is no infirmity in the order of the CIT(A).

20. We have considered the rival arguments and perused the orders of the authorities below. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case considered the legal and professional expenses as capital in nature since according to him such expenses give enduring benefit to the assessee and therefore it is capital in nature. He accordingly rejected the claim of the assessee that such expenditure is revenue in nature and allowed depreciation @ 60%. We find the Ld.CIT (A) allowed the claim of the assessee as revenue in nature on the ground that such expenditure is a recurring expenditure and not a onetime expenditure to bring into existence an asset of enduring nature. The relevant observation of the CIT(A) has already been reproduced in the preceding paragraph. We do not find any infirmity in the order of the CIT(A) on this issue. We find the Hon'ble Delhi High Court in the case of CIT Vs. ACL Wireless Ltd. (2014) 361 ITR 210 (Del) has held that expenditure incurred in ordinary courses of business on upgradation, improvement, removal of glitches of existing or already developed software to improve its product is to be treated as revenue expenditure.

21. We find the Hon'ble Delhi High Court in the case of Oriental Bank of Commerce Vs. Additional CIT reported (2018) 256 Taxman 24 (Del) has held that expenditure incurred by assessee on acquiring licenses to use software which did not confer any enduring benefit on assessee was to be allowed as deduction u/s 37 (1) of the IT Act. Since the Ld. CIT (A) in the instant case has given a finding that the expenditure is recurring in nature and not a onetime expenditure, therefore, in absence of any contrary material brought to our notice on this factual finding, the order of the

CIT(A) on this issue is justified in view of the decisions cited (supra). The ground raised by the revenue on this issue is accordingly dismissed.

22. Ground of appeal No.3 by the revenue reads as under :-

“On the facts and under the circumstances of the case, the Ld. CIT(A) has erred in deleting the disallowance of Rs.1,71,08,949/- on account of advertisement and marketing expenses treating it as revenue expenditure instead of capital expenditure without appreciating the facts that the bills produced by the assessee before the Assessing Officer establishing that the expenses are relating to capital in nature.”

23. Facts of the case in brief are that the Assessing Officer during the course of assessment proceedings observed that assessee company has incurred advertising and marketing expenses of Rs.3,90,82,609/-. From the details furnished by the assessee he noted that the assessee company has made certain payments towards Oxicach advertisement through channels which are capital in nature and are enduring benefit in nature. He accordingly allowed depreciation @ 15% by treating the same as capital in nature and made addition of Rs.1,71,08,949/-.

23.1 Before CIT (A) the assessee made elaborate submissions. The decisions of Hon'ble Delhi High Court in the case of CIT (A) Vs. Salora International Limited reported in 308 ITR 199 and the decision in the case of Pepsico India Holdings India Private Limited were brought to the notice of the CIT(A).

24. Based on the arguments advanced before him, the Ld. CIT(Appeals) decided the issue in favour of the assessee by holding that the expenditure of Rs.1,71,08,949/- on advertisement is revenue expenditure in nature and is allowable as deduction u/s 37 of the IT Act.

25. Aggrieved with such order of the CIT(A), the revenue is in appeal before the Tribunal.

26. The Ld. DR heavily relied on the order of the Assessing Officer and submitted that Ld. CIT (A) without appreciating the facts properly has treated the expenditure as revenue in nature as against capital expenditure treated by the Assessing Officer. So far as the decisions relied on by Ld. CIT (A) are concerned, she submitted that these decisions are distinguishable and not applicable to the facts of the present case.

27. The Ld. counsel for the assessee on the other hand heavily relied on the order of the CIT(A). He submitted that the assessee is in the business of trading in electronic recharge coupons and collection of payments of postpaid of various telecom operators. To promote the business, the assessee incurred Rs.3,90,82,609/- on advertisement on glow sign, signboard, posters etc and incidental expenditure on installation of glow sign, signboard etc at Retail Outlets. The expenditure was disallowed holding the same to be capital in nature. Taking into consideration assessee's submission that expenditure was for the growth of business, the CIT(A) deleted the disallowance, relying upon CIT v. Salora International Ltd (2009) 130 ITR 199 (Del) & CIT v. Pepsico India Holdings (P) Ltd (2012) 121 Taxman 5 (Del). The issue is squarely covered in favour of the assessee by the decision in the case of Pepsico India Holdings (P) Ltd (supra). Reliance is also placed on CIT v. Orient Ceramics and Industries Ltd. (2013) 358 ITR 49 (Del).

28. We have considered the rival arguments made by both the sides and perused the material available on record. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case considered the advertisement and market expenditure of Rs.3,90,82,609/- incurred by the assessee as capital expenditure in nature as against revenue expenditure treated by the assessee and allowed depreciation on the same. He accordingly made addition of Rs.1,71,08,949/-. We find the Ld. CIT (A) treated such advertisement

expenditure as revenue in nature and is allowable u/s 37 (1) of the IT Act. We do not find any infirmity in the order of the CIT(A) on this issue. The Hon'ble Delhi High Court in the case of CIT (A) Vs. Pepsico Holdings India Private Limited has held that expenditure incurred on glow sign and neon sign are expenditure on advertisement and publicity allowable as deduction u/s 37 (1) of the IT Act. While holding so the Hon'ble High Court has relied on the decision of Hon'ble Supreme Court in the case of Empire Jute Vs. CIT reported 124 ITR 1. The Hon'ble Delhi High Court in the case of CIT vs. Orient Ceramics and Industries Ltd. (2013) 358 ITR 49 (Del) has held that expenditure incurred by the assessee on Glow Sign Boards is revenue expenditure allowable as deduction u/s 37 (1) of the IT Act. Since the genuineness of the expenditure is not in dispute and the dispute is only regarding capital or revenue expenditure in nature, therefore, in view of the decisions cited above, we are of the considered opinion that the CIT(A) is justified in treating the same as revenue expenditure in nature. The order of the CIT(A) is thus upheld and the ground raised by the revenue is dismissed.

29. In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 07.01.2019.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(R. K. PANDA)
ACCOUNTANT MEMBER

NEHA

Date:-07.01.2019

Copy forwarded to:

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

ASSISTANT REGISTRAR
 ITAT NEW DELHI

Date of dictation	26.12.2018
Date on which the typed draft is placed before the dictating Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for Pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	07.01.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	