आयकर अपीलीय अधिकरण, "आई" खंडपीठ मुंबई

INCOME TAX APPELLATE TRIBUNALMUMBAI BENCHES "I" MUMBAI

सर्वश्री विजयपाल राव, न्या.स. **एवं** श्री राजेन्द्र, ले.स.

BEFORE SHRI VIJAY PAL RAO, JM AND SHRI RAJENDRA, AM

आयकर अपील सं. / ITA No. 5758/Mum/2011**निर्धारण वर्ष /**Assessment Year 2005-06

DCIT-9(2), Aayakar Bhavan, R.No.218, 2nd Floor, M.K.Road, Mumbai-400020	Vs	M/s India Infoline Insurance Services Pvt. Ltd. Building No.75 Nirlon complex, Goregaon (E), Mumbai-400063
		PAN -AAACF8058H

(अपीलार्थी /Appellant)	**(प्रत्यर्थी / Respondent)**
राजस्व की ओर से/ **Revenue by**	**: Shri Sunil Agrawal**
निर्धारिती ओर से / Assessee by	**: Shri Pritesh Mehta**
सुनवाई की तारीख/ Date of Hearing	**:** 21/07/2014
घोषणा की तारीख / Date of Pronouncement	**:** 21/07/2014

Per Rajendra,AM लेखा सदस्य राजेन्द्र के अनुसार:

Challenging the order of the CIT(A)-20, Mumbai, dated 10/06/2011, Assessing Officer has raised following grounds of appeal.

I. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in holding that reopening of the assessment by the Assessing Officer is bad in law even though there was no assessment u/s 143(3) and the return was merely processed u/s 143(1)?*

II. *On the facts and in the circumstances of the case and in law, the Ld. CIT(A)'s decisions is bad in law without considering the decision of the Supreme Court in the case of ACIT vs Rajesh Jhaveri Stock Brokers [291 ITR 500 (SC)].*

III. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was correct in treating the software expenses of Rs.96,00,000/- as revenue in nature even though the assessee was deriving enduring benefit from the said expenditure.*

IV. *The appellant prays that the order of CIT(A) on the grounds be set aside and that of AO be restored.*

V. *That appellant craves leave to amend or alter any grounds or add a new ground which may be necessary.*

Though there are five grounds of appeal but the effective ground of appeal is about the reopening of assessment.

2.Assessee-Company,engaged in the business of life insurance,filed its return of income on 29/10/2005 declaring total income at Rs.31.19 lakhs. The return was processed u/s.143(1) of the Act on 30/03/2007.Later on a notice u/s 147 of the Act was issued by the AO.From the

assessment records,the AO found that assessee had entered into an agreement with M/s India Infoline Ltd. to pay software services amounting to Rs.90 lakhs for information technology to be provided by it.As per the AO,same were of enduring in nature and therefore the expenditure incurred by it had to be treated as capital expenditure, that the software expenditure had to be added to total income, that non inclusion of that amount resulted in under assessment. As stated earlier a notice u/s 148 was issued on 30/03/2010. Later on a notice u/s 142(1) also issued.

3.While going through the Profit & Loss Account, AO found that the assessee have shown sum of Rs.90 Lakhs incurred under the head software development. He directed the assessee to explain as to why the expenditure incurred by it should not be treated as capital expenditure.Vide its letter dated 14/09/2010, assessee stated that during the year ended 31st March 2005,it had entered into an agreement to pay "software services" for information technology services,provided by the holding company for a period of three years,at the rate of Rs.90 lakhs per year, that the assessee did not have right, title or interest in the computer software or hardware, that parent company was rendering information technology services to it,that it was not getting any enduring benefit for the said agreement, that it had to return all hardware/software to parent company on termination of the said agreement, that the parent company was rendering services to the assessee in connection with operating and maintaining of computer software and computerised data processing and system network. After explanation of the assessee,AO held that the computer software was an intangible asset and any expenditure incurred for software iswas a capital expenditure,that it included compute programme recorded on any disc/tape/perforated media or other information storage device. He held that expenditure incurred on software development of Rs.90,00,000/- was to

be treated as capital expenditure.The AO allowed depreciation of @ 60% i.e 54,00,000/-. Finally,he made an addition of Rs.36,00,000/- (90,00,000-54,00,000) to the income of the assessee. He also made the addition under the head of Business Promotion Expenses .Vide its order dated 29/10/2010, he determined the income of the assessee u/s.143(2) r.w.s. 147 of the Act at Rs.69.77 Lakhs.

4.Aggrieved by the order of the AO assessee filed an appeal before the First Appellate Authority (FAA).After considering the submission of the assessee and assessment Order the FAA held that there must be tangible material for reopening the assessment even with the period of four years. Referring to the judgment of the Hon'ble Supreme Court in the case of ***Kelvinator of India Ltd (320 ITR 561)***,he held that audited annual account of the assessee for the financial year 2004-05 clearly disclosed the fact about the payment of software charges of Rs.90,00,000/-,that service-agreement under software charges were paid by the assessee was also filed before the AO,that no new facts/evidences came before her subsequently, that there was absence of tangible material,that the AO reopened the case on the basis of change of his opinion.He further held that the assessee had to return all the software/hardware services to the parent company on termination of the agreement, that it had not have any right, title interest in the computer software/hardware,that the assessee was not getting any enduring or permanent benefit ,that expenditure incurred was revenue in nature,that the assessee did not own any fixed assets, that agreement with the parent company was like obtaining the requisite computer system's on lease. Finally,he allowed the appeal filed by the assessee.

5.Before us,Authorised Representative (AR) relied upon the case of Rajesh Jhaveri Stock Brokers(291ITR500) delivered by the Hon'ble Supreme Court. The AR stated that the matter

was reopened because of the audit objection,that in the subsequent years similar disallowance was not made by the AO,that in the reasons recorded by the AO,there is no mention of existence of a tangible material.

6.We have heard the rival submissions and perused the relevant material on record. We find that in the case under consideration the AO had reopened the assessment as she was of the opinion that the expenditure incurred by the assessee under the head of the software charges was of enduring in nature.In our opinion on this basis issuing a notice u/s 148 of the Act was not justified.Expenditure incurred on software cannot be held tangible material especially when it was an annual expenditure and said fact was disclosed by the assessee. In the case of Kelvinator of India Ltd. Hon'be Supreme Court held as under:-

> *"We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ;he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as con-tended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the con-clusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows : "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in section 147.-A number of representations were received against the omission of the words `reason to believe' from section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the mean-ing of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omis-sion from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."*

We find that the assessee had made payment under the head of Software charges in

subsequent years also and the AO do not invoke the provisions of section 147/148.If it was a revenue expenditure for the year under appeal,same was for the subsequent years also.In our opinion there was no tangible material to reopen the assessment.Respectfully following the decision of Kelvinator of India Ltd.(supra)of the Hon'ble Supreme Court, we decide the effective grounds of appeal against the AO.In our opinion order of the FAA does not suffer from any legal infirmity,so, upholding it we dismiss the grounds of appeal filed by the AO.

As a result, appeal filed by the AO stand dismissed.
फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील अस्वीकृत की जाती है.
Order pronounced in the open court on 21st ,July, 2014.
आदेश की घोषणा खुले न्यायालय में दिनांक 21 जुलाई ,2014 को की गई ।

Sd/-	Sd/-
(विजयपाल राव **/ VIJAY PAL RAO**)	(राजेन्द्र **/ RAJENDRA**)
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

मुंबई/Mumbai, दिनांक/Date: 21st July, 2014
Shashi Shekhar Kumar

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. Assessee /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3. The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त,**4.**The concerned CIT /संबद्ध आयकर आयुक्त

5. DR "I" Bench, ITAT, Mumbai /विभागीय प्रतिनिधि आई खंडपीठ,आ.अ.न्याया.मुंबई

6. Guard File/गार्ड फाईल **सत्यापित प्रति** //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai**