IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2959 OF 2015

Tata Business Support Services Ltd.
Survey No. 15, Marisoft III
Kalyani Nagar, Marigold,
Pune – 411 014 **Petitioner**

Versus

1) Dy. Commissioner of Income Tax
Circle 1(2), Pune, PMT Building,
2nd floor, Room 204, Swargate,
Pune – 411 037

2) Income Tax Officer,
Ward 7(5) Pune, 60/61 Praptikar Sadan,
Erandwane, Karve Road
Pune – 411 004

3) Union of India
Through the Secretary, Ministry of Finance
North Block, New Delhi – 110 001 **Respondents**

Mr. Mihir C. Naniwadekar for the Petitioner.

Mr. Tejveer Singh with Mr. A. R. Malhotra for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.

DATED :- MARCH 26, 2015

ORAL JUDGMENT:- (Per S.C.Dharmadhikari, J.)

Rule. Respondents waive service.

2) Since Mr. Tejveer Singh appearing for the Respondents, upon service of notice, informed the Court that the Respondents do not

wish to file any affidavit and admit the factual statements and assertions in the Writ Petition that by consent Rule is made returnable forthwith.

3) The Writ Petition is directed against the notice dated 30th March, 2014 (Annexure 'J') and the order dated 26th February, 2015 (Annexure 'M') and the Petitioner prays that the same be quashed and set aside, after due scrutiny and verification thereof as to their legality and validity.

4) The Petitioner is a public limited company incorporated and registered under the Indian Companies Act, 1956, having its registered office at the address mentioned in the cause title. It is engaged, *inter alia,* in the business support services. The first Respondent before this Court is the Deputy Commissioner of Income Tax and who has issued the impugned notice and, the second Respondent is the officer who has passed the impugned order rejecting the Petitioner/Assessee's objections to the reopening of the assessment for the assessment year 2007-08. The third Respondent is Union of India.

5) For the above assessment year, return of income was filed electronically on 31st October, 2007 declaring loss of Rs.13,13,16,597/-.

The case was selected for scrutiny by the Assessing Officer. The notice under section 142(1) of the Income Tax Act, 1961 (for short the "IT Act") was issued on 16th July, 2009. The Petitioner claims that the questionnaire was issued at the relevant time and based on that, the Petitioner gave a detailed note on the nature of its business. It placed on record the balance sheet and profit and loss account along with all enclosures. Further details were also asked in the course of assessment proceedings.

6) The Assessee of course has undergone a change in its name, it is common ground that these documents were produced, the details furnished including the director's report for financial year 2006-07. The scrutiny assessment was undertaken and completed. The order in that behalf was passed on 24th August, 2009 (Annexure 'D').

7) The Petitioner states that subsequently on 11th October, 2010, a departmental audit party raised certain queries in relation to the payments made to TRX Inc. The audit query was based on re-examination of the assessment record itself. According to the Petitioner, no new facts or additional material had been disclosed. The Petitioner responded to this audit query after it was made available to it, by its communication dated 7th May, 2012. These documents are annexed as Annexures 'E' and 'F'.

8) Thereafter, a notice was issued under section 154 of the IT Act (Annexure 'G') dated 19th June, 2012. The details of the alleged mistake proposed to be rectified were made available to the Assessee by letter dated 6th July, 2010. The alleged mistake was stated to be that of the management fees and taken to be allegedly capital in nature. A detailed reply was filed to this notice by the Petitioner on 10th July, 2012 (Annexure 'I'). The Petitioner hoped that with this reply/clarification, the matter must have been closed by the Revenue. However, impugned notice was issued dated 30th March, 2014 (Annexure 'J'). That notice was received only on 2nd April, 2014. The reasons recorded for reopening were supplied on demand by letter dated 9th February, 2015 (Annexure 'K').

9) It is the Petitioner's case that neither the notice nor the reasons record that the necessary sanction has been accorded for the reopening by the superior authorities, as mandated by law. Hence, there is a clear defect going to the root of the matter and the notice is without jurisdiction. Then, on the reasons supplied, the Petitioner raised objections and these are contained in the letter dated 24th February, 2015, copy of which is at Annexure 'L'. It is these objections which were rejected by the order dated 26th February, 2015 (Annexure 'M').

10) This Writ Petition impugns and challenges the above and on various grounds.

11) Mr. Naniwadekar, learned Counsel appearing for the Petitioner submits that since the assessment is sought to be reopened after more than four years and to be precise nearly six years, then, the matter falls within the first proviso to section 147. In that, the requirement is of the Assessee having allegedly failed to disclose material facts truly and fully. Our attention has been invited by Mr.Naniwadekar to the reasons for reopening the assessment (page 144 of the paper book). He submits that the reason No. 1 is that they paid the management fees under the shared service agreement for acquisition of two US contact center from TRX Inc., USA. The second reason is that the expenditure is capital in nature when it is made for the initiation of the business or for extension of a business or for a substantial replacement of equipment. The enduring nature of the product is a pre-condition to determine whether the expenditure is capital. According to the Revenue, the expenditure is incurred in connection with procurement of the US contact centers which is obviously an capital asset. The expenditure of management fees is incurred with a view to bring into existence an asset for the enduring benefit of the business. In the circumstances, the Assessee did not

disclose all material facts at the time of assessment and therefore, the income chargeable to tax has escaped assessment. The carried forward loss and to the extent of Rs.984.40 lacs is referred in these reasons.

12) Mr. Naniwadekar submits that this is not what is contemplated by law and to enable reopening of assessment. There is absolutely no reason as to which fact is not disclosed, leave alone truly and fully. Mr. Naniwadekar invites our attention to page 42 and 57 of the paper book. He submits that at page 42, the profit and loss account for the year ended 31st March, 2007 discloses the management fees. It refers to the figures for the year ended 31st March, 2007 and year ended 31st March, 2006. Then, Mr. Naniwadekar invites our attention to page 57 of the paper book to submit that there were complete details which were provided under the heading US contact center acquisition. How the payments were accounted for has been truly and fully disclosed. Beyond this, there is no requirement in law and the Assessee cannot be expected also to indicate as to how this matter has to be appreciated and considered. This is a clear case where the Revenue is having another opinion and therefore reopening is not permissible on such ground. Mr. Naniwadekar also invites our attention to the order rejecting the objections and particularly para 4 thereof, wherein, the finding is that the Assessee failed to make full and true disclosure of

facts in the sense it has distorted facts as per its convenience. Such a finding does not suffice in law and in that regard, our attention is also invited to a para of the director's report at page 31. Mr. Naniwadekar submits that Respondent No. 2 copies the features of the acquisition of U. S. centers and as contained in this director's report. Based on all this, no reopening is permissible is the submission of Mr. Naniwadekar. He relied upon the two Judgments delivered by this Court, one in the case of *Bombay Stock Exchange Ltd. vs. Deputy Director of Income Tax (Exemption) and Ors.* reported in **(2014) 365 ITR 160**. He relies upon the conclusion recorded in this Judgment that a bald averment in the reasons that the Assessee has failed to disclose material facts would not suffice. The Assessing Officer must indicate that what material facts were not disclosed. The second Judgment is also rendered in the case of the same Assessee reported in **(2014) 365 ITR 181**. Mr.Naniwadekar submits that the Division Bench of this Court in this case concluded that when initiation of reassessment proceeding was based merely on change of opinion as no new material, tangible or otherwise, has been relied upon, then, that is impermissible in law. Mr.Naniwadekar emphasizes that in this Judgment, the same view taken by the Division Bench earlier has been reiterated, namely that the Assessing Officer has not set out in the reasons which fact or other material was not disclosed by the Assessee that led to income escaping.

If the conclusion is based on material already supplied and before the Assessing Officer, then, the reopening is not permissible and in that regard, para 5 of this decision is relied upon.

13) On the Other hand, Mr. Tejveer Singh appearing for the Revenue would submit that section 147 of the Income Tax Act is merely a procedural provision. *Explanation* 1 to section 147 of the IT Act would denote as to how mere production of documents or account books would not suffice. That does not mean that the Assessing Officer had a look at them and considered their contents. If the Assessee did not seek the reasons in time in this case and the officer has clearly opined as to how the income has escaped assessment for non disclosure of true and material facts, then, this is not a case for interference in Writ Jurisdiction. The view of the Revenue cannot be termed as perverse or vitiated by non application of mind or any error of law apparent on the face of the record. This Court must, therefore, allow the Revenue to take further steps in accordance with the notice and the reasons. The order recording objections and dealing with them should not be interfered with in the Writ Jurisdiction. The Petition be, therefore, dismissed.

14) With the assistance of both Counsel, we have perused the Writ Petition and all Annexures thereto. The impugned notice is dated

30th March, 2014. A copy of this notice is at Annexure 'J' at page 142 of the paper book. We have noted, on several occasions, that notices of this nature are issued in a standard format and often the officers merely fill in the blanks or tick mark whatever is applicable. We would highly appreciate if the department draws a notice not in this format, but something by which it would be clear in indicating to the Assessee as to why section 147 of the IT Act has been resorted to. The notice at page 142 reads as under:-

"**NOTICE UNDER SECTION 148 OF THE INCOME TAX ACT, 1961**

No. PN/DCIT Circle 1(2)/148/2013-14/

Office of the
Dy. Commissioner of Income-Tax,
Circle-1(2), PMT Building, 2nd floor,
Room No. 204, Swargate,
Pune – 411 037
Date: 30.03.2014

To,
The Principal Officer,
Tata Business Support Services Limited,
Survey No. 15, Marisoft III, Kalyani Nagar, Marigold,
Pune – 411 014.

PAN: AABCT9406B

Sir/Madam,

Where as I have reason to believe that income chargeable to tax for the assessment year 2007-08 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/re-assess the income for the said A. Y. 2007-08 re-compute/loss of the I. T. Act, 1961 assessment year and I hereby require you to deliver to me within 30 days from the date of service of this notice, a return in the prescribed form of your income for the said assessment year.

(Vipul Waghmare)
Dy. Commissioner of Income Tax
Circle 1(2), Pune."

15) Assuming that the reasons can be supplied, provided the Assessee demands the same, what is imperative is that they should be recorded. In the present case, on 9th January, 2015, the Petitioner/ Assessee may have applied for supplying of the reasons for reopening of the assessment for the assessment year 2007-08. In the present case, it is undisputed that the assessment is sought to be reopened after six years of the assessment. At request, therefore, reasons were supplied and which indicate that the return of income for assessment year 2007-08 on 31st October, 2007, declaring loss of 13,13,16,597/- was taken up for scrutiny and the scrutiny assessment was completed on 14th December, 2009 accepting the loss. The notice therefore issued on 30th March, 2014 ought to conform with section 147 and what is provided in the first proviso. That enables reopening of the assessment after the expiry of four years, if the 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 of the IT Act 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. We are not concerned with the other two provisos. For, they are not applicable here.

16) Mr. Tejveer Singh refers to *Explanation* 1 to section 147 of the IT Act and that reads as under:-

> *"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."

17) A perusal thereof would indicate as to how 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 foregoing proviso. Thus, production of books and other evidence from which material evidence could be discovered with due diligence is not what is sufficient. The Assessee must disclose fully and truly all material facts necessary for his assessment. In the present case, it is alleged that the Assessee has failed to disclose fully and truly all material necessary for the assessment, for that assessment year. However, the reasons for reopening the assessment at page 144 of the paper book read as under:-

> "REASONS FOR REOPENING OF ASSESSMENT IN THE CASE OF Tata Business Support Services Pvt. Ltd. A. Y. 2007-08 PAN-AABCT9406B
>
> The return of income for A. Y. 2007-08 on 31/10/2007 declaring loss of Rs.13,13,16,597/-. The scrutiny assessment has been completed on 14.12.2009 accepting the loss.
>
> On going through the profit and loss account it is noticed that the assessee has debited Rs.984.80 lakhs as management fees.

Further, it was noticed from the notes of accounts that the assessee has paid the management fees under the shared service agreement for acquisition of two US contact center from TRX Inc., USA. The Assessee has taken over the business along with the employees and the two centers became branch operation from April 1, 2006. The amount has been debited in profit and loss account for A. Y. 2007-08 as revenue expenditure.

The expenditure is capital in nature when it is made for the initiation of the business for extension of a business or for a substantial replacement of equipment. The enduring nature of the product is a pre-condition to determine whether the expenditure is capital. In this case it is pertinent to note that the expenditure is incurred in connection with procurement of the US contact centers which is obviously an capital asset. The expenditure of management fees is incurred with a view to bring into existence on assets for the enduring benefit of the business.

The assessee did not disclose all material facts at the time of assessment. There is failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment and for the at assessment year under proviso I of section 147 of IT Act. The facts regarding the issue have not been put up before AO which framing the assessment. In view of the above facts and findings, I have reason to believe that there is excess carry forward of loss to the extent of Rs.984.80 lakhs which has been escaped assessment. Hence case needs to be reopened u/s 147 of the IT Act, 1961. Issue notice u/s 148 of the IT Act, 1961.

(Vipul D. Waghmare)
Dy. Commissioner of Income Tax
Circle 1(2), Pune."

18) A bare perusal of the reasons would indicate as to how the Assessing Officer now says and on going through the profit and loss account that the Assessee has debited Rs.984.80 lacs as management fees. The Assessing Officer himself refers to the notes of accounts and states that the Assessee has paid the management fees under shared service agreement for acquisition of two US contact centers from TRX

Inc., USA. It is further alleged in the reasons itself that the Assessee has taken over the business along with employees from 1st April, 2006. This amount has been debited in profit and loss account for assessment year 2007-08 as revenue expenditure. Thus, not only the amount of the management fees debited to the account has been provided but by production of profit and loss account. In the profit and loss account, the head "management fees" is indicated and the sum debited. There are notes of accounts which indicate as to how the payment has been made and under the shared service agreement. The salient features of this agreement and as contained in further documents, namely, director's report, balance sheet and notes to the balance sheet have been produced. What the Revenue then expects the Petitioner/Assessee to produce has not been clarified or explained to us at all. If these are not facts and material for the purpose of assessing as to whether the loss indicated and under this head has been so suffered, then, what more is required to be produced and with the aid of which document or material should have been indicated with sufficient clarity. In the present case, unless this material so produced was expressly referred and considered, it was not possible to reason out as above. Now what emerges from paras 2 and 3 of the reasons is that this expenditure ought to have been treated as capital, but has not been so treated. Then, there is a mechanical reason as to how the Assessee did not

disclose all material facts. The law postulates reassessment for failure to disclose fully and truly all material facts. We do not see how the first sentence that the Assessee did not disclose all material facts at the time of assessment would suffice in the given circumstances. Then, there is an allegation that there is a failute on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment and reference is made to the proviso. The facts regarding the issue have not been put up before the Assessing Officer while framing the assessment.

19) In reply to this, the Assessee pointed out and specifically by the letter dated 24th February, 2015 that at the time of scrutiny assessment, all the facts and material demanded by the Assessing Officer on 16th July, 2009 were supplied on 5th August, 2009. On perusal of the assessment order, it is clear that the Assessing Officer has applied his mind to the facts of the case, to the Assessee's submission and then he has allowed the management fees of Rs.984.80 lacs as revenue expenditure. Reliance was placed upon para 3 of the assessment order and the findings therein.

20) The Assessee, therefore, objected and pointed out that the reassessment is proposed but without looking into the facts and material for the purposes of the treatment given to the said expenses.

The director's report and which was before the Assessing Officer as well has been referred to. In the director's report, under the head "international operations", all details as to how the acquisition was made and under what documents with all the salient features and the benefit occurring to the company have been pointed out. Reference was also made to note No. 10 in the notes forming part of the profit and loss account. It is in these circumstances that we are of the view that there is merit in Mr. Naniwadekar's submission that the reassessment is undertaken only on account of change of opinion. Now it is proposed to give different treatment and to the same head of expenses. In that regard, the order dated 26th February, 2015 rejecting the objections is relied upon. The said order indicates that reopening of assessment beyond four years is possible when the Assessee has not made true and full disclosure of material facts to complete the assessment. We are sorry to see such non application of mind and which is apparent. Section 147 deals with 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 provisions of sections 148 and 153 of the IT Act 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. The first proviso to this section refers to non disclosure of material facts truly and fully. As to what facts are material and disclosure of which is not true and full depends upon circumstances in each case. No general rule can be laid down. However, the crucial words are "failed to disclose fully and truly all material facts". The satisfaction about this is mandated and non disclosure thereof permits resorting to the power under section 147. Thus, the principle requisite is that any income chargeable to tax has escaped assessment and for the relevant assessment year and reopening of which is a discretion vested in the Assessing Officer. That can be exercised even after expiry of four years, but then, the requirement of the first proviso has to be satisfied. From the first proviso, it is evident that the Assessee cannot urge that he had produced before the Assessing Officer account books or other evidence from which material evidence could be discovered by the Assessing Officer. Therefore, if there is a non disclosure of full and true material facts, then, the Assessee will not be able to get away by merely urging that he has produced before the Assessing Officer account books or other evidence from which material evidence could, with due diligence, be discovered by the Assessing Officer.

21) In the present case, when the Revenue alleges failure to make full and true disclosure of material facts, then, the term failure has some specific legal connotation. Here, material facts are pertaining to the expenses under the head "management fees". It is apparent that the words employed are material facts. It is not just facts but material facts. The word "material" in the context means "important, essential, relevant, concerned with the matter, not the form of reasoning" (see Oxford Dictionary Concise Eighth Edition). Just as disclosure of every fact would not suffice but for proceeding under section 147 non disclosure ought to be of a material fact. The Assessee disclosed that loss under this head is derived from the acquisition of two centers. If that is known to the Revenue in this case, then, what further facts were expected to be disclosed so as to make the assessment has not been indicated. Mr.Naniwadekar is therefore right in urging that when the material facts have been disclosed and with full particulars truthfully, then, it is not enough to allege that there is a distortion of facts and as per the convenience of the Assessee. If there was distortion, then, we do not know as to how the Revenue contended before us and concluded in the reasons that the loss occasioned because of acquisition of two centers in US. Then, in para 4.1 at page 155, the reasons indicate that the factors stated by the Assessee go to prove that the payment of management fees to TRX Inc., USA has given enduring benefit to the

assessee and is therefore capital in nature. Thus, now a different treatment to this head of loss is intended. The statement in the reasons that the Assessing Officer never questioned the Assessee with regard to deduction claimed in the profit and loss account in this regard during the course of assessment proceeding and also the Assessee showed no initiative to appraise the Assessing Officer of the actual facts is patently incorrect and inaccurate. There is no denial of the fact that when the case was selected for scrutiny, not only did the Petitioner give a detailed note on the nature of business, but with regard to every single heading in its balance sheet and profit and loss account. It produced the necessary enclosures. On 11th October, 2010, a departmental audit party raised objection and the audit query was brought to the notice of the Petitioner. The Petitioner responded to the same as well. Then, notice under section 154 of the IT Act has also been issued. It is thus apparent that when the assessment order was passed and which clearly refers to all the material supplied, then, this observation and conclusion is erroneous to say the least. At page 19 of the Petition paper book, there is a letter dated 16th July, 2009 addressed by the Assessing Officer to the Petitioner's principal officer and which calls upon the Petitioner to file a detailed note on the nature of business. It also calls upon the Petitioner to furnish certain information and balance sheet and profit and loss account along with all annexures. The corresponding figures

for financial year 2005-06 under each heading are also called for facilitating comparison. Then, such further details, as are contained in this letter, have been clearly called for. The communication was extensive in nature. The Petitioner responded on this count and produced before the Assessing Officer the requisite details and the information. All this has been referred in the assessment order, copy of which is at page 85 of the paper book. Thus, we do not see any basis for the above conclusion and which has been reached. We find that the present case is fully covered by the Judgment of the Hon'ble supreme Court and which has been repeatedly relied upon and followed, namely, *Commissioner of Income Tax vs. Kelvinator of India Limited* reported in **320 ITR 561**. Mr.Naniwadekar's reliance on the two Division Bench Judgments is also apposite.

22) We are of the clear view that there was no failure to disclose material facts and failure to place a version favourable to the Revenue cannot be a reason to reopen the assessment. The conclusion that the Assessing Officer never applied his mind on this issue and therefore change of opinion is not the basis on which the assessment is sought to be reopened cannot be sustained. In the light of the undisputed factual material and referred by us extensively, it is apparent that the reopening was fully impermissible in law. Rather we do not

find any reference to the specific stand taken by the Petitioner while objecting to the notice under section 148 of the IT Act. The Petitioner pointed out as to how the assessment was finalized. Reference has been made to the letter dated 16th July, 2009 from the Assessing Officer and the response thereto on 5th August, 2009. There is no denial of the fact that the Assessing Officer has applied his mind to the expenditure debited to the profit and loss account and not disallowed it. The facts and which are taken from the director's report itself would indicate that the Assessee had disclosed what was relevant and necessary for the purpose of making assessment. The Assessee did not hold back any document nor failed to supply any information in addition to the explanation given by it in writing concerning the said management fees expenses. In the circumstances, this is a clear case of change of opinion and based on which, the reassessment is proposed. That being impermissible in law, the Writ Petition must succeed. It is accordingly allowed. Rule is made absolute in terms of prayer clauses (a) and (b). No costs.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**