

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 17.04.2018

+ **ITA 129/2018, ITA 415/2017, ITA 56/2018**

ORIENTAL BANK OF COMMERCE Appellant

Through: Mr Rajat Navet, Ms Sanya Talwar and
Mr Kushagra Pandit, Advs.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX

..... Respondent

Through: Ms Vibhooti Malhotra and
Mr. Rahul Chaudhary, Advs and Mr
Puneet Rai, Adv.

+ **ITA 414/2017**

**ORIENTAL BANK OF COMMERCE CENTRAL ACCOUNTS
OFFICE** Appellant

Through: Mr Rajat Navet, Ms Sanya Talwar and
Mr Kushagra Pandit, Advs

versus

**ADDITIONAL COMMISSIONER OF INCOME TAX RANGE -19,
NEW DELHI** Respondent

Through: Ms Vibhooti Malhotra and
Mr. Rahul Chaudhary, Advs and Mr
Puneet Rai, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT (Open Court)

1 The questions of law urged in these appeals are the following:-

“(i) *Whether in the facts and circumstance of the case,
the Tribunal was correct in law in holding that*

software expenses incurred by the Appellant during the assessment year were in the nature of capital expenditure?

- (ii) *Whether expenditure incurred towards software, which results in fine tuning of business operations and enables the Appellant to run its business effectively and efficiently, leaving the fixed assets untouched, is a revenue expenditure or a capital expenditure?*
- (iii) *Whether in the facts and circumstances of the case, the Tribunal was correct in law in upholding the order passed by the CIT(A) without giving any reasons for the same?"*

2 The assessee/bank incurred expenditure as amounts spent towards acquiring various categories of software; the Assessing Officer (A.O) after ascertaining the assessee's view, concluded that the software expenses charged to the Revenue could not be allowed since they fell in the capital stream. For each assessment year, separate amounts were thus disallowed. The assessee carried the matter in appeal to the CIT (A). The CIT(A) after examining and re-examining the material and considering the Income Tax Rules including Part B of the relevant section, was of the opinion that the expenses incurred on the software (except AMC) had to be treated as capital and consequently upheld the A.O's determination. The ITAT concluded that there was no infirmity in the order of the lower Revenue Authorities, after extracting relevant facts pertaining to the nature of the software. The ITAT's findings are as follows:-

“We have heard the submissions of both the sides and perused the material available on record and we find that the Id. CIT(A) has made an elaborate discussion on this issue. The Id. AR had submitted the details of AMC charges which has been allowed by the Id. CIT(A) as revenue expenditure, but in case of license fee for oracle database, antivirus software etc., the appellant could not establish that the same were for a particular period. The case laws relied upon by the appellant has rightly been distinguished by the Id. CIT(A). We, therefore, find that the Id. CIT(A) has passed a good order which needs no interference on this issue. Accordingly, grounds No. 7 in both the appeals of the assessee are dismissed.”

3 It is contended on behalf of the assessee that the software in issue by and large were specialized and meant for banking and bank related operation and the motive for acquiring them was to optimize performance and streamline the efficiency of the bank. Learned counsel relied upon the judgment of the Supreme Court reported as ***Alembic Chemicals Works Co. Ltd. v. CIT*** (1989) 177 ITR 377 (SC). He also relied upon a Division Bench judgment in ***CIT v. Asahi India Safety Glass Ltd. (2012)*** 346 ITR 329.

4. The learned counsel for the revenue urged that the question of law has to be answered in favour of the revenue, firstly because of the concurrent nature of the findings rendered by all the authorities, which were consistently adverse to the assessee. It was secondly urged that the CIT(A) conducted a detailed enquiry as to the nature of the software and the utility of each of them, and held that these were depreciable assets, for which the rates of the depreciation were set out

in part B of the Schedule to the Income Tax Rules – consequently the expenditure could not be treated as falling in the revenue stream.

5. This Court is cognizant at the very outset of the fact that the nature of the articles acquired are licenses. They do not confer any enduring right – much less a permanent right as in the nature of acquisition of property. These copyright licenses are used for the duration, spelt out by the licensor/intellectual property owner. Furthermore and importantly, the bank's objective is not to carry on software business, rather it uses the computer software as a tool to maximise its performance and streamline its efficiency. In *Asahi India Safety Glass Ltd.* (supra) the Division Bench of this Court after considering the previous judgments including *Alembic Chemicals Works* (supra) enunciated the correct test and principles as follows:

“It is important to bear in mind that what is required to be seen is not whether the advantage obtained lasts forever but whether the expense incurred does away with a recurring expense(s) defrayed towards running a business as against an expense undertaken for the benefit of the business as a whole. In other words, the expenditure which is incurred, which enables the profit-making structure to work more efficiently leaving the source of the profit-making structure untouched, would, in our view, be an expense in the nature of revenue expenditure. Fine tuning business operations to enable the management to run its business effectively, efficiently and profitably; leaving the fixed assets untouched would be an expenditure in the nature of revenue expenditure even though the advantage would thus collapse in such like cases. It would, in our view, be only truer in cases which deal with technology and software application

which do not in any manner supplant the source of income or added to the fixed capital of the assessee.”

6. In *Alembic Chemicals Works* (supra), while dealing with the replacement of what was considered to be an asset of enduring nature i.e. the moulds used for creating penicillin for culture of antibiotics for the purpose of pharmaceuticals production, the Supreme Court spelt out the correct principle as follows:-

“It would, in our opinion, be unrealistic to ignore the rapid advances in research in antibiotic medical microbiology and to attribute a degree of durability and permanence to the technical know-how at any particular stage in this fast-changing area of medical science. The state of the art in some of these areas of high priority research is constantly updated so that the know-how cannot be said to be the element of the requisite degree of durability and nonephemerality to share the requirements and qualifications of an enduring capital asset. The rapid strides in science and technology in the field should make us a little slow and circumspect in too readily pigeon-holding an outlay such as this as capital. The circumstance that the agreement in so far as it placed limitations on the right of the assessee in dealing with the know-how and the conditions as to the non-partibility, confidentiality and secrecy of the know-how incline towards the inference that the right pertained more to the use of the know-how than to its exclusive acquisition.”

7. The mere circumstance that the depreciation rate is spelt out in the Schedule to the Income-tax Act in our opinion is not conclusive as to the nature of the expenditure and whether it resulted an enduring advantage to a particular assessee. It is nobody's case that assessee is dealing with computer softwares or is in the business of any related

services. Rather it uses specific customized software, which is specific to its banking activities. But for the use of such software, the nature of expenditure otherwise incurred for streamlining its functions i.e. towards fee payable to the consultants for systems and employment of special professionals to carry on the tasks that the software in fact performs, would have fallen undoubtedly in the revenue stream. Taking these into account and the further circumstance that the software itself would have run its course or life span as it were, given that the earlier assessment year in question is 2008-09, we are of the opinion that the question of law framed is to be answered in favour of the assessee and against the revenue. The appeals are consequently allowed. No order as to costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 17, 2018
SU