

**IN THE INCOME TAX APPELLATE TRIBUNAL
“F” BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.4486/Mum/2013
ITA No.1014/Mum/2015
ITA No.5185/Mum/2014
(A.Ys. 2003-04 to 2005-06)**

Tata Communication Limited, (formerly Videsh Sanchar Nigan Limited) Videsh Sanchar Bhavan, M.G. Road, Fort, Mumbai – 400 001	Vs.	Deputy Commissioner of Income Tax-1(3) Aayakar Bhavan, Maharshi Karve Road, Mumbai – 400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AAACV2808C		
Appellant	..	Respondent

Appellant by :	J.D. Mistry & K.A. Damania
Respondent by :	Achal Sharma & S.N. Kabra

Date of Hearing	18.04.2022
Date of Pronouncement	31.05.2022

आदेश / O R D E R

PER AMARJIT SINGH, AM:

All these appeals were filed by the assessee against the order passed by the Id. CIT(A) for A.Ys. 2003-04, 2004-05 & 2005-06, respectively. Since, identical issue on similar facts are involved in all the appeals filed by the assessee, therefore, for the sake of convenience all

these appeals are adjudicated together by taking the ITA No. 4486/Mum/2013 as a lead case and its finding will be applied mutatis mutandis to the other two appeals. The assessee raised the following grounds before us:

- “1. On the facts and circumstances of the case and in law, the Hon’ble CIT(A) has erred in upholding that the assessment was validly reopened under section 147 of the Income Tax Act, 1961.
2. On the facts and the circumstances of the case and in law, the Hon’ble CIT(A) has erred in upholding the disallowance of depreciation of Rs.4,14,25,000/@ 25% of Rs.16,57,00,000/on account of alleged excess capitalization of the value of Safe Cable network, since the correct amount being Rs. 13,51,97.627/- (in lieu of Rs. 16.57,00,000/-) already stands deducted from the gross block of Plant and Machinery in AY 2006-07, being the year in which the alleged excess capitalization was discovered, thus resulting into double disallowance.
3. Without prejudice to Ground No 2 above, the Hon’ble CIT(A) has erred in upholding the excess disallowance of depreciation amounting to Rs.76,25,593/- as computed on the alleged excess capitalization of Rs.16,57,00.000/- instead of the correct value being Rs.13,51,97,627/-.
4. On the facts and the circumstances of the case and in law, the Hon’ble CIT(A) has erred in upholding the disallowance of deduction to the extent of Rs.15,00,000/- u/s 35D of the Act.
5. The Hon’ble CIT(A) was not justified in upholding the levy of interest of Rs.2,57,20,271/- under Section 234D of the Income Tax Act. 1961 by the learned Assessing Officer.

The Appellant craves leave to add, alter, amend or withdraw the Ground of Appeal herein and to submit such statements, documents and papers as may be considered necessary either at or before the appellate hearing.”

2. The fact in brief is that return of income declaring total income of Rs.9,45,21,85,073/- was filed on 01.12.2003. The assessment was completed u/s 143(3) of the Act on 14.02.2006 and total income was assessed at Rs.12,14,72,92,885/-. Subsequently, the A.O reopened the assessment by issuing a notice u/s 148 of the Act dated 30.03.2010. The order u/s 143(3) r.w.s 147 of the Act was finalized on 28.12.2010

assessing the total income at Rs.11,60,63,81,732/-. The A.O stated in the aforesaid order that the case was reopened on the following ground:

“(i) In the revised return of income, for AY 2006-07 in Note No.1, the assessee company has submitted as follows:

“Excess provisions written back in the ‘other income’ includes an amount of Rs.13,51,97,627/written off that has been provided by the assessee on capital purchases (SAFE under Sea Cable}. This amount has been reduced from the block of the assets from the current year.”

In the reassessment order the A.O has reproduced the submission of the assessee made during the course of assessment proceeding for A.Y. 2006-07 wherein vide letter dated 29.12.2008 the assessee explained that it had claimed a deduction of Rs.13,51,97,627/- for reversal of the provisions made in the earlier years towards capital advances since the same being not a trading receipt. This amount was capitalized during April, 2002 under the head plant and machinery on the bonafide assumption that the liability would be payable by it. However, during F.Y 2005-06 on the review of the liabilities, it was discovered that out of the provisions made of Rs.16,57,48,126/-, only a sum of Rs.3,05,50,499/- was found to be payable resulting in the reversal of liability of Rs.13,51,97,627/- as no more payable. During the course of assessment proceedings for assessment year 2006-07 the assessee has also furnished a detailed note explaining the reversal of the aforesaid provision. During the course of assessment proceeding of assessment year 2006-07 the assessee also explained that the said amount was reduced from the relevant block of assets titled “Plant and Machinery of F.Y. 2005-06” and the depreciation was claimed on the reduced written down value of assets. During the course of assessment for A.Y. 2006-07 the assessee further explained that it had capitalized a sum of Rs.2,36,82,10,028/- being the value of SAFE under sea cable during the

F.Y. 2002-03 and the same was put to use during the F.Y. 2002-03. During F.Y. 2005-06 it was transpired that a small portion of the liability amounting to Rs.13,51,97,627/- was no more payable and accordingly, the same had been reversed/capitalized by reducing the same from the block of plant & machinery as at April 1st, 2005, although in the interim period viz. during F.Y. 2002-03, 2003-04 & 2004-05, depreciation amounting to Rs.7,81,61,128/- was claimed as per the provisions of Sec. 32 of the Act. It was further explained that instead of reducing the written down value amounting to Rs.5,70,36,499/- as on April 1st, 2005 along with depreciation amounting to Rs.7,81,61,128/- separately from the written down value of the block of plant & machinery, the entire excess liability of Rs.13,51,97,627/- was reduced from the value of the block of the plant & machinery as at April 1st, 2005.

3. However, on the basis of submission made by the assessee during the course of assessment for A.Y. 2006-07 the A.O has reopened the assessment for assessment year 2003-04 to 2004-05 stating that assessee had wrongly capitalized an amount of Rs.16,57,00,000/- in the F.Y. 2002-03 relevant to the assessment year 2003-04 in respect of value of SAFE undersea cable which in fact has not been incurred towards the cost of assets on which it has claimed depreciation wrongly amounting to Rs.957,95,312/- for A.Y. 2003-04, 2004-05 & 2005-06 @ 25% every year.

4. During the course of appellate proceedings before us the Id. Counsel has vehemently contended that during the assessment year 2003-04 the assessee has submitted the complete information along with supporting document and material that assessee was a member of consortium which had agreed for constructing and maintaining optical,

fiber submarine cable system linking Europe, West Africa, South East Asia. As per the consortium agreement dated 17.06.1999 the total share of the assessee in the investment was determined at US Dollar 50 million (Indian Rs.2,36,82,10,028/-). The ld. Counsel also explained that installation of the SAFE cable was completed during F.Y. 2003-04 and same was also put to use during that year. The ld. Counsel contended that the A.O has reopened the case on change of opinion as the full facts of the matter detailed information were furnished during the course of assessment for A.Y. year 2003-04. The ld. Counsel also submitted that the case of the assessee was reopened by issuing of notice u/s 148 after 4 year from the end of relevant assessment year. The ld. Counsel has filed a paper book comprising copies of document and details pertaining to assessment for A.Y. 2003-04 to A.Y. 2006-07 filed before the lower authorities. The ld. Counsel referred page no. 9 of the paper book comprising form for reopening the assessment for initiating proceeding u/s 147 and for obtaining approval of the Commissioner of Income Tax and contended that it was signed on 29.03.2010. However, the reasons for belief that income has escaped assessment was recorded on 30.03.2010 after obtaining approval of the commissioner of Income Tax for reopening of the case. The copies of the reasons recorded on 30.03.2010 were placed in the paper book at page 4 to 7. Therefore, the ld. counsel submitted that the notice issue u/s 148 was not legally valid. The ld. Counsel has also relied on number of judicial pronouncements in support of his contention discussed in para 5 of this order. The ld. Counsel has also explained that amount of liability of Rs.13,51,97,627/- was arisen in assessment year 2006-07 not in A.Y. 2003-04.

On the other hand, the ld. D.R has supported the order of ld. CIT(A).

5. Heard both the sides and perused the material on record. The assessee is a domestic company engaged in domestic & international communication business. The case of the assessee was assessed u/s 143(3) of the Act for A.Y. 2003-04. During the course of assessment proceedings the assessee has explained with supporting document placed in the paper book from page No. 122 to 135 comprising copies of construction and maintenance agreement in respect of SAFE cable system that its share of investment was determined at Rs.2,36,82,10,028/-. During the course of assessment the A.O. vide notice u/s 142(1) of the Act dated 25.11.2015 specifically asked the assessee to furnish the detail of SAFE cable expenditure consisting of four parts of expenses totaling to Rs.2,36,82,10,028/-. The A.O has also asked the assessee to give detail of SAFE cable expenditure amounting to Rs.2,19,82,05,648/- vide serial No. 19 of the query made by him. In response the assessee as per annexure 7 of letter dated 16.12.2005 has furnished the require details. On 22.12.2005 the assessee has also furnished the copies of document in support of its claim of SAFE cable capital expenses. After taking into consideration the detailed submission and facts gathered from the inquiry the A.O has finalized the assessment on 14.02.2006 without making any disallowance.

During the assessment year 2006-07 the assessee itself has shown in the return of income that out of the outstanding liability of Rs.16,57,48,126/- only a sum of Rs.3,05,50,499/- was found to be payable, resulting in the reversal of Rs.13,51,97,627/- as no more payable. The assessee has also explained that instead of reducing the

written down value amounting to Rs.5,70,36,499/- as on April, 2005 along with depreciation amounting to Rs.7,81,61,128/- separately from the WDV of the block of plant & machinery, the entire value of excess liability of Rs.13,51,97,627/- was reduced from the value of block of plant and machinery as at April 1st, 2005. However, the A.O has reopened the assessment for A.Y. 2003-04 to 2005-06 without demonstrating any tangible material establishing that there was any wrong furnishing of information by the assessee.

We have also perused the judicial pronouncements relied upon by the ld. Counsel. In the case of Lintas India Pvt. Ltd. & Union of India & Anr., dated 14.12.2021 the Hon'ble Bombay High Court held that Section 151 provides, no notice shall be issued u/s 148 by an Assessing Officer after the expiry 4 year from the end of the relevant assessment year, unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied with reasons recorded by the A.O that it is a fit case for issue of such notice. The reasons should be before the commissioner before he express his satisfaction by according the sanction. The relevant operating para is reproduced as under:

“7. We do not agree with Mr. Suresh Kumar. Section 151 as it was then applicable, expressly provides “no notice shall be issued under Section 148 by an Assessing Officer after the expiry of 4 years from the end of the relevant assessment year, unless.....is satisfied, on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice’. Therefore, the Commissioner should be satisfied on the reasons that the Assessing Officer has recorded that it is a fit case for the issue of such notice. The reasons should be before the Commissioner before he expresses his satisfaction by according the sanction. In this case, the reasons is date 05/09/2017 and the sanction letter which reads “.... I hereby convey the approval for reopening the assessment” is dated 22/08/2017 and according to the Assessing Officer who has also filed the Affidavit-in-Reply, the approval was obtained in accordance with administrative procedure followed while obtaining sanction for re-assessment. According to Assessing Officer, firstly, a proposal is submitted to the Principal CIT/Addl.CIT in

the prescribed format with the draft reasons for re-opening. Then approval is obtained from Principal CIT/Addl.CIT and thereafter the reasons as approved by the Principal CIT/Addl.CIT are recorded. Eventually, the notice under Section 148 is issued. In our view, this is a flawed procedure being adopted. The procedure being adopted is contrary to Section 151 under which the sanction has to be granted for issuing a notice under Section 148 when the Principal CIT/Addl.CIT is satisfied that it is a fit case for issue of such notice. The reasons recorded have to be final and it cannot be a draft submission for approval of the Principal CIT or Addl.CIT. The Assessing Officer has to record the final reasons as to why according to him a notice has to be issued under Section 148 and only if the Principal CIT/Addl.CIT is satisfied with the reasons so recorded, they can grant sanction and by applying their mind. The sanction cannot be given mechanically. It is based on the reasons on which a sanction has to be given for issuing the notice. Reasons cannot be submitted in a draft form for approval. The reasons have to be that of the Assessing Officer and the Commissioner cannot improve upon those reasons.”

The Hon’ble High Court of Rajasthan in the case of CIT VS. Shivratn Soni, dated 14.09.2004 held as under:

“Whether where satisfaction of Assessing Officer for formation of belief that income as escaped assessment to tax is a condition precedent for assuming jurisdiction, requirement of recording reasons before issuance of notice under section 148 is essential safeguard to taxpayer against illegal and unauthorized assumption of jurisdiction without such satisfaction - Held, yes - Whether requirement to record reasons before issuing notice under section 148 is mandatory and if reasons are not recorded, there is no valid assumption of jurisdiction and subsequent proceedings are vitiated - Held, yes.”

The Hon’ble Delhi High Court in the case of CIT Vs. Tirat Ram Ahuja, dated 02.04.2022 held that a fact which comes into existence subsequent to making of the assessment cannot be a material fact within the purview of Sec. 147. The duty to disclose material facts necessarily postulates existence of a thing or material. If a material is not in existence or if a material is such of which the assessee had no knowledge, there would be no duty to disclose such material.

The Hon’ble Delhi High Court in the case of Central India Electric Supply Co. Ltd. Vs. ITO, Company Circle -X, New Delhi, held that there was no lack of disclosure by assessee inasmuch issue of enhanced compensation was settled only when Supreme Court pronounced its

judgment and on receipt of enhanced compensation assessee had disclosed same in its return for that year.

The Hon'ble Bombay High Court in the case of Sterling & Wilson P. Ltd. Vs. ACIT, Central-14(3)(2) held that where assessee filed details regarding claim of depreciation on goodwill in original assessment proceedings and A.O after considering same, allowed said claim, initiation of reassessment to disallow depreciation was nothing but change of opinion.

With the assistance of the ld. Representative we have also gone through the copy of reason recorded for issuing notice u/s 148 of the Act. It is noticed that in the form for reopening the assessment for initiating proceeding u/s 147 approval of commissions of Income Tax was obtained on 29.03.2010, however, the reason for belief that income has escaped assessment were recorded on 30.03.2010 after obtaining the approval for issuing of notice u/s 148 of the Act. Therefore, after taking into consideration the aforesaid facts and the judicial pronouncement as discussed above in this order we consider that initiation of proceeding u/s 147 of the Act in the case of the assessee is not valid, therefore, we quash the issuing of notice u/s 148 of the Act. Since, we have set aside the proceeding u/s 147, therefore, other ground of appeal of the assessee not required any adjudication. Accordingly, appeal of the assessee is allowed.

**ITA No. 5185/Mum/2014 &
ITA No. 1014/Mum/2015**

6. All the grounds of both the appeals are mentioned above are the same as discussed in ITA No. 4486/Mum/2013, therefore, applying the

finding of ITA No.4486/Mum/2013 as mutatis mutandis, both the appeals of the assessee are allowed.

7. In the result, the appeals of the assessee are allowed.

Order pronounced in the open court on 31.05.2022

Sd/-

(VIKAS AWASTHY)
JUDICIAL MEMBER

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Mumbai, Dated 31.05.2022

PS: Rohit

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

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

आदेशानुसार / BY ORDER,
सत्यापित प्रति // True Copy //

(Asst. Registrar)
ITAT, Mumbai