आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,जे,मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL MUMBAI BENCHES "J", MUMBAI

श्री अमित शुक्ला, न्यायिक सदस्य **एवं**

श्री अश्वनी तनेजा, लेखा सदस्य, के समक्ष

Before Shri Amit Shukla, Judicial Member, and Shri Ashwani Taneja, Accountant Member

ITA NO.5301/Mum/2011
Assessment Year: 2003-04

J.P. Morgan Services India P. Ltd. 9th Floor, B Wing, Prism Towers Mindspace, Malad (W) Mumba-40004	**बनाम**/ Vs.	ITO RG 8(2)(2) 707A, C-10 7th Floor, Bandra Kurla Complex Bandra (E) Mumbai-51
(Assessee)		(Revenue)
P.A. No.AABCD0503B		

ITA NO.5130/Mum/2011
Assessment Year: 2003-04

ITO RG 8(2)(2) 707A, C-10 7th Floor, Bandra Kurla Complex Bandra (E) Mumbai-51.	**बनाम**/ Vs.	J.P. Morgan Services India P. Ltd. 9th Floor, B Wing, Prism Towers Mindspace, Malad (W) Mumba-40004
(Revenue)		(Respondent)
		P.A. No. AABCD0503B

C.O. NO.294/Mum/2013
Assessment Year: 2003-04

J.P. Morgan Services India P. Ltd. 9th Floor, B Wing, Prism Towers Mindspace, Malad (W) Mumba-40004	**बनाम**/ Vs.	DCIT 8(2) R.NO.216-A, Aayakar Bhavan, M.K. Rd. Mumbai-20
(Assessee)		(Revenue)
P.A. No.AABCD0503B		

Appellant by	Shri F. V. Irani (AR)
Respondent by	Shri S.S. Kumaran (DR)

सुनवाई की तारीख / **Date of Hearing :**	**09/09/2015**
आदेश की तारीख /**Date of Order:**	**30/10/2015**

आदेश / O R D E R

Per Ashwani Taneja (Accountant Member):

These are cross appeals and cross objections, filed by the Assessee and the Revenue against the order of Ld. Commissioner of Income Tax (Appeals) -17, Mumbai {In short, 'CIT(A)'}, for the assessment year 2003-04 dated 29.03.2006, decided against the assessment order passed by the Assessing Officer (in short 'AO') u/s 143(3) of the Act.

We first take up Cross Objection filed by the Assessee:

2. It is noted that the cross objection has been filed by the assessee beyond the period of limitation. During the course of

hearing, Ld. Counsel of the assessee submitted that since the assessee has filed additional ground also, adjudication of Cross Objection may not be required, and therefore, same was "not pressed" by the ld. Counsel. In view of this, Cross Objection field by the assessee is dismissed, as not pressed.

Now, we take up assessee's appeal in ITA No.5301/Mum/2011.

3. The grounds raised by the assessee in the appeal memo are reproduced below:

> *"Aggrieved by the order passed by the Commissioner of Income-tax (Appeals)-17, Mumbai [hereinafter referred to as the learned CIT(A)], under section 250 of the Income-tax Act, 1961 (Act) and based on the facts and circumstances of the case, J.P. Morgan Services India Pvt. Ltd. [hereinafter referred to as 'the Appellant'] respectfully submits that the learned CIT(A) erred in partly upholding the order of the Income-tax Officer- Range 8(2)(2), by treating an amount of Rs 42,100,000 in respect of project management study as being capital expenditure and disallowing the same.*
>
> *Without prejudice to the above, the Appellant submits that the learned CIT(A) erred in not allowing depreciation under section 32 of the Act on the amount of fees paid for the project management study upheld as capital expenditure.*
> *The Appellant craves leave to add, alter, vary, omit, substitute or amend the ground of appeal, at any time before or at, the time of hearing of the appeal, so as to enable the Honourable Income-Tax Appellate Tribunal to decide this appeal according to law."*

4. During the course of hearing, it was noted that assessee had filed following grounds as additional grounds vide its letter dated 30th December 2013:

> *"1. The disallowance of Project Management Study Fees of Rs 4,21,00,000 by the Income-tax Officer -8(2)(2), Mumbai ("the ITO") as capital expenditure, ought to have been deleted, as the same was illegal, void-ab initio and without/ in excess of jurisdiction, inter-alia, as:*
> *i) it was made by the ITO pursuant to directions given to him by the Additional Commissioner}; of Income-tax - Transfer Pricing (2), Mumbai ("the TPO");*
> *ii) in any event and without prejudice to (i) immediately above, the aforesaid directions of the TPO were themselves illegal, void-ab initio and without/ in excess of jurisdiction.*
> *2. The disallowance of expenditure of Rs1,79,00,000 allegedly in connection with idle capacity and the disallowance of expenditure of Rs.75,99,000 in connection with new service line cost as capital expenditure by the ITO, ought to have been held as illegal, void-ab initio and without/in excess of jurisdiction, inter-alia, as:*
> *i) it was made by the ITO pursuant to directions given to him by the TPO;*
> *ii) in any event and without prejudice to (i) immediately above, the aforesaid directions of the TPO were themselves illegal, void-ab initio and without/ in excess of jurisdiction."*

4.1. It was submitted by the Ld. Counsel during the course of hearing that the aforesaid additional grounds do not need any investigation of fresh facts, and these are purely legal in nature and raise fundamental issue of jurisdiction going to the very root of the legality of the additions/disallowance made and require adjudication in the interest of justice. Reliance was placed by the Ld. Counsel, in support of admission of these grounds, on the judgment of Hon'ble Supreme Court in

the case of National Thermal Power Co. Ltd. vs. CIT 229 ITR 383. On the hand, Ld. DR submitted that additional grounds raised by the assessee may be admitted so long as these do not require any investigation of fresh facts.

4.2. We have heard both the sides on this issue, and it is noted by us that the additional grounds raised by the assessee are purely legal and do not require any investigation of fresh facts. Thus, in view of judgment of Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd., supra, these additional grounds were admitted for adjudication, and with the consent of the parties, we proceeded further to hear and decide the appeal on merits viz-a-viz additional grounds and other grounds.

First we take up additional grounds:

5. The main issue raised by the Ld. Counsel in the additional grounds is that disallowances/additions were made by the AO in the assessment order on the basis of directions given by the Transfer Pricing Officer (in short 'TPO'), in its order. Thus, primary objection raised by the Ld. Counsel was that since the TPO had no jurisdiction to issue any such directions to the AO, these were bad in law and all subsequent proceedings taken by thereafter in this regard, including the query letters issued by the AO on the impugned issues were bad in law, and further, the disallowance/additions made by the AO in the assessment order, having been made on the

basis of these directions of the TPO, were illegal and void ab initio. Ld. Counsel has drawn our attention on para 8 of the order passed by the TPO dated 28.02.2006, which reads as under:

> *"The assessee has incurred certain expenditure and has debited the same to its P&L A/c. This expenditure prima facie appears to be in the nature of capital expenditure. The AO may examine this expenditure vis.. project feasibility study costs-Rs.4.41 crores, costs in connection with idle capacity/unutilized space –Rs.1.79 crores, new service line costs-Rs.75.99 lakhs and fees for rental options/brokerage -Rs.72.09 lakhs, to arrive at a finding whether this expenditure is to brought to tax or not."*

5.1. It was argued by the Ld. Counsel that these observations made by the Ld. TPO in its order, constitute 'directions', which the TPO was not authorised to give to the AO. It was further submitted that immediately after receipt of the TPO's order, Ld. AO was prompted to issue query letter to the AO dated 08.03.2006 (i.e. within five working days), on the issues as were suggested by the TPO in its order. Our attention was further drawn on the AO's order at page 2 para 3, wherein AO had made reference to the order of the TPO. Ld. Counsel has argued that giving of direction by the Ld. TPO was without the authority of the law, thereby vitiating the entire proceedings, taken up thereafter by the AO. In support of his arguments, reliance was placed upon the judgment of Hon'ble Bombay

High Court in the case of ICICI Home Finance Co. Ltd. vs. ACIT 82 CCH 0103.

5.2. On the other hand, Ld. DR has submitted that these observations given by the TPO in its order were not any kind of 'directions'. It was further submitted that these observations were not binding upon the AO. It was also submitted that AO had given opportunity to the assessee and inquiries were made independently. Lastly, it was submitted by the him that even if these direction were expunged, the AO had inherent jurisdiction to examine these issues in the course of assessment proceedings carried out u/s 143(3), as the law has given ample powers and scope of making requisite queries to the assessee with regard to verification to the claims made by the assessee in the return filed by it, under the aforesaid proceedings. It was submitted that thus, in view of the aforesaid reasons, the judgment of Hon'ble Bombay High Court in the case of ICICI Home Finance Co. Ltd., supra, was not applicable upon the facts of the present case. In nut shell, it was argued by him that objections raised by the Ld. Counsel were without any legal basis and sound reasoning and therefore, these should be dismissed.

5.3. We have heard both the sides and gone through the material placed before us. In our considered opinion, Ld. Counsel has misunderstood or mis-appreciated the facts of the case and conceptual frame work of law on this issue. Firstly, the observations made by the TPO in its order were not any sort of 'directions'. These may at the best constitute

suggestions to the AO. Ld. Counsel has vehemently relied upon the judgment of Hon'ble Bombay High Court in the case of ICICI Home Finance Co. Ltd. (supra). It is noted that this judgment is rendered by the Hon'ble High Court in an all together different context. This judgment was delivered by the Hon'ble High Court in the context of defining scope of power that has been bestowed upon the AO to reopen, u/s 147 of the Income Tax Act, a completed assessment. It was in this context, when the Hon'ble High Court held that before reopening the case, the AO is obliged under the law to record the reasons comprising of belief formed by the AO for escapement of income of assessee. In that context, it was held by the Hon'ble High Court that the belief made by the AO should be independent and on the basis of application of own mind of the AO, and that it should not be on the basis of directions of any superior authorities. Thus in this specific context, it was observed by the Hon'ble High Court that belief of escapement of income must be determined by the AO himself and he cannot blindly follow information of an audit authority for the purpose of arriving at a belief that income has escaped assessment.

5.4. It is noted by us that the facts of this case, stand on an all together different pedestal. First of all, the impugned assessment proceedings were not commenced u/s 147. These proceedings have been carried out u/s 143(3) of the Income Tax Act. The parameters laid down under the law for assumption of jurisdiction for initiating and carrying out the

proceedings u/s 143(3) and u/s 147 are totally different. There is no such obligation of formation of belief and recording of reasons for initiation of proceedings u/s 143(3), as are required in the proceedings initiated u/s 147. It is worth noting that proceedings initiated under section 147 for reopening of an already concluded assessment, have been couched by the legislature in a special framework of provisions contained in sections 147 to 151 of the Income Tax Act, 1961. All these provisions provide some fetters on the powers of the AO, and these have to be strictly complied with by the AO for reopening of the case and framing of the reassessment order. On the other hand, in the proceedings u/s 143(3), the legislature has given ample powers to the AO to make requisite inquiries with the assessee or other connected persons, for the purpose of finding out the authenticity of the claims made by the assessee in the return of income filed by it and also for the purpose of determination of the taxable of the assessee and taxable payable thereon, as per law. Thus, in our considered view, both the situations are not comparable, on the angle as suggested by Ld Counsel, and therefore, his submissions on this issue are not acceptable under the law. Further, without prejudice, even if we expunge the directions of the TPO, we find that AO has requisite powers under the law, de-horse the impugned directions of TPO, to examine the impugned issues during the course of assessment proceedings and making assessment of the same as per law, in the assessment order passed by him u/s 143(3). Thus, in our considered view, the submission of the Ld. Counsel, viewed

from any angle, has no legs to stand and therefore, primary objection raised by the assessee by way of additional grounds is dismissed.

Now, we shall deal with the main ground raised by the assessee in the appeal memo.

6. The assessee has challenged the action of Ld CIT(A) in confirming the action of the AO in making of Rs 4,21,00,000/, in respect of fee paid for project management study, by treating the same as capital expenditure.

6.1. During the course of assessment proceedings it was noted by the AO that the assessee has claimed an amount of Rs. 4.21 crores being consultancy charges paid to M/s. Mckinsay & Co. for project management study. It was noted by the AO that the study was undertaken for addressing the matters relating to programme management methodology and defining a preliminary roadmap covering issues such as site contingency and potential of increasing off shoring services to JPM Services. It was held by the AO that the aforesaid study was intended to provide operational advantage which was an enduring benefit to the assessee company over a period of time and therefore, such payment was capital in nature. The claim was therefore, disallowed by the AO.

6.2. The assessee contested the matter before Ld. CIT(A), wherein the assessee made detailed submission supported with documentary evidences, showing that the impugned

payment was on account of revenue expenses and AO has wrongly treated the same as capital expenditure. Reliance was placed by the assessee on various judgments in support of its claim. However, Ld. CIT(A) was not convinced with the arguments of the assessee. It was held by him that Project Management Study was intended to enhance the level of activity of the assessee company in India, with view to take advantage of business opportunity available in India, this would in turn mean that the nature of advantage which the assessee company would derive, would be enduring in nature, and therefore Ld. CIT(A) upheld the action of AO in treating the same as capital in nature, and accordingly disallowance made by the AO was confirmed.

6.3. Before us, Ld. Counsel has made detailed submissions. It was submitted that the assessee company was engaged in the business of rendering IT enabled services and software development services to JP Moran Chase Group entities worldwide. The project management study was undertaken by Mckinsey for preparing a programme management methodology and preliminary strategic road map showing the potential risks and rewards of significantly increasing operational volumes over the subsequent years. It was submitted that the terms of specific consideration for JPM Services, the report broadly highlighted the following aspects:

a. Potential opportunities to increase business by developing additional resources and ramping up the

existing operations.

b. A broad overview of costs that may be involved in enhancing capabilities.

c. Rationalizing the organization structure in anticipation of enhanced operations.

d. Potential business development process to be undertaken to maximize the benefits.

It was argued that, in nutshell, the report enabled the assessee company to understand whether it would be beneficial to step up the operations or continue at the existing level, and that there were number of judicial decisions that have held that preparation of a project management or feasibility report, especially where it is incurred in connection with an existing business, constitutes 'revenue' expenditure. Ld. Counsel, placing reliance on various decisions in his favour, drew our attention on the propositions held in the decisions of DCIT vs Assam Asbestos Ltd 263 ITR 357, ITO vs Jacob Pacadiyil 43 ITD 459, Usha Alloys and Steels Ltd vs DClT 55 ITD 418 and Kesoram lndsutreis and Cotton Mills Ltd vs CIT 196 ITR 845. It was submitted that in Empire Jute Co. Ltd. vs CIT, 124 ITR 1, the Supreme Court held that there might be cases where expenditure even if incurred for obtaining an advantage of enduring benefit, would be on revenue account, and that what is material is to consider the nature of the advantage in a commercial sense. If the advantage consists, in merely facilitating the asessee's trading operations while keeping the assessee's capital untouched, the expenditure

would be on revenue account.

6.4. Ld. Counsel, adverting to the facts of this case, submitted that the expenditure incurred by the assessee company on project management report did not bring into existence any asset or advantage of an enduring nature and merely sought to provide the management with an insight into Indian outsourcing industry so as to enable the management to conclude whether it would be advisable to expand the business while still achieving the same or better levels of efficiency and profitability, and hence the expenditure should be regarded as revenue in nature. Our attention was drawn by him on pages 25 to 26 of the paper book, being the written submissions of the assessee company, filed before the Ld. CIT(A). It was finally submitted that the impugned expenses were incurred for the purpose of same business, having same management and interlacing of funds, and therefore, viewed from this angle also the impugned expenses were revenue in nature and were allowable to the assessee company.

6.5. On the other hand, Ld DR read before us page no. 25 of the paper book, to argue that prima facie it appears that expenses were incurred for starting a new project, and therefore, these expenses were capital in nature and not allowable against the income of the current year. Reliance was placed on the detailed observations of the AO and findings of

the Ld. CIT(A), and it was submitted that the orders of the lower authorities should be upheld on this issue.

6.6. We have gone through the arguments made by both the sides, order of the lower authorities, material placed before us for our consideration and also the judgments relied by both the parties on this issue. First of all, to reduce the controversy, we have examined weight in the argument of Ld DR that prima facie it appears that impugned expenses have been incurred for starting new project, and this was the main reason to treat the impugned expenses as capital in nature. In this regard, it is noted by us that the undisputed facts are that there was a completed interconnection, interlacing and interlocking of the funds and common management in the existing business and the proposed new project of the assessee company. Although, the assessee's stand is that there was no new business under consideration, but it was expansion of the existing business only, that was under consideration. On this issue, under these facts, the law laid down in the judgments relied upon by the Ld. Counsel, as mentioned in the above para, is clear. The view, emerging from the perusal of these judgments, is that under these circumstances, this kind of expenditure incurred by the assessee would be revenue in nature because the assessee is already in the business and had added new lines to the business. If the assessee obtains a project report for running business more profitably, then the expenses would fall in revenue field and not in the capital field, though benefit might

be enduring in nature. In various cases, it has been held by the courts that expenses incurred in connection with preparation of survey and feasibility report and various technical services for setting up a project would be revenue in nature, so long as the assessee is already in business. In the case of Assam Asbestos Ltd 263 ITR 357, expenses incurred by the Assessee in connection with survey and feasibility report to establish a mini cement plant to feed its asbestos unit were held as revenue expenses by Hon'ble Gauhati High Court, as it did not bring into existence of new fixed capital. Similarly, in ITO vs. Jacob Pacadiyil 43 ITD 459, expense in connection with project report was held to be revenue as it was intended to bring about efficiency in business. In Usha Alloys and Steels Ltd vs DCIT 55 ITD 418, expenses in connection with feasibility report regarding installing a captive power station was held revenue as the report by itself did not bring into existence the power plant. In Kesoram Industries and Cotton Mills Ltd v. CIT 196 ITR 845, legal and other expenses incurred in connection with proposed cement factory project, were found to be expenses pertaining to exploring the feasibility of expanding or extending the existing business and were therefore held to be allowable deduction.

6.7. Now, we shall deal with reasoning of Ld CIT(A) to treat these expenses as capital in nature and his objections in accepting the claim of the assessee for treating them as revenue in nature. For this purpose, we have further analysed,

some more fatcs with respect to nature of the expenses incurred, so as to determine precisely their true nature, before we can hold that whether these would fall in revenue field or in capital field. It is seen that the assessee company is in the business of rendering IT enabled services and software development services to the JP Margan chase group entities worldwide in respect of various lines of business of JP Margan shores group. The project management study was undertaken by the consultants Mckinsay who were engaged by the assessee company, for preparation of programme management methodology and primary strategic road map, highlighting the potential risks and rewards of significantly increasing operation volumes of the assessee in subsequent years. It was submitted to us that, in nutshell, the object of obtaining the aforesaid study report was to enable the assessee company to understand whether it would be beneficial to step up the operations or to continue operating at the same levels. In our considered view, undoubtedly, objective of the study report was to provide efficient and operational advantage to the assessee in carrying out its business activities. With the help of this report the assessee company aimed to increase its efficiency in day to day running of the business. Thus, on these facts, Ld. CIT(A) is also at concurrence with us. But Ld. CIT(A) has treated the impugned expenses as capital expenses on the ground that the project management study was intended to drastically alter assessee's level of activity in India with a view of taking advantage of business opportunity available in India, which would in turn mean that the nature

of advantages which assessee would derive, would be enduring in nature, and therefore, expenses of project management study should be treated as capital expenditure. In our view, here at this stage, while drawing conclusion, Ld. CIT(A) has gone wrong, in appreciating the correct legal position. The facts were analysed by the Ld. CIT(A) in the right context. But, what is to be seen is that under the income tax law, whether simply because if an expense would provide benefits of enduring nature to the assessee, shall make the expense as capital in nature. In our view, correct position of law is not like that. If an expense can be treated as capital expense merely on the basis of getting the benefits of enduring nature from the said expense, then virtually each and every expense can be placed in the category of capital expenses. Let us take example of expenses incurred in the form of payments made on the account of salary to the employees or expenses incurred on training of the employees. In such a situation, after getting the training, the employees may provide useful contribution to its employer-organization in the longer period, thereby providing benefits of enduring nature. We can take another example of expenses incurred on advertisement; these also provide benefits of enduring nature in the longer term. There can be numerous other examples of such expenses. But, none of these expenses are cagegorised as capital in nature, and these are allowed as revenue nature expenses by the department. Therefore, merely because the expenditure provides benefits of enduring nature, should not, ipso facto, make that expenditure as capital in nature. In other words,

'benefits of enduring nature' is not the sole factor to categorise an expense as capital expense. In support of the view taken by us, we can take support from the judgment of Hon'ble Supreme Court in the case of Empire Jute Co. Ltd. vs CIT 124 ITR 1. In our considered opinion, before the expenditure can be put into capital field, it has to pass the twin tests i.e. **one**- the expense should provide benefit of enduring nature, and **two-** the expense should give rise to creation of a capital asset. Unless both the ingredients are present, **cumulatively**, the expense cannot be put into the capital field.

6.8. Coming back to the facts of the case; the expenditure under consideration, in our considered view, did not give rise to creation of a capital asset. It would, at the most, give operational efficiency to the assessee company. The assessee company is already in business. The Ld. CIT(A) has also accepted these facts correctly. The only objection of Ld. CIT(A) that project management study is intended to drastically alter the assessee level of activities in India and therefore, these expenses should be treated as capital in nature, in our view is not acceptable in the eyes of law, especially in the given facts and circumstances of this case. Therefore, keeping in view the facts and circumstances of the case and the judicial pronouncements, as were relied upon by the Ld. Counsel in the submissions made before Ld. CIT(A) and before us, we hold that the expenses incurred by the assessee for an amount of Rs.4.21 crores in respect of project management study, are revenue in nature. Disallowance made by the AO in

this regard is deleted. Thus, the ground raised by the assessee is allowed.

Now, we take up ITA No.5130/M/2011 for A.Y.2003-04:

7. In this appeal, Revenue has raised, effectively, following grounds of appeal:

"1.On the facts and in the circumstances of the case and in law, the CIT(A) erred in holding expenditure of Rs.1,79,00,000/- as revenue in nature, without appreciating the fact that the expenditure was admittedly incurred by the assessee for enduring benefit and hence the A.O. rightly treated the same as capital in nature.

2. On the facts and in the circumstances of the case and in law, the CIT(A) erred in holding expenditure relating to setting up new service lines amounting to Rs.75,99,000/- as revenue in nature, without appreciating the fact that the expenditure would give the assessee enduring benefit and hence the A.O. rightly treated the same as capital in nature."

8. Ground No.1: In this ground, Revenue has challenged the action of Ld. CIT(A) in treating expenses of Rs.1.79 crores as revenue in nature.

8.1. It was observed by the AO in the assessment proceedings that assessee has debited a sum of Rs. 1.79 crores as cost

incurred in connection with idle capacity. With regard to the justification of this claim, it was explained by the assessee to the AO that it has been in stage of continuous expansion since the commencement of its operations and had planned its operations and infrastructure in a manner so as to take into account the anticipated expansion plans. It was further submitted that it incurred various costs in the nature of rental expenses, facility management, depreciation on leasehold and furniture and fixture, utilities' costs and repairs & maintenance for the purpose of its business. The assessee company also submitted that these being routine business expenses of the company, werer accounted under the respective heads viz. rent, repairs and maintenance etc. However, as parts of the premises were vacant for a period of time, the above costs in this regard could not be recovered by the assessee from its clients. It was further clarified that these costs were incurred in connection with anticipated expansion plans. However, as observed by the AO, the assessee company could not produce any evidences in support of the fact that these premises were empty and not utilized for the purpose carrying out any activities towards the work pertaining to clients. It was also observed by him that the company was at the expansion stage, and that it had got some anticipated expansion plan. In view of these facts, it was held by the AO that firstly the expenses do not partake the nature of revenue expenses since it could not be established that the expenses pertain to the assessee's

business, and therefore these should have been charged to the clients. Secondly, without prejudice to the above, as confirmed by the assessee also, the assessee company was in the expansion stage, and therefore, viewd from this angle also, these were capital expenditure and not revenue. As per AO, the expenses on the expansion of the company were going to fetch an enduring benefit to the assessee and accordingly by no stretch of imagination, these expenses could fall under the definition of revenue expenses. It was accordingly held that, these expenses were not pertaining to business of the assessee and these were capital in nature, and therefore these were disallowed and added to the total income of the assessee company.

8.2. Being aggrieved, the assessee contested the matter before Ld. CIT(A). It was submitted that the assessee while setting up unit-II, had planned its operation and infrastructure in a manner taking into account the growth of the business and anticipated expansion plans. However, being the initial years of operation, some of the facilities remained unutilized for various reasons. All the facilities, although not fully utilized, were nevertheless utilized for the purpose of business. The assessee, for services rendered to its overseas entities, recovers its fees on the basis of cost incurred in rendering services plus an appropriate mark up, and keeping in view the fact that the assessee was in its initial phase of business, it could not naturally achieve full capacity of its operations. The operating costs in

respect of the entire premises were required to be incurred. These were legitimate business expenditure, and therefore allowable as deduction u/s 30 or section 37(1). Reliance was placed on the following decisions:-

i)Vijay International vs. ACIT 253 ITR 26

ii)CIT vs. Western India Sea Food (F) Ltd. 199 ITR 77

iii) Juderchand Harisam vs.CIT 23 ITR 437

iv) CIT vs. Malayalam Plantations 53 ITR 140

8.3. In view of the submissions of the assessee and case laws relied upon therein, Ld. CIT(A) held that these expenses were revenue in the nature and were incurred for the purpose of business, and accordingly, addition made by the AO was deleted by him.

8.4. We have gone through submissions made by both the sides very carefully and the orders of lower authorities and material places before us. It is noted by us that Ld CIT(A) has rightly observed that the AO has not questioned the revenue nature of these expenditure but held that as part of expenditure has been incurred for unutilized space, it had to be disallowed as capital in nature. The issue cropped up only because the assessee had furnished the details of expenditure to TPO to determine the appropriate transfer price in its transaction with foreign associates and the TPO had required the AO to determine the nature of some of the expenses. The assessee being in initial years of operations,

was in expansion mode and necessarily had to take on lease extra space anticipating business in future. It appears that anticipated business took time while the assessee had to incur the expenditure which it had committed. In our view, Ld CIT(A) is legally and factually correct in holding that the fact that some space, which the assessee had taken on lease, remained unutilized, does not alter the nature of expenses it had incurred. We agree with the findings of Ld CIT(A) that the nature of expenses is revenue and have been incurred for the purpose of business, and therefore, the conclusion of the AO that expenses pertaining to unutilized space was capital in nature, is not correct.

8.5. It is further noted by us that if we go by the principle of 'twin-tests', as was discussed by us in **para 6.7.** of this order while deciding appeal of the assessee, we find that these expenses cannot be treated as capital in nature, at all. Therefore, in view of the detailed reasoning as given by us in **para 6.7.** of this order, findings of Ld. CIT(A), the facts and circumstances of this case and well settled position of law, it is held that the amount of Rs.1.79 crore being the expenses incurred by the assessee is revenue in nature and Ld. CIT(A) has rightly deleted the disallowance made by the AO. No interference is called for in the order of Ld. CIT(A) and the same is upheld, and therefore Ground no.1 of Revenue's appeal is dismissed.

9. Ground no.2: In this ground, the revenue has challenged the action of Ld. CIT(A) in treating the expenses relating to setting up of new service lines, amounting to Rs.75.99 lacs as revenue in nature. During the course of assessment proceedings, it was noted by the AO that assessee had debited an amount of Rs.75.99 lacs on account of new services lines costs. In response to the query raised by the AO, the assessee company explained that the assssee company has been in a stage of continuous expansion since its incorporation. It has been adding various services lines to its business from time to time. During the previous year relevant to the assessment year under consideration, the assessee company added following three new service lines in addition to its existing service lines viz:

1. Commercial Loan Services
2. Provision of services in relation to brokerage
3. Call centre services

The company had incurred various costs in rendering services to its clients in relation to the above three service lines. As per the billing cycle of the company, typically the cost incurred by it in rendering services for a new service line is recovered from its clients two to three months later and the expenses were booked during the current year. The fees in this regard were due to company in the subsequent F.Y. i.e. during the year ended March 31, 2004. In view of these facts, it was observed by the AO that the assessee company has added three new different service lines in its own business, and since any new services introduced by the company is a

new venture in itself, and therefore the expenses incurred for setting-up the new venture are nothing but capital expenditure, and accordingly this amount was treated as capital expenditure and added back to the total income of the assessee by the AO.

9.1. Being aggrieved, the assessee contested this matter before Ld. CIT(A), wherein it was submitted that the assessee company was engaged in rendering the IT enabled services to JPMC group. It assigns a particular team to render particular support services. The provision of a new type of IT enabled service to a particular client entails formation of a group consisting of staff with skill sets commensurate with the requirement of the particular client. The team assigned to render the services would be formed either out of the existing staff or new employees being hired for the purpose. In either case, the services rendered by the client continue to remain a new venture. The inherent nature of the IT enabled service consists of receipt of data, processing the same and delivering the processed data to the client. These activities are carried out using the computers, leased lines and technology. It was submitted that in view of these facts, the formation of new teams does not mean that the assessee had entered into a new venture. In the year under consideration, the assessee was engaged in rendering 17 types of IT enabled services (including the three new lines discussed above), from the common location. All the lines of business were

under common control of the management. The assets and infrastructure employed for the service lines were common, and all these different lines of business constitute one integrated business of rendering IT enabled services. The assessee placed reliance on various decisions, which were cited in its support to narrate the principles on which the different ventures undertaken by an assessee may be viewed as same business. Taking help from these decisions, it was argued that the new lines were not new venture or business commenced by the assessee, but merely a new line of business within the realm of the IT enabled services rendered by it to its group entities located worldwide, due to the following reasons:

a) The support services rendered under the commercial loan segment, brokerage segment and call centre service line of business were actually part of bssiness of the assessee since commencement of its operations,

b) The general management and control overlooking the functioning of these lines of business remains the same for all lines of business.

c) No fresh capital has been brought into the business for commencement of these new lines of business.

d) The profits from these lines of business are consolidated along with other lines of business and reported in the financial statements without bifurcation into various lines of activities.

e) The basic facilities provided for these new lines of business are costs similar to the costs required for running other lines of business under the IT enables services

f) Further, the expenditure incurred by the assessee on these

new lines of business have not brought into existence any capital asset.

In view of the aforesaid facts, it was submitted that the expenses incurred by the assessee were expenses incurred in rendering services under new lines of business as against expense for setting up new ventures as stated by the AO. The costs incurred in connection with new lines of business were not different from costs incurred on existing lines of business and have similarly been recovered by the assessee and should qualify as deductible revenue expenditure. It was also submitted that the expenditure incurred by the assessee have actually been billed out in the subsequent year (i.e. year ended 31st March, 2004) on the basis of billing cycle of the assessee with an appropriate markup on the costs incurred. In view of the above, it was argued that the expenses in the nature of salary and facilities costs could by no stretch of imagination be regarded as capital expenditure**.**

9.2. After considering detailed submissions of the assessee, it was found by the Ld. CIT(A) that these expenses were revenue in nature and therefore, disallowance made by the AO was deleted by him, after recording detailed findings and passing a well reasoned order considering aforesaid facts, and endorsing the submissions of the assessee, on facts as well as on law.

9.3. Being aggrieved, the revenue has filed an appeal before the Tribunal.

9.4. We have heard both the sides and gone through the orders of lower authorities and facts and circumstances of the case. It is noted by us that Ld. CIT(A) has rightly held that the AO has dealt with the issue perfunctorily, and factual and proper analysis of these expenses has not been made by him to inquire whether these were incurred to acquire fixed assets or only to meet routine expenses. Moreover, as per the decision of Honble Supreme Court cited by the assessee, other relevant factors have to be taken into account. The assessee has stated that the three new lines are in the nature of IT enabled services, which is regular business run by it. The control and management is same for all the 17 lines, which constitutes the business activities. No fresh capital has been sourced to commence these new activities and the profits from all the activities are consolidated and reported together. It is worth noting that, as was submitted by the assessee company, all these expenses have been recovered subsequently in the normal billing cycle of the assessee. The AO has not brought anything on record to controvert these submissions. In our considered view, the findings of Ld. CIT(A) are also well reasoned and in accordance with law and facts, no interference is called for therein, and therefore, same are upheld. Thus, Ground no.2 of revenue's appeal is dismissed.

10. In the result, Cross Objection filed by the assessee is dismissed and Assessee's appeal is partly allowed and Revenue's appeal is dismissed.

Order pronounced in the open court on 30th October, 2015.

Sd/-	Sd/-
(Amit Shukla)	(Ashwani Taneja)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य** / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 30/10/2015
*Patel, P.S.*नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

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