IN THE INCOME TAX APPELLATE TRIBUNAL

"J" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI N.K. PRADHAN, ACCOUNTANT MEMBER

ITA no.5793/Mum./2016
(Assessment Year : 2009–10)

Tata Teleservices (Maharashtra) Ltd.
D–26, TTC Inustrial Area
MIDC Sanpada, P.O. Turbhe ……. Appellant
Navi Mumbai 400 073
PAN – AAACH1458C

v/s

Dy. Commissioner of Income Tax
Circle–7(3), Mumbai ……. Respondent

Assessee by : Shri Nikhil Malviya
Revenue by : Shri R. Manjunatha Swamy

Date of Hearing – 05.03.2018	Date of Order – 28.03.2018

O R D E R

PER SAKTIJIT DEY, J.M.

This is an appeal by the assessee against order dated 16th May 2016, passed by the learned Commissioner (Appeals)–14, Mumbai, for the assessment year 2009–10.

2. In ground no.1, the assessee has challenged the validity of proceedings initiated under section 147 of the Act.

3. Brief facts are, the assessee a company is engaged in the business of providing telecom service. For the assessment year under

dispute, the assessee filed its return of income on 30th September 2009, declaring business loss of ₹ 69,63,73,861. That besides, the assessee offered long term capital gain of ₹ 34,33,31,420 and long term capital gain of ₹ 3,09,071. The return of income filed by the assessee was selected for scrutiny and assessment in case of the assessee was originally completed under section 143(3) of the Act vide order dated 31st December 2011, determining the income at ₹ 11,47,96,590. Subsequently, the Assessing Officer on verifying the details available on record having found that the assessee had not deducted tax at source on payment made towards inter–connection and other access charges amounting to ₹ 7.28 crore formed an opinion that due to non–deduction of tax at source the payment made by the assessee should have been disallowed but was not done resulting in escapement of income. Accordingly, he initiated proceedings under section 147 of the Act by issuing notice under section 148 of the Act to the assessee on 29th March 2012. After receiving the said notice, assessee objected to the re–opening of assessment which was rejected by the Assessing Officer on 26th December 2012. In the course of assessment proceeding, the Assessing Officer called upon the assessee to explain why the payment made towards inter–connection and access cost should not be disallowed under section 40(a)(ia) for non–deduction of tax at source. Though, the assessee objected to the proposed disallowance, however, the Assessing Officer rejecting the

objection of the assessee disallowed an amount of 7,28,19,366 under section 40(a)(ia) of the Act. Further, the Assessing Officer disallowed depreciation of ₹ 8,67,68,976, on account of reduction in cost of assets. Accordingly, he completed assessment under section 143(3) r/w section 147 of the Act. Being aggrieved of the assessment order so passed assessee preferred appeal before the learned Commissioner (Appeals) who upheld the validity of proceedings initiated under section 147 of the Act. He also upheld the disallowance under section 40(a)(ia) for non–deduction of tax at source. As regards the disallowance of depreciation, the learned Commissioner (Appeals) directed the Assessing Officer to verify whether such disallowance had already been made in rectification order date 20th March 2013, passed under section 154 of the Act and if it has already been made, not to make any further disallowance.

4. Learned Authorised Representative for the assessee appeared and filed written submission. The learned Authorised Representative submitted, re–opening of assessment having been made in the absence of any tangible material and without application of mind and on a mere change of opinion, is invalid.

5. Learned Departmental Representative strongly relied upon the observations of the learned Commissioner (Appeals) in Para–3.2 of his order.

6. We have heard rival submissions and perused material on record. As could be seen, the assessee is challenging the re–opening of assessment under section 147 of the Act basically on the reasoning that such re–opening of assessment has been made on a mere change of opinion in the absence of any tangible material. However, in the course of hearing before us, the assessee has failed to establish the fact whether the issue of non–deduction of tax at source on payments made towards inter–connect and access cost was ever enquired into and examined by the Assessing Officer during the original assessment proceeding. Undisputedly, action under section 147 of the Act in case of the assessee has been initiated before expiry of four years from the end of the relevant assessment year, therefore, the proviso to section 147 is not applicable. That being the case, the burden is on the assessee to demonstrate through cogent evidence that while completing the original assessment, the Assessing Officer has formed an opinion on the issue of non–deduction of tax at source on payment made towards inter–connect and access cost. Nothing has been brought before us by the assessee to demonstrate this fact. That being the case, the contention of the assessee that the re–assessment proceeding under section 147 has been initiated on a mere change of opinion cannot be accepted. Therefore, upholding the validity of initiation of proceedings, we dismiss this ground.

7. In ground no.2, the assessee has challenged disallowance of ₹ 7,28,19,366 under section 40(a)(ia) of the Act.

8. As discussed in the earlier part of this order, in the course of assessment proceeding, the Assessing Officer having found that the assessee has not deducted tax at source on inter–connect and access cost of 7,28,19,366, called upon the assessee to explain why the payment so made should not be disallowed under section 40(a)(ia) of the Act. Though, the assessee objected to the proposed disallowance, however, the Assessing Officer while completing the assessment disallowed the said amount under section 40(a)(ia).

9. The learned Commissioner (Appeals) also upheld the disallowance while deciding the issue in appeal filed by the assessee.

10. The assessee through its written submissions has submitted before us that in its own case, the Tribunal while deciding the appeals arising out of order passed under section 201(1) and 201(1A) considering identical issue of applicability of section 194J of the Act to inter–connect usage charges, held that the payment made towards inter–connect usage charges to other telecom network not being in the nature of fees for technical services will not attract the provisions of section 194J. In this regard, a copy of the order dated 27th May 2016, passed in ITA no.2043/Mum./2014 and others was placed before the

Bench. Thus, it was submitted, there being no liability on the assessee for deduction of tax on payment of inter–connect charges, disallowance made u/s 40(a)(ia) is unsustainable.

11. Learned Departmental Representative, though, agreed that the issue is covered by the decision of the Tribunal, however, he relied upon the observations of the Assessing Officer and the learned Commissioner (Appeals).

12. We have heard rival submissions and perused material on record. It is evident from facts on record that the disputed disallowance under section 40(a)(ia) was made by the Assessing Officer on non–deduction of tax at source on payments made towards inter–connect usage charges. Notably, in assessee's own case for assessment year 2010–11, 2011–12 and 2012–13, the Assessing Officer passed orders raising demands under section 201(1) and 201(1A) against the assessee alleging non–deduction of tax at source on payment of inter–connect usage charges. The reasoning of the Assessing Officer while raising such demands in the aforesaid assessment years was, the payment made by the assessee towards inter–connect usage charges are in the nature of fees for technical service, hence, will attract the provisions of section 194J of the Act. However, while deciding assessee's appeal on the disputed issue, the Tribunal in the order referred to above held that inter–connect usage charges are not in the nature of fees for

technical services, hence, the provisions of section 194J would not be applicable. In view of the aforesaid decision of the Co–ordinate Bench in assessee's own case there is no obligation / liability on the assessee to deduct tax at source on payment of inter–connect usage charges. Consequently, no disallowance under section 40(a)(ia) can be made for non–deduction of tax at source. Therefore, we hereby delete the disallowance of ₹ 7,28,19,366. Ground is allowed.

13. In ground no.3, assessee has challenged the addition of ₹ 8,67,68,976, on account of disallowance of depreciation.

14. As discussed earlier, the Assessing Officer while completing the impugned assessment, disallowed depreciation of ₹ 8,67,68,976, on account of consequential effect on reduction of cost of assets by virtue of learned Commissioner (Appeals)'s order for A.Y. 2003–04.

15. Learned Commissioner (Appeals), while deciding the issue directed the Assessing Officer to verify whether similar disallowance has been made in the order passed under section 154 of the Act and if such disallowance has been made therein, he directed the Assessing Officer not to make any further disallowance.

16. We have heard rival submissions and perused material available on record. It is evident from the order of the learned Commissioner (Appeals) that the assessee contested the disallowance of depreciation

only on the ground that similar disallowance has been made by the Assessing Officer in the rectification order passed under section 154 of the Act on 20th March 2013. The learned Commissioner (Appeals), after considering the aforesaid submissions of the assessee has directed the Assessing Officer to verify the claim of the assessee and delete the disallowance in case it is found that similar disallowance has been made in the rectification order. We do not find any infirmity in the order of the learned Commissioner (Appeals) on this issue. When the only relief claimed by the assessee before the learned Commissioner (Appeals) is on the ground of double disallowance of depreciation and the learned Commissioner (Appeals) has addressed the grievance of the assessee by issuing necessary directions to the Assessing Officer to delete the disallowance in case of double disallowance, there is no need to interfere with the order of the learned Commissioner (Appeals). This ground is, therefore, dismissed.

17. In the result, assessee's appeal is partly allowed.

Order pronounced in the open Court on 28.03.2018

Sd/-	**Sd/-**
N.K. PRADHAN	**SAKTIJIT DEY**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

MUMBAI, DATED: 28.03.2018

Copy of the order forwarded to:

(1) The Assessee;

(2) The Revenue;

(3) The CIT(A);

(4) The CIT, Mumbai City concerned;

(5) The DR, ITAT, Mumbai;

(6) Guard file.

True Copy
By Order

Pradeep J. Chowdhury
Sr. Private Secretary

(Dy./Asstt. Registrar)
ITAT, Mumbai