

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D' NEW DELHI
BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A. No. 3765 and 3766/Del/2015
Assessment Year: 2008-09 and 2010-11

DCIT, Circle 19(1)
New Delhi

vs M/s Oxigen Services (P) Ltd.
Unit No 31, Tribhuvan Complex
Ishwar Nagar, New Friends
Colony, New Delhi
PAN NO AABCI1405k

(Appellant)

(Respondent)

Appellant by: Smt NainaSoin Kapil, CIT DR
Respondent by: Sh SatyenSethi, Advocate,

Date of hearing: 14.02.2019

Date of Pronouncement: 15.02.2019

ORDER

PER K. NARASIMHA CHARY, JM

Challenging the orders dated 9/3/2015 in appeal numbers 542 and 558/14-15 on the file of the learned Commissioner of Income Tax (Appeals)-7, Delhi ("Ld. CIT(A)") Revenue preferred these two appeals. Since the grounds involved in these 2 appeals are common in nature, we find it just and convenient to dispose of these 2 appeals by way of a common order, with reference to the facts in ITA 3765/Del/2015 for the assessment year 2008-09.

2. Brief facts of the case are that M/s oxygen services India Private Limited ("the assessee") is a domestic company engaged in the business of trading in electronic recharge coupons, collection of payments of post-paid bills of various telecom operator and ticketing and they have pioneered the idea and execution of electronic virtual distribution (using POS/WAB/SMS) of services like prepaid airtime, DTH/broadband payments on behalf of service providers. For the assessment year 2008-09 the assessee filed their return of income on 13/10/2008 declaring a total loss of Rs. 222,451,028/-. By order dated 28/12/2011 under section 143(3) of the Act, Ld. assessing officer assessed the total loss at Rs. 179,732,770/-, by making additions, insofar as this appeal is concerned, on account of the disallowance of Rs. 62,17,290/- on account of legal, professional and consultancy expenses, disallowance of Rs. 52,16,124/- on account of advertisement and marketing expenses, disallowance of depreciation of Rs. 84,10,239/- on POS terminals, disallowance of depreciation of Rs. 74,713/- on UPS and disallowance of Rs. 16,24,375/- under section 14 A of the Act, which the Ld. CIT(A) deleted in appeal. Revenue, therefore, filed this appeal.

3. Insofar as the disallowance on account of legal, professional and consultancy expenses is concerned, the payments of Rs. 29,50,000/- and Rs. 32,67,290/- made to Wipro Ltd and Interglobe technologies were disallowed on the ground that the same were capital in nature, incurred for software development services. Contention of the assessee has been that these two entities did not provide any software development services, and on the other hand they were providing only support services. Particularly Wipro Ltd, inter alia, provided server management and monitoring services, backup and restoration management, network, database management, antivirus and

security management and vendor management services etc whereas Interglobe provided IT support services by placing its staff at the disposal of the assessee to provide uptime for IT platform, escalation of customer complaints and troubleshooting.

4. It is the argument of the Ld. DR that the payments made to these two entities were the payments for software development services as is established by the bills produced before the learned assessing officer wherein it was mentioned as payments for software development services, which gives enduring benefit to the assessee and, therefore, the learned assessing officer rightly held such expenditure to be capital in nature. She further submits that the issue of capitalising software expenses has always been a debatable issue and has to be seen in the background of facts of each case; that there cannot be any specific or precise test which can be applied conclusively or universally for distinguishing between capital and revenue expenditure and that different minds come to different conclusions with equal propriety; that the cardinal rule is that the question whether a certain expenditure is capital or revenue account should be decided from the practical and the business viewpoint and in accordance with the sound accountancy principles; and that in view of the view taken by the Special Bench of the Delhi-Tribunal in the case of Amway India Enterprises vs. DCIT (2008) 111 ITD 112 while dealing with this complex issue to decide the nature of the expenditure as to whether it is capital or revenue, the tests of enduring benefit, ownership and functional aspects are generally applied.

5. She further submitted that the issue needs a deeper investigation by the authorities below and the services as cited by the Ld. CIT(A) do not speak about the benefits rendered to the assessee were of enduring nature or

brief period and the learned assessing officer was not confronted on this aspect nor the Ld. CIT(A) dealt deeper into these aspects, but he simply relied on the self-serving statement of the assessee, and without a steadying the observations of the auditors in the audit report as they are required to make in para 17 (a) of the audit report as to whether any capital expenditure was debited to the profit and loss account which was not done by either of the authorities. Lastly, she contended that the expenses on account of software have been claimed by the assessee so the onus is on the assessee to satisfy the learned assessing officer as to his claim so that it could be allowed by the learned assessing officer and in the absence of any material whatsoever produced by the assessee the expenditure was rightly treated as capital by the learned assessing officer.

6. Per contra, it is the submission on behalf of the assessee that similar questions have arisen in the case of the assessee for the assessment years 2008-09 to 2010-11 which were disposed of by the Ld. CIT(A) vide orders dated 9/3/2015 and the Revenue preferred appeals against the orders of Ld. CIT(A) for all these years. Ld. AR submitted that appeal relating to the assessment year 2009-10 in ITA No. 3812/Del/ 2015 has been disposed of by a coordinate Bench of this Tribunal and while placing reliance on the decisions of the Hon'ble jurisdictional High Court in the case of CIT vs. ACL Wireless Ltd (2014) 361 ITR 210 and Oriental Bank Of Commerce verses ACIT (2018) 256 taxman 24 the Tribunal reached a conclusion that the expenditure incurred by the assessee on acquiring licenses to use the software which did not confer any enduring benefit on the assessee was to be allowed as deduction under section 37 (1) of the Act.

7. We have gone through the order dated 7/1/2019 in ITA No. 3812/Del/2015 in assessee's own case for assessment year 2009-10. On the identical set of facts, while placing reliance on the decision of the Hon'ble jurisdictional High Court in the cases of Oriental Bank Of Commerce (supra) and ACL Wireless Ltd (supra) a coordinate Bench of this Tribunal reached a conclusion that the expenditure incurred by the assessee on acquiring licenses to use the software which did not confer any enduring benefit on the assessee and has to be allowed as deduction under section 37 (1) of the Act. It is not the case of the revenue that there is any change of facts and circumstances involved in these two assessment years. From the record we could also find that while granting relief Ld. CIT(A) also placed reliance on the decision of the Hon'ble jurisdictional High Court in the case of CIT vs. Asahi India safety Glass Ltd (2012) 346 ITR 329 (Del). There is no reason as to why we should not follow this line of decisions which are applicable to the facts of the case on hand. We, therefore, while respectfully following the decisions of the Hon'ble jurisdictional High Court and also the view taken by a coordinate Bench of this Tribunal in assessee's own case for the assessment year 2009-10 on identical set of facts, hold issue in favour of the assessee and find the ground of appeal as devoid of merits. We, accordingly, dismissed ground No. 1 of the Revenue's appeal.

8. Now coming to the disallowance on account of advertisement and marketing expenses, case of the assessee is that the assessee is in the business of trading of electronic recharge coupons and collection of payments of post-paid of various telecom operators; that it to promote the business, the assessee encourages expenses on advertisement on glow sign, signboard, posters etc and incidental expenditure on installation of glow

sign, signboard etc at a retail outlets; and such an expenditure is, therefore, not in the nature of capital expenditure.

9. It is the argument of the Ld. DR that the learned assessing officer on verification of payments to the five parties observed that the expenses were broadly in the nature of installation of board, installation of data cables which can by no means considered as revenue expenditure since they gave enduring benefit to the assessee, and, therefore, the said expenditure was rightly treated as capital expenditure by the learned assessing officer to disallow the same. Ld. CIT(A), however, held that the assessee made payments IB & W communication (P) Ltd which is contrary to the facts on record which shows that the payments were made to five parties. Ld. DR further submitted that the discussion made in the impugned order revolves around the advertisement expenses only and in only one paragraph there is discussion about the expenses on glow sign words, which contention the assessee never advanced before the learned assessing officer. She submits that without calling for any comments from the learned assessing officer on this issue, Ld. CIT(A), without giving reasons for resolving the expenses to be revenue committed an error in deleting the same. She further submitted that this issue also needs a deeper investigation.

10. Per contra, Ld. AR submits that given the nature of business of the assessee, there is need to promote the business by incurring certain expenditure on advertisement's by way of glow signs, signboards, posters etc and also the incidental expenditure on installation thereof. He further submitted that Ld. CIT(A) rightly considered these aspects in their proper perspective and decided the issue in favour of the assessee in the light of the decisions of the jurisdictional High Court in the cases of CIT vs.

SaloraInternational Ltd (2009) 308 ITR 199 (Del) and CIT Vs. PepsiCo India Holdings Private Limited (2012) 207 taxman 5 (Del). He further submitted that in assessee's own case for the assessment year 2009-10, a coordinate Bench of this Tribunal accepted the contention of the assessee in ITA No. 3812/Del/2015 and on that aspect placed reliance on the decisions of the Hon'ble directional High Court in the cases of PepsiCo India Holdings (supra) and CIT vs. Orient ceramics and industries Ltd (2013) 358 ITR 49. He submitted that the facts and circumstances of the assessment year 2008-09 are identical to the facts involved in the assessment years 2009-10 and 2010-11.

11. On a perusal of the order dated 7/1/2019 in ITA No. 3812/Del/2015 for assessment year 2009-10 in assessee's own case, we find that the a coordinate Bench of this Tribunal considered the contentions on either side in the light of the decisions cited before them and reached a conclusion that the decisions in the cases of PepsiCo Holdings India Private Ltd (supra) and Orient Ceramics and Industries Ltd (supra) are applicable to the facts of the case. Further, since the genuineness of the expenditure is not in dispute and the dispute is only regarding capital or revenue expenditure in nature decided the issue in favour of the assessee holding that the expenditure incurred by the assessee on glow sign boards and a neon sign boards is revenue in nature and allowable as deduction under section 37 (1) of the Act.

12. In the absence of any compelling reasons to take a different view in assessee's own case for an earlier year, we find it difficult to deviate from the view taken by a coordinate Bench of this Tribunal in assessee's own case for the subsequent year, namely, 2009-10. We, accordingly, respectfully

following the decisions of the Hon'ble jurisdictional High Court and also the view taken by a coordinate Bench of this Tribunal in assessee's own case for the assessment year 2009-10 hold that the findings of Ld. CIT(A) on this aspect do not suffer any infirmity and no interference by us is warranted. We accordingly dismiss ground No. 2 of revenue's appeal.

13. Third ground in this Revenue's appeal is in relation to the depreciation on POS terminals at 60%. Assessee claimed depreciation on POS terminals at 60% by treating the same as part of block of assets "computers" whereas the learned assessing officer treated the same as part of Plant and Machinery block and allowed depreciation at 15%. Ld. CIT(A) followed the decision of a coordinate Bench of this Tribunal in the case of ACIT vs. M/s Connaught Plaza Restaurants (P) Ltd in ITA No. 5466/Del/2013 and allowed depreciation at 60%.

14. It is the argument of the Ld. DR that the POS terminals are very clearly distinguishable from computers in all sense of terms be it structurally or functionally and learned assessing officer had discussed the difference between these two elaborately. She submits that a computer is an electronic device that takes input or output such as numbers, text, sound, images, animations, video etc., processes it, and converts it into meaningful information that could be understood, presenting the changed input i.e., processes input as output; whereas a payment terminal (point of sale terminal "POS terminal") or credit card terminal is a device which interfaces with the payment records to make electronic fund transfers and is an electronic device used to process card payments at a retail locations. She further submitted that a POS terminal generally reads the information of a customer's credit or debit card, checks whether the funds in a customer's

bank account are sufficient, transfers the funds from the customer's account to the seller's account, records the transaction and prints a receipt.

15. She further submitted that the computer accessories and peripherals cannot be used without the computer and that is the reason why they are the parts of the computer system and entitled to depreciation at the higher rate of 60%. While referring to the decisions in the case of CIT vs. BSES Rajdhani Powers Ltd, ITO vs. Samiran Majumdar (2006) 98 ITD 119 (Kolkata-Trib) and Expeditors International (India) Private Limited vs. CIT she submitted that the computer accessories like printer, CPU, mouse, keyboard etc form part of computers; whereas the POS is neither a part of computer nor its periphery and it is patently a different machine which neither has a CPU, hard disk, motherboard, monitor or mouse which are the sin-qua-non for placing a device in the category of computer. According to her, POS is a simple device used to make payments which uses a specific preloaded single Software-programme wherein the company retailer enters products details, price, customers mobile number which the POS sends to host after validating the retailer and an cryptic response is received from the host requesting for pain for successful transaction leading to the printing retailers copy and customers copy. Basing on this he submits that at best a POS is a smart device and certainly not a computer.

16. Ld. DR placed reliance on the decision of the Hon'ble Madras High Court in the case of M/s Dinamalar, Tirunelveli vs. ITO in TCA No. 624 of 2016 where the assessee claimed depreciation on Canon lide, scanner, computerised accounting and stacking machines, transportation charges, CTP machine, scanner, Cisco router, modem, computerised counting and stacking (F/C), CTP machine (clearing charges), CTP machine (erection)

treating it as computers. Ld. assessing officer disallowed the higher claim of depreciation at 60% by holding that the said machineries were computerised machines and were not computers classified in the depreciation table.

17. Ld. CIT(A), in the case of M/s Dinamalar (supra), upheld the decision of the learned assessing officer by observing that increasingly organisations are moving towards computerised integrated manufacturing, where more and more computers, robots, and microprocessors are used in conjunction with the machines; that such machines cannot be called as computers even though computer is an integral and a dedicated part of the whole machine; that computer in the machine cannot be used for any other purpose; that for example a computerised numerically controlled lathe machine has a computer and microprocessor to control the movements of the spindle but that cannot make such machine a computer and still does machining, cutting metal and creating shapes in the metal but it is more automated and it even by reprogrammed instructions through the computer.

18. Ld. DR further submits that in the above case Ld. CIT(A) further observed that as per the schedule of depreciation, the rate at 60% of depreciation is allowable only to computers and at best may include accessories like servers, scanner, Cisco router modem etc as held in the decisions cited before Ld. CIT(A) by the assessee, but can never include the missions acquired by the assessee in that case. Ld. CIT(A), in that case, applied functionality test and held that only the assets like laptops, servers, printers, scanners, Cisco Routers, modem, laptop mouse, project, pen drive, network equipment, router pack desktop with monitor, IBM San switches are integral parts of computer band which cannot be used without being attached to the computers-alone are computers or computer accessories or

peripherals. Tribunal upheld the decision of the Ld. CIT(A) in the case and it was confirmed by the Hon'ble High Court.

19. Ld. DR, therefore, by importing the core argument from the above decision, submitted that at the most computer peripherals can qualify for claiming depreciation at 60% but a POS cannot qualify as a computer within the meaning of explanation (xi) to section 36 of the Act. On the same analogy, Ld. DR submits that in today's era, the world is going smart with all day to day devices being smart and essentially work our computer digital software and a smart phone is a device embedded with machine to machine and/or cognitive computing technologies such as artificial intelligence (AI), machine learning or deep learning, all of which it uses to reason, problem solving, make decisions and even, ultimately, take action which include robots, self driving cars and other cognitive computing systems that are able to make decisions and solve problems without human intervention. According to her, if the logic of the assessee is accepted, all devices which run on computer software would qualify as computers whether it is mobile phones, washing machines, digital camera, MRI machines, robots, self-driving cars, children smart toys etc. Basing on this the Ld. DR submits that certainly this is not the intent of legislature and the expression computers cannot be twisted and carried too far to vitiate the intent of legislature. She, however, further submitted that there is need to verify whether the POS terminals were bought as computers or POS terminals.

20. Per contra it is the submission on behalf of the assessee that all these contentions are considered by the higher forum in a plethora of decisions and while granting relief to the assessee for the assessment year 2009-10 in ITA 3812/Del/ 2015 while upholding the order of Ld. CIT(A), a coordinate

Bench of this Tribunal followed the ratio of the Delhi Ld. PCIT vs. Connaught Plaza Restaurants (P) Ltd in ITA No. 542/2016 by order dated 20/9/2016. In view of the binding precedent laid down by the Hon'ble jurisdictional High Court, there is nothing illegality or irregularity in the conclusions reached by the Ld. CIT(A) and grant depreciation at 60% on POS terminals.

21. On a careful reading of the order dated 7/1/2019 in ITA No. 3812/Del/2015 in assessee's own case for the assessment year 2009-10, we find that the Tribunal followed the decision of the Hon'ble Delhi High Court in the case of Connaught Plaza restaurants (supra) wherein the issue of higher rate of depreciation on POS terminals was considered and the decision of the Tribunal granting 60% depreciation thereon was upheld. In the said decision Hon'ble jurisdictional High Court noticing that the Ld. CIT(A) in assessee's own case for the assessment year 2008-09 held that the assessee was entitled to the depreciation at 60% on the ground that the equipment was akin to a computer and such a finding was concurred by the ITAT. After that the Hon'ble High Court held that as against such findings no question of law, much less a substantial one arises for a determination and, accordingly, dismissed the appeal of the revenue.

22. It is, therefore, clear that the issue is no longer res Integra and is squarely covered by the decision of the Hon'ble High Court in the case of Connaught Plaza restaurants (supra) which the coordinate Bench of this Tribunal followed in assessee's own case for assessment year 2009-10. Since the facts are identical and are covered by the decision of the Hon'ble jurisdictional High Court, we find it difficult to countenance the arguments advanced on behalf of the Revenue. While respectfully following the same we hold that this ground of Revenue is devoid of any merits and is liable to

be dismissed. We accordingly uphold the findings of the Ld. CIT(A) and dismiss ground No. 3.

23. Next ground that arises for our consideration is the disallowance of depreciation on UPS. The question is whether they depreciation could be allowed at 60% as claimed by the assessee treating it as the computer periphery or at 15% as restricted by the learned assessing officer by treating it as falling within Plant and Machinery block.

24. Ld. DR placed reliance on the decision in the case of Nestlé India Limited vs. DCIT 111 TTJ 498 (Del) wherein the Tribunal held that the depreciation on UPS is not to be allowed at 60%. However subsequently there are many decisions on this aspect and more particularly the Hon'ble Delhi High Court in the case of CIT vs. BSES Yamuna Power Ltd (2013) 358 ITR 47 held that UPS forms part of the computer periphery and depreciation at a 60% is allowable. In view of this settled position by the said judgement, we do not find any merits in the contention of the revenue and ground No. 4 is accordingly dismissed.

25. Lastly, ground No. 5 relates to the disallowance under section 14 A. There is no dispute that during the year under consideration no exempt income is derived by the assessee. In view of the decisions of the jurisdictional High Court in the cases of Ld. PCIT vs. McDonalds India Ltd (2019) 101 taxmann.com 86, Cheminvest Ltd vs. CIT (2015) 378 ITR 33 and Ld. PCIT vs.IL & FS energy development company Ltd (2017) 399 ITR 483 in the absence of any exempt income earned by the assessee in the financial year relevant to the concerned assessment year, no disallowance could be made under section 14 A of the Act. Issue is no longer res Integra and well settled by the aforesaid judgements. We therefore do not find any reason to

interfere with the findings of the Ld. CIT(A) on this aspect and by uphold the same while dismissing ground No. 5 of the appeal.

ITA No. 3766/Del/2015.

26. This appeal relates to the assessment year 2010-11. Issues involved in this appeal are relating to the depreciation allowable on POS terminals and the allowance of the expenditure on account of legal, professional and consultancy expenses. These two issues are dealt with in assessee's own case for the assessment year 2008-09 in the preceding paragraphs vide grounds No. 3 and 2 respectively and also by the coordinate Bench of this Tribunal in assessee's own case by order dated 7/1/2019 in ITA No. 3812/Del/2015. Facts are identical for these two years. We, therefore, while following the same reasoning reach a conclusion that depreciation at 60% is allowable on the POS terminals and that the expenditure on account of advertisement and marketing is Revenue in nature. In view of this finding, this appeal also fails and is, therefore, liable to be dismissed. This appeal is, accordingly, dismissed.

27. In the result both the appeals of the revenue are dismissed.

Order pronounced in the open court on this the 15th February, 2019

Sd/-

(R.K. PANDA)

ACCOUNTANT MEMBER

Dated: 15th February, 2019

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

Sd/-

(K. NARASIMHA CHARY)

JUDICIAL MEMBER

By order
Asstt. Registrar, ITAT

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