IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "I", MUMBAI

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA No.3325/M/2012
Assessment Year: 2005-06

DCIT, Cir. 6(1), R.No.506, 5th Floor, Aayakar Bhavan, M.K. Road, Mumbai - 400020	Vs.	M/s. Integrated Technology Solutions P. Ltd., Nirlon House, 3rd Floor, Dr. Annie Besant Road, Worli, Mumbai – 400 025 **PAN: AAACI 1867B**
(Appellant)		(Respondent)

ITA No.3803/M/2012
Assessment Year: 2005-06

Assistant Commissioner of Income TAx, Circle 6(1), Mumbai	Vs.	M/s. Integrated Technology Solutions P. Ltd., Nirlon House, 3rd Floor, Dr. A.B. Road, Worli, Mumbai – 400 025 **PAN: AAACI 1867B**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Haresh Buch, A.R. & Ms. Monika Agarwal, A.R
Revenue by : Shri B. Yadagiri, D.R.

Date of Hearing : 08.12.2015
Date of Pronouncement : 12.02.2016

O R D E R

Per Sanjay Garg, Judicial Member:

The above titled cross appeals one by the Revenue and the other by the assessee have been preferred against the order dated 27.02.2012 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2005-06. First we take up the appeal of the assessee. The assessee has taken the following grounds of appeal:

"**GROUND I**

1. The Commissioner of Income Tax (Appeals) - 14 Mumbai ("CIT(A)"), erred in confirming the action of the A.O. in disallowing a sum of Rs.17,00,000/- (after considering depreciation) incurred for software development and maintenance on the alleged ground that the same is capital expenditure,.

2. The appellant prays that the said Software Development Expenditure be treated as revenue expenditure and be allowed as a business expenditure.

GROUND II

1. The CIT(A) erred in upholding the action of the A,O. in treating loan of 1,25,01,689/- taxable u/s. 68 of the income Tax Act, 1961 ("the Act") and further enhancing the income to Rs.1,61,15,409/- on alleged ground that the same is unexplained credit within the meaning of section 68 of the Act.

2. The Appellant therefore prays that the said addition be deleted.

GROUND III:

The Appellant craves leaves to add to, alter and / or amend the above grounds of appeal."

Ground No.1

2. Vide ground No.1, the assessee has agitated the action of the Ld. CIT(A) in confirming the disallowance of a sum of Rs.17 lakhs holding the same as a capital expenditure as against the claim of the assessee that the same being of revenue in nature. During the year under consideration, the assessee incurred various expenses for software development and maintenance amounting to Rs.44,34,703/-. The Assessing Officer (hereinafter referred to as the AO) disallowed the said expenditure treating the same as capital in nature; however, he allowed the deprecation on the same. Being aggrieved, the assessee filed appeal before the Ld. CIT (A).

3. The Ld. CIT(A) in the impugned order has discussed the individual items relating to the each of the software expenses. After considering the details submitted by the assessee, he has held that except the expenses relating to software adaptation charges for terminals activated on 22.07.04, the other software expenses incurred by the assessee for maintenance and back up etc. were of revenue in nature. In respect of the expenses of Rs.17 lakhs incurred

on account of software adaptation charges for terminals, he has held that the same were in the nature of operating software and thus capital in nature. He, however, has allowed depreciation on the same as per the rules. The assessee, thus, has come in appeal before us agitating the above action of the Ld. CIT(A).

4. The Ld. A.R. of the assessee, before us, has submitted that the said expenses were incurred by the assessee for up-gradation of the already installed software. It has been submitted that the assessee is in the business of online lottery. The already existing software in the lottery terminal of the assessee was not supporting the software used by the Martin Lotteries in relation to which the assessee has been running the above business. The assessee upgraded the software for smooth running of lottery business. This software was activated on 22.07.04. The assessee, in this respect, has relied upon the copy of the invoice dated 07.12.04 placed at page 117 of the paper book. The Ld. A.R. has further submitted that all the earlier expenses incurred on operating software had already been capitalized by the assessee, itself, in the earlier year. The expenditure of Rs.17 lakhs was incurred by the assessee for up-gradation of existing software which in fact contributed towards the smooth running of the business of the assessee. He, therefore, has submitted that such software expenses having life of short duration which require continuous up-gradation due to new technology introduced from time to time and not having long term enduring benefit were required to be treated as revenue in nature. He, in this respect, has relied upon the decision of the co-ordinate bench of this Tribunal in the case of "ACIT vs. Sanghvi Savla Stock Brokers Ltd." (2014) 43 Taxmann.com 323 (Mum-Trib.). The Tribunal in the said decision has very elaborately discussed about the nature of the software expenses and has observed that software keep on changing at a very past pace with the growing requirement in the day to day business. Most of the software become obsolete in short span and new and upgraded versions are required for

better functioning and that any expenditure on such an up-gradation or buying of software for facilitation and efficient working of operations through computers in day to day business management is to be treated as revenue in nature until and unless it is established that the software installed has a very long lasting life and enduring benefit on a capital asset. The relevant observations made by the Tribunal in para 12 of the said decision, for the sake of convenience, are reproduced as under:

> "……. Whether any particular expense falls in the capital field or revenue field has to be judged, looking to the nature of expenses and various tests laid down by the courts from time immemorial. In this age of computerization, various softwares are developed for smooth functioning of various business needs that helps business to run effectively, efficiently and profitably. The softwares keep on changing at a very fast pace with the growing requirement in the day-to-day business. Most of the softwares become obsolete in short span and new and upgraded version are required for better functioning. Unless, it has been brought on record that the software installed has a very long lasting life and enduring benefit on a capital asset, then, probably it can be said that it may not be of revenue in nature. However, the software application, per-se, do not, in any manner, supplants the source of income or make any addition to the capital side of the assessee. Thus, in our opinion, software application expenses are nothing, but up-gradation of efficient working of operations through computers in the day-to-day business management, which keeps on changing periodically and thus any expenditure on such an upgradation or buying of software is revenue expenditure only. The decisions as relied upon by the learned Counsel also supports our view. Even though the Rules have provided rate of depreciation on computer software, but that does not lead to any kind of drawing legal inference that all the softwares have to be characterised as capital asset. Thus, the grounds raised by the assessee in the cross objection are treated as allowed."

5. The above observations of the co-ordinate bench of the Tribunal can be safely applied to the case of the assessee wherein the assessee had demonstrated that the above expenditure of Rs.17 lakhs was incurred by the assessee for up gradation of existing software for smooth running of online lottery business of the assessee. We, therefore, hold that the said expenditure was rightly claimed by the assessee as revenue expenditure. We, accordingly, hereby, set aside the finding of the Ld. CIT(A) on this issue and delete the disallowance so made by the lower authorities on this issue and direct the AO to treat the said software expenses of Rs.17 lakhs as revenue in nature.

Ground No.2

6. Vide ground No.2, the assessee has agitated the action of the Ld. CIT(A) in upholding the action of the AO in treating the loan of Rs.1,25,01,689/- as unexplained credit and taxable under section 68 of the Act. The assessee has further agitated the action of the CIT(A) in further enhancing the income to Rs.1,61,15,409/- on account of unexplained credits u/s 68 of the Act.

The brief facts leading to the above addition are that the AO noticed that the assessee had taken unsecured loan amounting to Rs.1,88,62,689/-, outstanding balance of the same at the year-end being Rs.4,66,72,689/-. It was stated that out of the total outstanding unsecured loans, an amount of Rs.4,12,47,000/- belonged to the assessee's holding company 'Marketing and Brand Solutions (India) Pvt. Ltd'. (in short M & B) and the balance of Rs.54,25,689/- to 'Modi Entertainment Ltd.' (in short Modi) (a related company). The amount belonging to Modi, represented excess amount received during the current assessment year against the advance given by the assessee in earlier years. That during the year under consideration, an amount of Rs.1,34,37,000/- had been received by the assessee from M & B. The AO treated the loans of Rs.1,25,01,689/- as unexplained credit in the books of the assessee in the light of the provisions of section 68 of the Act on the ground that the entries in respect of these loans remained unexplained. Being aggrieved by the said addition, the assessee preferred appeal before the Ld. CIT(A).

7. The assessee submitted before the Ld. CIT(A) that it had taken the loan wholly and exclusively for the purpose of business. The assessee had obtained loan from its holding company in respect of which it had also submitted confirmation of the lender to the AO. After considering the submissions of the assessee, the Ld. CIT(A) called for a remand report from the AO. In the remand report, the AO stated that the assessee had taken loan from various parties and that many of these loans were squared up during the year under

consideration. However, entries, in respect of these loans, had remained unexplained. He therefore added the total loan amounting to Rs.1,25,01,689/- into the income of the assessee under section 68 of the Act. The AO also pointed out that there was a mismatch of the figure and that the correct addition should have been at Rs.1,61,15,409/- instead of Rs.1,25,01,689/-. The AO also reported in the remand report that the assessee had failed to prove the genuineness in respect of entries mentioned from Sl. No.1 to 141 of the auditor's report except the entry at Sl. No.142 representing loan taken from M& B which was found to be acceptable. Considering the above report of the AO, the Ld. CIT(A) observed that the assessee had failed to prove the genuineness of transactions and furnish the confirmations from the parties. Only the confirmation from one party i.e. M & B was furnished. He accordingly held that the additions in respect of loan from parties mentioned at Sl. No.1 to 141 of the auditor's report were liable to be confirmed. While holding so, he, also observed that the AO had not made additions in respect of loans taken from M & B or from Modi, which were sister concerns of the assessee. He accordingly upheld the additions made by the AO in respect of parties listed from Sl. No.1 to 141 in the auditor's report submitted by the assessee, however, held that the assessee had submitted confirmations in respect of M & B and Modi. He worked the correct figure of addition at Rs.1,61,15,409/- and added back the same to the income of the assessee. Being aggrieved, the assessee has come in appeal before us.

8. We have heard the rival contentions and have also gone through the records. At the outset, the Ld. A.R. of the assessee, before us, has submitted that the amounts in question credited into the accounts of the assessee were, in fact, not the loans. These, in fact, were the security deposits received by the assessee from the retailers. The Ld. A.R. has brought our attention to the application dated 17.07.14 moved for admission of additional evidence wherein it has been stated that the assessee was in possession of various

documents such as retailer application forms, distributor agreement and the relevant receipts depicting the receipt of amount from various persons along with retailer application form. The said retailer application froms were not only signed by the respective parties but also having the photographs of the each party affixed along with name, address etc. duly mentioned thereupon. The Ld. A.R. has further submitted that the above stated documents were sufficient enough to prove the genuineness of transactions and the source of credits into the accounts of the assessee. It has been explained that these documents pertained to a 10 year old period and the assessee was making all out effort to trace the same, however, despite best efforts the same could not be produced before the lower authorities. Since the said documents have now been retrieved and the same go to the root of the case, it has been pleaded that the same be admitted as additional evidence in support of the pleadings of the assessee. The Ld. A.R. in this respect has further relied upon an affidavit of one Mr. Sushil M. Waghmare, Director of the assessee company, wherein, the above facts have been explained and it has been submitted that the above documents be taken into consideration for just and proper decision of the case.

9. We have gone through the application, affidavit and the relevant documents. We find that the relevant documents go to the root of the case and are very much necessary to be looked into for just and proper decision of the case. We, therefore, allow the application of the assessee for additional evidence and direct the AO to admit the documents relied upon and sought to be produced by the assessee and after considering the said documents/evidence, decide the issue afresh in accordance with law. This issue is accordingly restored to the file of the AO.

Ground No.3

10. Ground No.3 taken by the assessee is general in nature and does not require any adjudication.

11. Now we come to the appeal of the Revenue i.e. ITA No.3325/M/2012.

ITA No.3325/M/2012

12. The Revenue in its appeal has taken the following revised grounds of appeal:

> "1. On the facts and circumstances of the case and in law, Ld. CIT (A) erred in deleting the disallowance of interest of Rs.47,84,336/- without appreciating the fact that assessee could not submit details of interest paid and usage of borrowed funds.
>
> 2. On the facts and circumstances of the case and in law, Ld. CIT (A) erred in deleting the addition made by the A.O of Rs.4,52,849/- even when payment of Employees' contribution to P.F. was made beyond the due date prescribed under the P.F. Act as per requirements of Section 36(va) of the Act, without appreciating that the employees contribution to P.F is not covered by Section 43B of the Act and therefore payment beyond due date prescribed under P.F.Act as per section 36(va) of the I.T.Act but before filing of return would not mitigate the violations of Section 36(va) of I.T.Act.4.
>
> 3. The appellant prays that the order of CIT(A) on the above grounds be set aside to the file of AO or confirm the order of the AO.
>
> 4. The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."

Ground No.1

13. Ground No.1 is relating to the action of the Ld. CIT(A) in deleting the disallowance of interest of Rs.47,84,336/-. The Ld. CIT(A), while deleting the said disallowance of interest, has observed that the loan amount in question was in fact the security deposits received by the assessee from the retailers and that the same was used for the purpose of business of the assessee.

14. The Ld. D.R., in this respect, has submitted that the finding of the Ld. CIT(A) are virtually not based on any concrete evidence on the file in this respect.

15. After going through the order of the Ld. CIT(A) on this issue and considering the submissions of the Ld. Representatives of the parties, we think

it proper to restore this issue also to the file of the AO in the light of our observations made above while restoring the issue of addition of Rs.1,61,15,409/- made under section 68 by the lower authorities in relation to ground No.2 of the assessee's appeal. Since this issue is interlinked and connected with the issue raised vide ground No.2 in the assessee's appeal, we therefore, direct the AO to decide this issue also afresh in the light of evidences furnished by the assessee in this respect.

Ground No.2

16. Ground No.2 taken by the Revenue is relating to the action of the Ld. CIT(A) in deleting the addition made by the AO in respect of late deposit of Employees' Contribution to PF. The contention of the Revenue is that the said contribution was made beyond the due date prescribed under the PF Act and hence there was a violation of the provision of section 36(va) of the Income Tax Act. Both the Ld. Representatives of the parties have fairly agreed that this issue is covered in favour of the assessee by the decision of the Hon'ble Supreme Court in the case of "CIT vs. Alom Extrusions Ltd." reported in (2009) 319 ITR 306 (SC) wherein the Hon'ble Supreme Court *inter alia* has held that the amendment to section 43B vide Finance Act, 2003 w.e.f. 01.04.2004, whereby, the second proviso to section 43B has been deleted and further amendment to 1st proviso has been made, whereby, it has been provided that nothing contained in the said section shall apply in relation to any sum which is actually paid by the assessee on or before the due date applicable for furnishing the return of income, is retrospective in nature and would operate from 01.04.1988. The Hon'ble Bombay High Court has in the case of "CIT vs. Hindustan Organics Chemicals Ltd." in ITA No.399 of 2012 vide order dated 11.07.14 has held that the Employees' Contribution to PF is covered by the said decision and that the applicable date will be on or before the due date of filing of return of income for deposit of the said contribution. Moreover, we find that the assessment year under consideration before us is A.Y. 2005-06 for

which the said amendment otherwise is applicable. The findings of the Ld. CIT(A) on this issue are therefore upheld.

17. In view of our observations made above, the appeal of the assessee is treated as allowed for statistical purposes and the appeal of the Revenue is treated as partly allowed for statistical purposes.

Order pronounced in the open court on 12.02.2016.

Sd/-	**Sd/-**
(Ashwani Taneja)	**(Sanjay Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 12.02.2016.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.