*IN THE HIGH COURT OF JUDICATURE AT BOMBAY*
*ORDINARY ORIGINAL CIVIL JURISDICTION*

*WRIT PETITION NO.2486 OF 2022*

Tata Communications Limited )
having its address Videsh Sanchar Bhavan, )
M.G. Road, Fort, )
Mumbai – 400 001. ) .. Petitioner

*Versus*

1. Deputy Commissioner of Income Tax-1(3)(1)) Aayakar Bhavan, M.K. Road, )
Mumbai - 400 020. )

2. Principal Commissioner of Income Tax-1, ) Aayakar Bhavan, M.K. Road, )
Mumbai - 400 020. )

3. National Faceless Assessment Centre, Delhi,) National Faceless Assessment Centre, )
New Delhi – 110 003. )

4. Union of India )
Through the Secretary, Ministry of Finance,)
Government of India, North Block, )
New Delhi - 110 001. ) .. Respondents

---

Mr. J. D. Mistri, Senior Advocate a/w Mr. Harsh M. Kapadia for the petitioner.
Mr. Suresh Kumar for the respondents.

---

CORAM M.S. Sonak &
Jitendra Jain, JJ.
RESERVED ON: 3 March 2025
PRONOUNCED ON: 7 March 2025

JUDGMENT (Per Jitendra Jain, J):-

1. Rule. The Rule is made returnable immediately at the request of and with the consent of the learned counsel for the parties.

2. This Petition challenges re-assessment notice under Section 148 of the Income-tax Act, 1961 (the Act) dated 30 March 2021 for the assessment year (AY) 2014-2015 and the re-assessment order passed pursuant thereto dated 28 March 2022.

**Brief Facts :**

3. The petitioner filed its return of income u/s 139(1) of the Act on 24 November 2014 which was subsequently revised on two occasions namely on 17 March 2016 and 25 March 2016 which was further modified on 29 November 2016. In the original return of income, the petitioner offered guarantee fees charged to its Associate Enterprise (AE) amounting to Rs.152.66 crore by taking 1.5% of the guarantee amount as the basis. This figure of Rs.152.66 crore was credited to the profit and loss account. However, in March 2016, the petitioner realized that they have offered guarantee fee more than what was required and therefore revised the return of income by offering Rs.34.07 crore. This was done by reducing Rs.118.59 crore in revised return of income. The net effect was that the petitioner offered Rs.34.07 crore of income as guarantee fees. However, since the accounts for the financial year 2013-14 relevant to AY 14-15 were closed, the petitioner in the account of financial year 2015-16 reversed the guarantee fee amounting to Rs.118.59 crore.

4. In the revised return of of income for AY 2014-15, the petitioner under the heading 'allowable deductions' in (xiii) reduced the guarantee fee receivable pertaining to financial year 2013-14 but booked in financial year 2015-16 amounting to Rs.118.59 crore. In the note annexed to the said revised return of income, being note No.16 read as under ;

> *'The company has revised the guarantee fees charged to its subsidiaries for FY 2013-14, post finalization of the books of accounts for the year. Accordingly, the guarantee fee reported above excludes an amount of Rs.118,58,58,621 which has been accounted as reversal of guarantee income int he books of FY 2015-16. For tax purpose, the reversal has been given effect to in FY 2013-14 itself.'*

5. The above revised return of income was selected for scrutiny assessment and after obtaining the Transfer Pricing Officer's (the TPO) report, a draft assessment order was passed on 28 December 2017. In the draft assessment order, the TPO made a transfer pricing adjustment of Rs.187,556,48,429/- which included adjustment on account of "corporate guarantee fees" issued on behalf of AE's amounting to Rs.120,80,22,974/-. The reason for making the said addition, on account of corporate guarantee fees, was the TPO rejected the contention of the petitioner that only 0.33% should be estimated towards guarantee fees which the transfer pricing officer estimated at 1.5% of the guarantee amount. The draft order was a subject matter of objections filed before DRP u/s 144C of the Act and finally on 25 October 2018, an order under Section 143(3) read with Section 144-C(13) of the Act was passed wherein pursuant to the directions of the DRP, the corporate guarantee fees proposed by the TPO at Rs.120,80,22,974/- was confirmed. The said final assessment

order dated 25 October 2018 is challenged by the petitioner by filing an appeal to the Tribunal on 14 December 2018. In the writ petition, the petitioner has specifically averred that this issue of adjustment on account of "corporate guarantee fee income" is pending before the Tribunal. The appeal filed before the Tribunal is still pending as of today.

6. Meanwhile, pending the appeal before the Tribunal, a notice under Section 148 of the Act came to be issued on 30 March 2021 for the assessment year 2014-15, calling upon the petitioner to deliver a return of income within 30 days from the service of the notice. The petitioner, vide letter dated 29 April 2021, requested the assessing officer to treat the original revised return filed in March 2016 as a return pursuant to the notice under Section 148 of the Act and further requested the reasons for reopening the assessment.

7. On 12 November 2021, a notice under Section 142(1) was issued without providing the reasons, calling upon the petitioner to file its return of income. The said notice was replied by the petitioner vide letter dated 18 November 2021 wherein the petitioner once again requested the revised return filed in March 2016 to be taken as return pursuant to Section 148 notice. The petitioner also enclosed a copy of the said return.

8. On 24 March 2022, the assessing officer issued a show cause cum draft assessment order and called upon the petitioner to reply to the same within one day, i.e. by 25 March 2022. In the draft order, for the first time, the reasons recorded were reproduced and furnished to the petitioner.

9. The reasons, as produced in the draft order, read as under:

> *As per reason recorded for the re-opening of the case, the relevant part is reproduced here -*
> *"The deduction claimed by the assessee in computation of income is not admissible due to following reasons:*
> *1. Reversal of income accounted under guarantee fee in FY 2013-14 is reportedly done in the books for FY 2015-16. Hence if at all deduction is allowable based on audited books for the FY 2015-16, it is allowable only in AY 2016-17 relevant to FY 2015-16 that too subject to confirmation that it is written off in the books.*
> *2. (ii) If the deduction is allowed in AY 2014-15, this tantamount to allowing bad debts of AY 2016-17 in AY 2014-15 as the income is offered in AY 2014-15. As per the provisions of section 36(2), bad debts is allowable only in the year income is written off. Hence no deduction can be allowed in AY 2014-15.*
> *3. Department does not have any mechanism to watch whether assessee has offered the amount in the computation of income relevant to AY 2016-17 if the same is claimed in the AY 2014-15.*
> *4. DRP-2, in its order dated 27th September 2018 at para 46 confirmed the addition made by TPO on account of guarantee fee. As per DRP, guarantee commission should have been charged at the rate of 1.5% of the borrowing guaranteed instead of 0.33% charged by the assessee from its overseas Associated Enterprises. Accordingly differential amount of Rs. 120,80,22,974/- was added back in the computation."*
> *Considering the above facts and non-compliance of the assessee company, the entire amount claimed as grantee fees reversal of Rs.1,18,58,58,621/- is hereby disallowed and added back to the total income of the assessee company. Penalty proceedings u/s 271(1)(C) of the IT Act, 1961 for furnishing inaccurate particulars of income.*

10. On 25 March 2022, the petitioner filed its submissions challenging the reopening based on the reasons reproduced in the draft assessment order. The petitioner had various objections to the reopening.

11. On 28 March 2022, the Faceless Assessment Unit passed a final reassessment order in which Rs.118.59 crore

was added to the "guarantee fees" and a demand of Rs.542 crore was raised. The petitioner filed a rectification application for not crediting the prepaid taxes before arriving at the respondents' demand of Rs.542 crore. The said rectification application is also pending as of today.

12. Meanwhile, to obviate limitation period for filing an appeal, the petitioner after filing the present petition has challenged the reassessment order by filing an appeal to the Commissioner of Income Tax (Appeals).

13. It is on the above backdrop that the petitioner is before this Court challenging the reassessment proceedings as per the pre-amended law.

**Submissions of the Petitioner :**

14. Mr. Mistri, learned Senior Counsel for the petitioner submits that the impugned notice is issued after a period of 4 years from the end of the relevant assessment year and in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment, the reassessment notice and the proceedings are bad in law. He further submits that the issue of "guarantee fees" is pending before the Tribunal and therefore even on this account the impugned proceedings are barred by the 3rd proviso to Section 147 of the Act. He further submitted that in the assessment order addition of Rs.120.8 crore on account of "guarantee fee income" has been made and therefore there cannot be any case for the very same amount having escaped the assessment so as to confer jurisdiction on the respondents

for reopening the case. He also submitted that there is no fresh tangible material and the present proceedings are nothing but would amount to change of opinion on the issue which was examined during the course of the regular assessment proceedings.

15. Mr. Mistri, learned Senior Counsel for the petitioner also has raised various other grounds which we do not propose to reproduce and adjudicate in this petition but leave it open to be decided in appropriate case. Mr. Mistri, learned Senior Counsel, therefore, prayed for quashing of the notice u/s 148 of the Act and consequent assessment order passed pursuant thereto.

**Submissions of the Respondents :**

16. Mr. Suresh Kumar, learned counsel for the respondent submitted that the petitioner did not file its return of income pursuant to notice u/s 148 of the Act and therefore was not entitled to the reasons recorded. He submits that this is in accordance with the procedure laid down by the Supreme court in the case of ***GN Driveshafts (India) Ltd vs Income Tax Officer And Ors***[1] wherein it was obligatory on the petitioner to file its return of income before asking for the reasons for reopening. He further submitted that the reversal of the "guarantee fees" was not the issue during the course of original assessing proceedings. Therefore the submissions made by the petitioner is required to be rejected. He, however, does not dispute that the issue of "guarantee fees" is pending before the Tribunal. He relied upon the affidavit-in-reply in

1 (2003) 259 ITR 19

support of these submissions and prayed for dismissal of the appeal.

17. In the reply filed by the respondents, reasons disclosed for reopening the assessment reads as under:

> *REASONS FOR REOPENING OF ASSESSMENT*
>
> *1. The assessee company filed its return of income for A.Y.2014-15 on 25.11.2014 declaring total income at Rs.999.60 Crore. The return was revised on 25-3-2016 declaring revised Income of Rs.892.37 Crore. The return was again revised on 29-11-2016 offering Income of Rs.922.69 Crore. Assessment u/s 143(3) r.w.s. 144C was completed on 25.10.2018 assessing total Income at Rs.1237.63 Crore. While completing scrutiny assessment, return filed by assessee on 29-11-2016 was considered.*
>
> *2. It is seen from the return and computation filled by the assessee on 29-11-2016 and also on 25-3-2016 that assessee had claimed a deduction of Rs.118,58,58,621 under the head Guarantee fee reversal pertaining to FY 2013-14 but booked in FY 2015-16. No such deduction was claimed in the original return filed on 25-11-2014. At note No.16 attached to the computation of Income it is stated that the company had revised the guarantee fee charged to its subsidiaries for AY 2013-14, post finalisation of the books of accounts for the year. Accordingly, it was stated that the guarantee fee offered to tax excludes an amount of Rs.118,58,58,621 which has been accounted as reversal of guarantee income in the books of FY 2015-16. It is stated for tax purpose, the reversal has been given effect to in FY 2013-14 itself.*
>
> *The deduction claimed by the assessee in computation of income is not admissible due to following reasons;*
>
> > *1. Reversal of income accounted under guarantee fee in FY 2013-14 is reportedly done in the books for FY 2015-16. Hence if at all deduction is allowable based on audited books for the FY 2015-16, it is allowable only in AY 2016-17 relevant to FY 2015-16 that too subject to confirmation that it is written off in the books.*
> >
> > *2. (ii) If the deduction is allowed in AY 2014-15, this tantamount to allowing bad debts of AY 2016-17 in AY 2014-15 as the income is offered in AY 2014-15. As per the provisions of section 36(2), bad debts is allowable only in the year income is written off. Hence no deduction can be allowed in AY 2014-15.*
> >
> > *3. Department does not have any mechanism to watch*

*whether assessee has offered the amount in the computation of income relevant to AY 2016-17 if the same is claimed in the AY 2014-15.*

*4. DRP-2, in its order dated 27th September 2018 at para 46 confirmed the addition made by TPO on account of guarantee fee. As per DRP, guarantee commission should have been charged at the rate of 1.5% of the borrowing guaranteed instead of 0.33% charged by the assessee from its overseas Associated Enterprises. Accordingly differential amount of Rs.120,80,22,974 was added back in the computation. If the assessee claims any further deduction from the income already offered, the differencial amount to be added would further increase to that extent.*

*3. In view of above, deduction claimed by the assessee to the extent of Rs.118,58.58,621 is not allowable in the AY 2014-15. This had resulted in under assessment of income to the extent of Rs. 118,58,58,621.*

*4. Hence, It is clear that there is failure on the part of assessee to disclose fully and truly all material facts necessary for the assessment for the year in question within the meaning of First provision to section 147(1) of the Act.*

*5. In view of the above, I have reason to believe that income chargeable to tax to the tune of Rs. 118,58,58,621/-has escaped the assessment within the meaning of section 147 of the Act for the A.Y.2014-15. It is therefore proposed to issue notice u/s 148 of the Income-tax Act, 1961 for A.Y.2014-15 to reassess such income and also any other income chargeable to tax which has escaped the assessment and which may come to notice subsequently in the course of proceedings under this section.*

*6. In this regard, as mandated by Section 151 of the IT Act, 1961, the satisfaction of the Pr. Commissioner of Income Tax-1, Mumbai, regarding fitness of the case for issuing for issuing notice u/s 148 of the IT Act, 1961 is hereby requested on the above mentioned reasons.*

## Analysis and Conclusion :

18. We have heard learned senior counsel for the petitioner and learned counsel for the respondent.

19. Relevant provisions of Section 147 as it existed at the relevant point are reproduced herein:

*147. Income escaping assessment - If the Assessing Officer has reason to believe" that any income chargeable to tax has escaped assessment" for any assessment year, he may", subject to the provisions of sections 148 to 153, assess or reassess" such income "and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings" under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*

*Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*

*Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year.*

*Provided also that the Assessing Officer "may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.*

*Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.*

20. There is no dispute that, in this case, the original assessment order u/s 143(3) of the Act was passed on 25 October 2018, and the impugned notice under Section 148 of the Act has been issued after the expiry of 4 years from the end of the relevant assessment order. As per the first proviso

to Section 147 of the Act, reassessment proceedings cannot be initiated unless there is a failure to disclose fully and truly all material facts necessary for the original assessment. In the instant case, reasons reproduced in the draft assessment order, which were the reason furnished to the petitioner at the first instance, does not allege any failure on the part of the petitioner to disclose fully and truly all material facts anywhere in the assessment. There is no an allegation that any income has escaped assessment. Therefore, on this ground itself the proceedings must be quashed. It is a settled position that the reasons furnished at the first instance to an assessee have to be looked into, and the same cannot be improvised subsequently. This position is laid down by the decision of the Co-ordinate bench of this Court in the case of ***Indivest Pte Ltd. Vs Adit & Ors***[2]***.***

21. In any case, in the documents annexed to the affidavit in reply, the respondents have annexed reasons for reopening, which differ from those reproduced in the draft order. On a comparison of the reasons filed along with the reply and the reasons as reproduced in the draft assessment order, in the reasons annexed to the reply, there are 5 crucial paragraphs which are absent in the reasons reproduced in the draft order, namely paras 1, 2, 3, 4 and 5. It is a settled position that the reasons furnished to the assessee have only to be seen, and the officer cannot supply different reasons in the affidavit of reply.

22. Even otherwise, in the reasons annexed to the reply, the reasons itself state, ***'it is seen from the return and***

2 (2013) 350 ITR 120

*computation of income....'*. It further states that *'at note No.16 attached to the computation of income.....revised the guarantee fee...'.* This indicates that the reasons are based on the documents forming part of the original assessment proceedings. There is no fresh tangible material that has been referred to in the reasons annexed to the reply, which would empower the assessing officer to reopen the case, more so after a period of 4 years.

23. The reasons appearing in the draft assessment order and to the reply filed by the respondent do not disclose what are the facts which the Petitioner has not disclosed and which were necessary for the assessment. In the absence of this statement in the reasons recorded the impugned proceedings are required to be quashed and set aside, as being without jurisdiction.

24. Admittedly, there is also no dispute that the issue of "guarantee fee" is pending before the Tribunal since an addition was made on this count in the original assessment proceedings. As per third proviso to section 147 of the Act, if the subject matter is pending before the Appellate Authority, then the assessing officer is debarred from initiating the reassessment proceedings on that very issue. In the instant case, even on account of third proviso to section 147, the impugned proceedings are without jurisdiction.

25. It is also important to note that the fact that the issue of guarantee fee is pending before the Tribunal in the petitioner's appeal clearly shows that this issue was examined in the course of the original assessment proceedings.

Therefore, in the absence of any fresh tangible material, the impugned proceedings would amount to a change of opinion for reviewing the earlier order, which is not permissible under the Act.

26. The jurisdictional requirement is that the reassessment proceedings can be initiated if any income has escaped the assessment. In the instant case, the issue of the "guarantee fee" has been added to the assessment order passed under section 143(3) r/w. 144C(13) of the Act. If that be so, we fail to understand as to how the said issue would amount to having escaped the assessment. Therefore, even on this count, the impugned proceedings and the approval granted to such proceedings are wholly without jurisdiction.

27. Therefore, to summarise, because there was disclosure, there was enquiry and because there was enquiry there was addition and because there was addition, issue is pending before the Tribunal in appeal and therefore none of the jurisdictional condition can be said to have been satisfied for exercising powers under Section 147 of the Act and consequent reassessment order to survive.

28. The respondent justifies its delay in giving reasons for reopening by pointing out that the petitioner did not file its return of income pursuant to Section 148 notice. Assuming we accept such contention, however, since the reasons have been given in the draft assessment order, this Court is certainly entitled to examine the reasons for deciding the satisfaction of the jurisdictional condition for reopening the case.

29. Even otherwise, the petitioner vide letters dated 29 March 2021 and 18 November 2021 requested the respondent to treat the revised return filed in March 2016 as return filed pursuant to the notice under Section 148 of the Act and further a copy of the said return was also filed. In our view, this would amount of substantial compliance of the requirement of filing of return of income pursuant to the notice under Section 148 of the Act. The petitioner is justified in relying upon the decisions of Delhi High Court in the case of ***Principal Commissioner of Income-tax v. S.G. Portfolio (P.) Ltd.***[3] ***and Madras High Court in the case of Swapna Manuel v. Assistant Commissioner of Income-tax***[4], in support of the contention that a letter filed by an assessee to treat the original return as return pursuant to 148 notice would amount to compliance of notice under Section 148 of the Act.

30. We note that the petitioner has filed an appeal after filing the present petition to obviate the limitation period and since, as held by us above, the reassessment proceedings are wholly without jurisdiction, we exercise our discretion to entertain the present petition and quash the reassessment notice under section 148 of the Act dated 30 March 2021 and consequently the assessment order passed on 20 March 2022. Mr. Mistri, learned Senior Counsel states that the petitioner would withdraw the appeal filed before the Commissioner of Income-tax (Appeal) within two weeks from the date of uploading the present order, and such appeal would be deemed to have been withdrawn.

---

3 (2023) 151 taxmann.com 307 (Delhi)
4 (2024) 160 taxmann.com 166 (Madras)

31. For all the above reasons, the rule is made absolute in above terms and the notice under section 148 dated 30 March 2021 and the reassessment order dated 28 March 2022 is quashed and set aside.

32. The rule is made absolute without costs.

(Jitendra Jain, J) (M.S. Sonak, J)