* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 25.09.2019
Pronounced on:16.12.2019

\+ W.P.(C) 11452/2017

INTEC CORPORATION ..... Petitioner

Through: Mr. M.S. Syali, Senior Advocate with Mr. Bharat Beriwal, Mr. Mayank Nagi, Mr. Tarun Singh and Mr. Pulkit Verma, Advocates.

versus

THE ASSTT. COMMISSIONER OF INCOME TAX CIRCLE 31(1), NEW DELHI ..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing Counsel with Mr. Deepak Anand, Mr. Piyush Goyal, Mr. Vivek Gurnani and Mr. Agni Sen, Advocates.

CORAM: JUSTICE VIPIN SANGHI
JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.

1. The present petition filed under Article 226 of the Constitution of India *inter alia* seeks issuance of a writ of certiorari for quashing the notice dated 25.03.2017 issued by the Respondent under section 148 of the Income Tax Act, 1961 (hereinafter 'the Act') in relation to Assessment Year (AY) 2009-10 and the order dated 07.12.2017 passed by the Respondent disposing of the objections raised by the Petitioner in response to the aforesaid notice.

2. Petitioner has premised the challenge to the notice dated 25.03.2017 (hereinafter 'the impugned notice'), on the ground that the Assessment Officer (AO) did not have the jurisdiction to issue the impugned notice beyond six years from the end of relevant AY - 2009-10 i.e. the maximum time limit provided for issuance of notice under Section 148 of the Act.

3. Before delving into the merits of the case, we may note that the Petitioner has not addressed any arguments with respect to the merits of case, i.e. the assumption of jurisdiction by the AO under section 147/148 of the Act. This has been specifically averred in the note of arguments filed in the Court. Revenue, also asserts that there is no pleading or ground in the petition questioning the validity of reopening *viz* Section 147/148 of the Act. Thus, we are not venturing into the contest- whether, or not, the impugned notice fulfils the requirement of Section 147. Consequently, we have confined and restricted our scrutiny only to the issue of limitation, in the context of applicability of Section 150 of the Act. Since the scope of challenge has been curtailed, the judgments relied upon by the Petitioner and the Revenue, dealing with the scope of notice under Section 147 have not been dealt with in the present case.

Brief Facts:

4. Petitioner is engaged in the business of manufacturing and marketing of Roof Mounted Package Air Conditioners (RMPU's) and has a manufacturing unit in Kala Amb, H.P. (hereinafter referred as "Kala Amb Unit"). In order to expand its business, Petitioner set up a new unit at Selaqui in Uttarakhand (hereinafter 'the Selaqui Unit'), in the year 2006. Petitioner claimed to have

started production of the RMPU's, in the Selaqui Unit during the financial year 2007-08, and claimed deduction of profits, under Section 80-IC of the Act, in the concerned AY, 2008-09. The claim filed by the Petitioner for deduction of profits was selected for scrutiny and rejected by the AO, inter alia, on the ground of violation of the conditions prescribed in Section 80-IC (4)(ii) of the Act. Petitioner preferred an appeal before the CIT (A), against the order of the AO and succeeded therein. As a result the deductions claimed by the Petitioner under Section 80-IC of the Act, were allowed. The order of CIT (A), was challenged by the Revenue, before the Income Tax Appellate Tribunal (hereinafter 'ITAT').

5. In the meanwhile, Petitioner's case for AY 2009-10 was also selected for scrutiny on the same ground i.e. deductions claimed under Section 80-IC of the Act. Petitioner requested the concerned AO to follow the order of CIT (A), as the same was binding upon him. The concerned AO acceded to Petitioners request and completed the assessment for the AY 2009-10 under Section 143(3) of the Act, without disallowing deduction under Section 80-IC of the Act.

6. Subsequently, vide order dated 16.01.2017, ITAT reversed the findings of the CIT (A) w.r.t. AY 2008-09 and allowed departmental appeal in favour of the Revenue.

7. In this background, the AO issued the impugned notice dated 25.03.2017, under Section 147 / 150 of the Act, for reassessment of the return filed by the Petitioner for the AY 2009-10, requiring the Petitioner to file the return

for the said AY. Petitioner complied with the notice and sought reasons for re-opening the assessment, which were provided to it by the Revenue. Thereafter, the Petitioner vide letter dated 20.11.2017 raised objections against the reasons provided by the Revenue for reopening the assessment, which were rejected on 07.12.2017, reiterating that reopening of the assessment is necessary and obligatory in consequence of and in order to give effect to, the finding or direction contained in the order dated 16.07.2019, passed by the ITAT.

Case of Petitioner:

8. Mr. M.S. Syali, learned Senior counsel for the Petitioner, contends that as per Section 149, notice under Section 147 could have been issued within a maximum period of 6 years from the end of the relevant assessment year. The period of six year in the present case i.e. for AY 2009-10 ended on 31.03.2016. Invocation of Section 150 of the Act, on the premise of giving effect to finding/direction contained in the order passed by the ITAT, w.r.t. AY 2008-09, is not valid and does not justify the extension of limitation of six years to re-open an assessment. He contends, it is trite law that the principle of *res judicata* is not applicable to income tax proceedings, and assessment for each year is a distinct and independent proceeding. The finding recorded in one assessment year is not required to be mandatorily followed in subsequent years, and the AO is duty bound to consider new facts placed on record by the assessee. Further, he contends that in its order dated 16.07.2019, the ITAT has not given any finding or direction with respect to the AY 2009-10. Thus, Section 150 of the Act cannot be invoked for re-opening the assessment for AY 2009-10 on the basis of the aforesaid

order. Concomitantly, he submits that the ITAT could not have given any material finding or direction in respect of an assessment year, of which the assessment was not under challenge before it. He further submitted that the word "effect" used in Section 150(1) would mean "final effect" and the term "finding/direction" would mean "final finding/direction". Since, the order of the ITAT is subject to final adjudication by the High Court or Supreme Court, and also for the fact that Petitioner's Miscellaneous Application under Section 254(2) of the Act, seeking rectification of mistakes in the order of the ITAT is pending until today, the order of the ITAT cannot be given effect to, until it has attained finality, one way or the other. In support of his submissions, he has relied upon several precedents on various legal propositions that have been taken into account and dealt with appropriately while giving our analysis and findings.

Case of the Respondent:

9. Per contra, Mr. Zoheb Hussain, learned senior standing counsel for the Revenue, contends that the order passed by the ITAT, holding the Petitioner not eligible to claim benefit of deduction under Section 80-IC of the Act, is binding for the AY 2009-10 as well, and reopening of the assessment under Section 148 read with Section 150 is valid and proper. He contends that the provision of Section 150(1) and 153(3) are clear and unambiguous as to the power of Revenue to reopen assessments, in consequence of, or to give effect to, any finding or direction of an appellate authority. The assessee is not eligible for any benefit under Section 80-IC and as per its own submissions during the course of assessment proceedings in the relevant year, the assessee agreed that the order of the ITAT for AY 2008-09 will be

binding for AY 2009-10. Thus, the reopening under section 148 read with 150 is in accordance with law. Moreover, Section 150 does not contemplate finality of orders and has a non-obstante clause specifically excluding applicability of section 149.

Analysis and Findings

10. Before adverting to the merits of the contentions raised by learned counsel for both the parties, the relevant extracts of the provisions of law are reproduced hereunder for ready reference:

> ***"147.*** *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) :*
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> *** *** ***
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> *Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—*
> *(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;*
> *(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by*

the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

*** *** ***

148. *(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :*

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150. *(1) Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.*

(2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken.

153. *(1) No order of assessment shall be made under section 143 or section 144 at any time after the expiry of twenty-one months from the end of the assessment year in which the income was first assessable:*

*** *** ***

Explanation 2.—For the purposes of this section, where, by an order referred to in clause (i) of sub-section (6),—

(a) any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order; or

(b) any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, if such other person was given an opportunity of being heard before the said order was passed."

11. The present case pertains to AY 2009-10. In terms of Section 149(1)(b) of the Act, the case can be reopened within six years from the end of the relevant assessment year. The Revenue has relied upon Section 150 to reopen the assessment for AY 2009-10, in light of the order of ITAT pertaining to the AY 2008-09. The reasons as provided to the Petitioner are indicated in the letter dated 15.09.2017. Reference thereto is essential for deciding the present petition and the same is extracted herein below:-

"In response to your letter dated 22.06.2017, you are hereby provided the reasons for reopening as under:

" In this case, the return for Ay was filed by the assessee on 29-09-2009 declaring total income of Rs. 21895890. The assessee has claim deduction of Rs. 2536835 being the profit from its industrial unit of Selaqui u/s 80IC during the AY 2009-10. The return was processed under section 143 (1) on same income. The case was selected for scrutiny u/s 143 (3) and the returned income was accepted.

In this case of the assessee the return of the income for AY 2008-09 was filed by the assessee declaring income of Rs. 15282400. The assessee claimed deduction of Rs. 31309690 from its gross total income u/s 80IC of the Income Tax Act

being the profit from a new industrial unit at Selaqui in Uttarakhand claim to have commenced the manufacturing and production during the year. The entire manufacturing of assessee was done upto AY 2007-08 from its industrial unit at Kala-Amb, Himachal Pradesh and during the year under assessment, the manufacturing process had been split between the unit at Kala-Amb and Selaqui. Hence, during scrutiny proceedings for the AY 2008-09, the Assessing Officer (AO) disallowed the deduction claim u/s 80IC on the profits of Selaqui unit being the unit not eligible as the same was made by splitting its earlier manufacturing unit. The aggrieved assessee filed appeal before the Ld. CIT (A) who decided the matter in favour of the assessee vide his order dated 05-10-2011.

The scrutiny proceeding for AY 2009-10 was under progress when the order of CIT (A) was pronounced. The assessee has claimed deduction of Rs. 2536835 being the profit from its industrial unit at Selaqui u/s 80IC during the AY 2009-10. Though the department filed the appeal before the ITAT against the decision of CIT (A) for AY 2008-09 before the then AO, in relation to the proceedings for AY 2009-10, the assessee pressed to follow order of CIT (A) in respect of allowability of deduction u/s 80IC for AY 2008-09 and also submitted that the decision of the Tribunal would be binding as on that date. The relevant portion of the submission made by the assessee vide letter dated 22.12.2011 is reproduced as under:

> *"At the very outset, we would like to bring on record that the directions given by the Additional Commissioner of Income Tax, Range-23, New Delhi (copy of which has not been enclosed with your notice under reply) are prejudiced to the assessee in as much as the same are beyond the scope of the Act and the application u/s 144A dated 30.11.2011 filed by the assessee. However,*

> *we assume that this must be in response to our application dated 30.11.2011 to him u/s 144A of the Income Tax Act, 1961 seeking directions to you to follow the order of the learned CIT (A)-XXIII, New Delhi (copy of which has already been placed on record) in the assessee's own case for AY 2008-09.* ***That, as such, the CIT (A) order being the only order before you till date the same is binding upon you. The reason given to us for not following the said order being that you will be preferring an appeal to the Tribunal is academic in nature and as and when you do so the decision of the Tribunal would be binding as on that date.****"*

The then AO allowed the deduction while considering the submission of the assessee.

Now, the Hon'ble ITAT in its order dated 16-01-2017 allowed the appeal of the Revenue and sustained the addition made by the AO for the AY 2008-09 by holding that it is a case of splitting up/re-construction of the business already in existence for which the assessee is not eligible for deduction u/s 80IC.

The AO allowed of deduction of Rs. 2536835 u/s 80IC for AY 2009-10 by considering the submissions made by the assessee following the order of the CIT (A) in assessee's own case for AY 2008-09 which was in assessee's favour. Now that ITAT has held that the assessee is not at all eligible for any benefit u/s 80IC. Now, as per the assessee's own submission made during the proceeding for AY 2009-10, the directions of the ITAT in 2008-09 is also binding for the AY 2009-10.

I have independently examined all the material and reached on the conclusion that the case is squarely covered by Section 150 of the Income Tax Act which states as under:

"Notwithstanding anything contained in the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or re-computation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law."

As per the assessee's own submission made during the proceedings for AY 2009-10, the directions of the ITAT is AY 2008-09 is also binding for the AY 2009-10.
The case is not covered under the first proviso to Section 147 of the Income Tax Act.

Considering the factual matrix, statutory provisions and legal principles, the undersigned has reason to believe that there has been an escapement of income to the tune of Rs. 2536835/- chargeable to tax for the assessment year 2009-10 and hence it is a fit case for initiation of proceedings in terms of section 147 of the I.T. Act, 1961.

Accordingly, necessary approval u/s 151 of the I.T. Act, 1961 is solicited for issuance of notice u/s 148 of the I.T. for Asstt. Year 2009-10."

2. The reason of re-opening for A.Y. 2009-10 u/s 147 of the Income Tax Act, 1961 provided above is for your information."

12. On a perusal of the reasons for reopening, it emerges that, during the course of assessment for AY 2009-10, Petitioner has claimed deduction from its gross income under Section 80-IC of the Act, being the profit from manufacturing and production at its new industrial unit at Selaqui in

Uttarakhand. Petitioner claimed that the entire manufacturing of assessee upto AY 2007-08, was done from its industrial unit at Kala Amb, Himachal Pradesh and thereafter, the manufacturing process had been split between the unit at Kala Amb and Selaqui. During scrutiny proceedings for AY 2008-09, the AO disallowed the deductions claimed under Section 80-IC on the profits of Selaqui unit made by splitting its earlier manufacturing unit. On an appeal preferred by the Petitioner, CIT (A) decided the matter in favour of the assessee. During the scrutiny proceeding for AY 2009-10, the Petitioner pressed to follow the order of CIT (A) in respect of deduction under Section 80-IC for AY 2008-09 and also submitted that the decision of the ITAT would be binding upon it. The relevant portion of the submission made by the Petitioner has been reproduced in the reasons that formed the basis for reopening the assessment, as extracted hereinabove. Since the Petitioner agreed to be bound by the findings of the ITAT, the question arises as to whether it is legally permissible to reopen the assessment pertaining to AY 2009-10 in light of the decision of ITAT pertaining to AY 2008-09.

13. The main plank of Petitioner's argument is that Section 150 mandates the existence of 'finding' or 'direction' for the re-assessment of the year for which the action is taken. Mr. M.S. Syali has argued, that the 'finding' or 'direction' must relate to AY 2009-10, and a finding in respect of AY 2008-09 would not suffice. In this regard, Mr. Syali has firmly relied upon the judgment of the Supreme Court in ***Income Tax officer v. Murlidhar Bhagwan Das, (1964) 52 ITR 335 (SC)***, wherein it has been held as under:-

"... ... ***It is important to remember that the proviso does not confer any fresh power upon the Income-tax Officer to make assessments in respect of escaped incomes without any time-limit. It only lifts the ban of limitation in respect of certain assessments made under certain provisions of the Act and the lifting of the ban cannot be so construed as to increase the jurisdiction of the tribunals under the relevant section. The lifting of the ban was only to give effect to the orders that may be made by the appellate, revisional or reviewing tribunal within the scope of its jurisdiction. If the intention was to remove the period of limitation in respect of any assessment against any person, the proviso would not have been added as a proviso to sub-section (3) of section 34, which deals with completion of an assessment, but would have been added to sub-section (1) thereof****.*

The words relied upon are "section limiting the time", "any person", "in consequence of or to give effect to any finding or direction." ***A "finding", can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year.*** *The AAC may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression "direction" cannot be construed in vacuum, but must be collated to the directions which the AAC can give under section 31 of 1922 Act. Under that section he can give directions,* inter alia, *under section 31(3)*(b), (c) *or* (e) *or section 31(4) of 1922 Act.* ***The expression "direction" in the proviso could only refer to the directions which the AAC or other Tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression "finding" as well as the expression "direction" can be given full meaning,***

namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words "in consequence of or to give effect to" do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions.

The expression "any person" in its widest connotation may take in any person, whether connected or not with the assessee, whose income for any year has escaped assessment; but this construction cannot be accepted, for the said expression is necessarily circumscribed by the scope of the subject-matter of the appeal or revision, as the case may be. That is to say, that person must be one who would be liable to be assessed for the whole or a part of the income that went into the assessment of the year under appeal or revision. *A combined reading of section 30(1) and section 31(3) of 1922 Act indicates the cases where persons other than the appealing assessees might be effected by orders passed by the Appellate Commissioner. Modification or setting aside of assessment made on a firm, Joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the HUF or the individual, as the case may be. In such cases though the latter are not* eo nomine *parties to the appeal, their assessments depend upon the assessments of the former. It is not necessary to pursue the matter further.* ***It was, therefore, to be held that the expression "any person" in the setting in which it appeared must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal.***"

(emphasis supplied)

14. The Petitioner has further relied on ***Rajender Nath v. CIT, (1979) 120***

ITR 14 (SC), wherein it has been held as under:-

> *"11.* ***The expressions "finding" and "direction" are limited in their meaning. A finding given in an appeal, revision or reference arising out of an assessment must be a finding necessary for the disposal of the particular case, that is to say, in respect of the particular assessee and in relation to the particular assessment year. To be a necessary finding it must be directly involved in the disposal of the case.*** *It is possible in certain cases that in order to render a finding in respect of A, a finding in respect of B may be called for. For instance, where the facts show that the income can belong either to A or B and to no one else, a finding that it belongs to B or does not belong to B would be determinative of the issue whether it can be treaed as A's income. A finding respecting B is intimately involved as a step in the process of reaching the ultimate finding respecting A. If, however, the finding as to A's liability can be directly arrived at without necessitating a finding in respect of B, then finding made in respect, of B is an incidental finding only.* ***It is not a finding necessary for the disposal of the case pertaining to A. The same principles seem to apply when the question is whether the income under enquiry is taxable in the assessment year under consideration or any other assessment year. As regards the expression "direction" in section 153(3)(ii) of the Act, it is now well settled that it must be an express direction necessary for the disposal of the case before the authority or court. It must also be a direction which the authority or court is empowered to give while deciding the case before it. The expressions "finding" and "direction" in section 153(3)(ii) is not of the Act must be accordingly confined (sic) . Section 153(3)(ii) is not a provision enlarging the jurisdiction of the authority or court. It is a provision which merely raises the bar of limitation for making an assessment order under section 143 or section 144 or section 147—ITO v. Murlidhar Bhagwan Das (1964) 52 ITR 335 (SC)*** *and* ***N. Kt. Sivalingam Chettiar v. CIT (1967) 66 ITR 586 (SC)****. The question formulated by the Tribunal raised*

the point whether the AAC could convert the provisions of section 147(1) into those of section 153(3)(ii) of the Act. In view of section 153(3)(ii) dealing with limitation merely, it is not easy to appreciate the relevance or validity of the point."

(emphasis supplied)

15. Petitioner also relied upon ***Gujarat Power Corporation Ltd. vs. ACIT, (2013) 350 ITR 266***, wherein it has been held as under:-

"41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. ***Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be re-opened by the same authority.*** *Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under section 147 of the Act.* ***However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee.*** *The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue.* ***This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.****"*

(emphasis supplied)

16. On this issue, Revenue has relied upon the decision of this Court in ***Commissioner of Income Tax v. P.P. Engineering Works, (2014) 369 ITR 433 (Delhi)***, where the Court had the occasion to interpret Section 150 and 153. In the said decision, this Court also considered the judgment of the Supreme Court in ***Murlidhar Bhagwan Das*** (supra), and taking note of the legislative history including purpose behind enactment of Sub-Section (2) to Section 150, and explanations 2 and 3 to Section 153 of the Act, observed as under:-

> *"**4.** Aggrieved, appellant-Revenue preferred an appeal before the Tribunal relying upon Section 153 of the Act. **It is noticeable that the Commissioner of Income Tax (Appeals) did not refer to Section 150 (2) and Section 153, Explanation 2 of the Act**. The Tribunal also without referring to the two provisions, held that the assessment order could not be sustained, as the Tribunal had not given any finding or direction in the earlier order dated 11th August, 2008 relating to the assessment year 2000- 1.*
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> *** *** ***
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> ***7.** Delhi High Court in **Rural Electrification Corpn. Ltd. v. CIT (2013) 355 ITR 345/34 taxmann.com 197 (Delhi)** had occasion to consider the effect of Explanation 3 and whether the ratio as expounded by the Supreme Court in **ITO v. Murlidhar Bhagwan Das (1964) 52 ITR 335 (SC)** would be still applicable. The legislative history including purpose behind enactment of sub-section (2) to Section 150 and Explanations 2 and 3 to Section 150 of the Act were referred to. Reference was also made to sub-section (3), clause (ii) of Section 153 of the Act and thereafter it was opined:—*

"12. When the Income Tax Act, 1961 was enacted, Section 153 did not contain the Explanations 2 and 3. Those explanations were introduced subsequently in 1964 after the Supreme Court decision in ***Murlidhar Bhagwan Das*** *(supra).* ***It is therefore, apparent that the two explanations were added so as to supersede the view taken by the Supreme Court in respect of the 1922 Act. Explanation 2 in Section 153 makes it clear that even where any income is excluded from the total income of the assessee from a particular assessment year, then an assessment of such income for another assessment year shall, for the purpose of Section 150 as also of Section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order. In other words, a finding in respect of a different year can also be used for the purposes of invoking the provisions of Section 150 of the said Act, by virtue of the deeming provision contained in Explanation 2 in Section 153 of the said Act. This would otherwise not have been available in view of the decision of the Supreme Court in Murlidhar Bhagwan Das (Supra). Similarly, Explanation 3 stipulates that where, by an order inter-alia passed by the Tribunal in an appeal, any income is excluded from the total income of one person and held to be the income of another person, then, assessment of such income on such other person shall, for the purposes of Section 150 as also Section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order*...*"*

8. *In* ***Rural Electrification Corporation Ltd.*** *(supra), Explanation (3) to Section 153 was applicable and in this case, Explanation 2 to Section 153 would be applicable, and the ratio*

and reasoning given in ***Rural Electrification Corpn. Ltd.*** *(supra) would apply with equal force. Explanation 2 to Section 153 applies when income is found to be relating to some other year and Explanation 3 applies when income is found to be income of some other person. Otherwise, the two explanations are identical and serve the same purpose.*

9. *Similar view has been taken by Gujarat High Court in* ***Kalyan Ala Barot v. M.H. Rathod (2010) 328 ITR 521*** *, wherein effect of the two explanations read with sub-section (2) to Section 150 were considered and it was held:—*

> *"13.* ***On a plain reading of sub-section (3) of section 153 of the Act, it is apparent that the same lifts the bar of limitation laid down under sub-section (1) and subsection (2) thereof in respect of the classes of assessments, reassessments or recomputations enumerated thereunder. Thus, in the light of the provisions of section 153(3)(ii) the normal time limit for completion of assessments or reassessments, as contained in section 153(1) or section 153(2), shall have no application where the assessment is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under sections 250, 254, 260, 262, 263 or 264 or in an order of any Court in a proceeding otherwise than by way of appeal or reference under the Act.***
>
> *14. The language employed in Explanation 2 to section 153 makes it abundantly clear that under the said provision, when an order in appeal, revision or reference is made whereby any income is excluded from the total income of an assessee for an assessment year, then an assessment of such income for another assessment year shall be deemed to be one made in consequence of or to give effect to any finding or*

direction contained in the said order for the purpose of section 150 or section 153. ***Thus, for the purpose of resorting to the exception provided under sub-section (3)(ii), it is not necessary that there should be any specific finding or direction contained in the said order with regard to assessment of income for another assessment year in light of the deeming provision in Explanation 2 below section 153 of the Act. The very fact that income has been excluded from the total income of the assessee for an assessment year by virtue of an order referred to in clause (ii) of sub-section (3) would be sufficient for the purpose of making an assessment of such income in another year and for the purpose of section 150 and section 153, the same would be deemed to have been made in consequence of or to give effect to any finding or direction contained in the said order****.*

18. Another contention raised on behalf of the petitioner is that a finding in terms of section 150 of the Act can only be that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. ***The expressions "finding" as well as "direction" can be only in the context of a finding necessary for giving relief in the assessment of the year under consideration.*** *That an order made in relation to a particular assessment year cannot be made the basis for reopening the concluded assessment of an earlier assessment year.* ***However, the said contention loses sight of Explanation 2 below section 153 which provides that where, by an order referred to in clause (ii) of sub-section (3), where any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for***

> ***another assessment year shall, for the purposes of section 150 and section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order****.*
>
> *19.* ***On a combined reading of sub-section (1) of section 150 and sub-section (3) of section 153, it is apparent that in cases falling under clause (ii) of sub-section (3) of section 153 read with Explanation 2 thereunder, the provisions of subsection (1) of section 150 would be applicable and the bar of limitation under section 149 would not be applicable.*** *While section 150(1) and section 153(3) contemplate issuance of notice under section 148 and completion of assessment, reassessment and recomputation respectively, in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision,* ***Explanation 2 to section 153(3) contains a deeming provision which provides that where by an order referred to in clause (ii) of sub-section (3) any income is excluded from the total income of an assessee for an assessment year, then an assessment of such income for another assessment year shall for the purposes of section 150 and section 153 be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order****."*
>
> *(emphasis supplied)*

17. Petitioner has however argued that the dicta of the Supreme Court in ***Murlidhar Bhagwan Das*** (supra) under the Income Tax Act, 1922 is applicable with equal force to Section 150 of the 1961 Act, notwithstanding the amendments noted above. It is also argued that Revenue cannot take

recourse to the judgment of ***P.P Engineering*** (supra) as it applies only to the situations that are covered by the Explanation to Section 153. However, we find that subsequent to the decision of the Supreme Court in ***Murlidhar Bhagwan Das*** (supra), the position in law has undergone change, in view of the enactment of Sub-Section (2) to Section 150 and Explanations 2 and 3 added to Section 153. Now, there cannot be any doubt that a finding in respect of a different year can also be used for the purpose of invoking the provisions of Section 150 of the said Act. Our observations are not to be construed to mean that the ratio of the Supreme Court in ***Murlidhar Bhagwan Das*** (supra) has lost relevancy. However, certainly the observations made therein have to be examined in light of the changed legal position. The explanation inserted subsequent to the said judgment has to be weighed in the facts of each case. The explanation has to be read so as to harmonize with, and clear up any ambiguity in the main provision. In this regard it is useful to refer to the decision of the Supreme Court in ***S. Sundaram Pillai v. V.R. Pattabiraman*, (1985) 1 SCC 591,** the relevant portion of which reads as under:

> *"**53.** Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—*
>
> *"(a) to explain the meaning and intendment of the Act itself,*
>
> *(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,*
>
> *(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,*

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

18. Undoubtedly, the situations contemplated by the Explanation do not exist in the present case, however, it is to be borne in mind that Explanation 2 introduces a deeming concept and therefore, the scope of the Section is enlarged. This, however, cannot be construed to mean that Section 150 can be resorted to only for the situations which are covered by virtue of Explanation 2 to Section 153.

19. Before proceeding further, it would be necessary to first understand, the "finding" in question in the present case. The ITAT has, for AY 2008-09, held that the Assessee's Selaqui unit for which deduction under Section 80-IC was sought, did not carry on any manufacturing activity and it was just a dropbox address. The Assessee had transferred more than 20% of the total machinery employed at Selaqui unit from Kala Amb unit in violation of Section 80-IC (4) (ii) of the Act. The relevant findings in the ITAT order read as under:-

"17. We are unable to. agree with the Id. CIT, (A) who has

taken the affidavit filed by Shii R.S. Sidhu as a gospel truth even without insisting upon any evidence to support his findings. First of all, the affidavit of Shri R.S. Sidhu relied upon by the ld. CIT (A) is undated Secondly, the CIT (A) has proceeded in haste in entertaining the undated affidavit in the evidence in violation of Rule 46A of the Income-tax Rules, 1962 (for short 'the Rules') to believe the averment made by the assessee in the affidavit as gospel truth. Thirdly, there was no mention of telephone number, tele-fax and internet facility at the Selaqui unit because in the purchase order dated 05.07.2007 telephone number of Kala Amb unit is given and tele-phone number, of Head Office, Delhi of the assessee has been given Fourthly documents transporting the machinery purchased from Grip Engineers Pvt. Ltd., and ABB, Faridabad are not tallying with the material receipt dated 03.05.2007 regarding transportation of21 electrical motors through truck no. DL 1M 1252 whereas 21 electrical motors were alleged to have been transported by ABB through truck no. HR35J5393 on 28.04.2007. All these facts go to prove that the Selaqui unit was just a drop box address and no manufacturing activities are being carried out in the same.

18. Assessee stated to have purchased the machinery from M/s. Grip Engineers Pvt. Ltd., BaUabhgarh and ABB, Faridabad on 23.04.2007 and 28.04.2007 respectively but stated to have stored the same at Kala Amb unit for want of non-availability of the transit form to be issued by Uttarakhand Government. When assessee alleged to have started manufacturing at Selaqui unit in the month of June 2007, it is difficult to believe as to why the order was placed 5 months in advance without getting the necessary transit form issued, which to our mind, does not require any extensive exercise, particularly when the Government is providing exemption to the new unit u/s 80-IC, it cannot take five months to issue transit form.

19. Moreover, when this fact is examined in the light of the fact that no travelling allowance has been debited by the assessee to the P&L account during the year under assessment, it is

difficult to believe that any manufacturing activities have been carried out at the Selaqui unit. Because earning the turnover of Rs.11.11 crores with profit of Rs. 3.13 crores from the assembling / manufacturing unit is humanly not feasible without supervision of senior / junior functionaries of the ,assessee either from Kala Amb unit or from Head Office, Delhi nor any skilled worker has ever visited the Selaqui unit or proyed to be engaged. So, all these facts strengthen the findings returned by the AO' which have been overturned by the CIT (A) on the basis of whims and fancies. Since the assessee has transferred tools and machinery more than 20% of the total machinery employed' at Selaqui unit from Kala Amb unit it is violation of section 80-IC (4)(ii) of the Act.

20. The factum of transfer of machinery by Grip Engineers Pvt. Ltd. Balabhgarh and ABB, Faridabad to the Kala Amb unit of the assessee on 23.04.2007 and 28.04.2007 respectively with which the assessee has alleged to have started manufacturing in the month of June 2007 is not to be seen in isolation, rather it is to be seen in the light of the connected facts and circumstances that the assessee has debited only amount of Rs. 1,35,388/- under the head wages, bonus, PF, ESI, etc, with which at the most only one worker can be hired and no expenditure has been debited to P&L account on account of travelling expense nor telephone, tele-fax and internet facility is proved to have been established at Selaqui unit. So we are of the considered view that new plant and machinery, even if assumed to be transferred by the assessee from Kala Amb unit to Selaqui unit, it was never put to use to carry out the manufacturing activities to qualify for exemption under Section 80-IC."

20. We may note that the aforesaid order has been upheld by this Court in **ITA No. 72/2019**, decided on 28th January 2019, and the matter is stated to be pending challenge before the Supreme Court.

21. Petitioner has argued that since the deduction under Section 80-IC of the

Act has to be claimed on year to year basis, it is possible for the Assessee to be denied deduction in one year, but to be allowed deduction in another year. In support of this submission reliance has been placed on, ***CIT v. Seeyan Plywoods, 190 ITR 564 (Ker), CIT v. Satellite Engineering Ltd., 113 ITR 208 (Guj), CIT v. Suessin Textile Bearing Ltd., 135 ITR 443 (Guj), HCL Technologies v. ACIT, 377 ITR 483 (Del), Deputy Commissioner of Income Tax, Circle-11(1) Bangalore v. Ace Multiaxes Systems Ltd., 400 ITR 141.*** While, this position may be correct, however, one cannot ignore the fact that the finding given by ITAT strikes at the foundation of the claim of the Petitioner that Selaqui unit is entitled to deduction under Section 80-IC of the Act for the immediate succeeding year in question. Since ITAT categorically observed that Petitioner cannot claim deduction under Section 80-IC of the Act, as it did not commence production at the Selaqui unit for the AY 2008-09, Petitioner cannot claim deduction under the same proviso without satisfying the AO that for the AY 2009-10, he had in fact commenced production at the Selaqui unit. Moreover, one cannot also lose sight of the fact that during scrutiny proceedings before the AO for the year 2009-10, the Assessee took benefit of the order of the CIT (A) by submitting that its case for the present year is covered by the decision of the CIT (A) for AY 2008-09. The Petitioner in its reply dated 22.12.2011 stated that any order passed by ITAT will be binding as on that date. The relevant portion is recorded in the following words:-

> *"At the very outset, we would like to bring on record that the directions given by the Additional Commissioner of Income Tax, Range-23, New Delhi (Copy of which has not been enclosed with your notice under reply) are prejudicial to the*

> *assessee in as much as the same are beyond the scope of the Act and the application under Section 144A dated 30.11.2011 filed by the assessee. However, we assume that this must be in response to our application dated 30.11.2011 to him under Section 144A of the Income Tax Act, 1961 seeking directions to you to follow the order of the Ld. CIT(A) XXIII, New Delhi (Copy of which has been already placed on your record) in the assessee's own case for assessment year 2008-09. That, as such, the CIT(A) order before you till date the same is binding upon you. Your reason given to us for not following the said order being that you will be preferring an appeal to the Tribunal is academic in nature and as and when you do so the decision of the Tribunal would be binding as on that date"*

22. In pursuance to the aforesaid reply and on consideration thereof, the AO allowed the deduction of the Assessee for AY 2009-10 and accepted the return of income filed by the Assessee. The acceptance of the deduction claimed by the Assessee in the relevant assessment year was a direct consequence of the order passed by CIT (A) in the preceding AY, and the undertaking given by the Petitioner to be bound by the order of the ITAT for the AY 2008-09. Pertinently, at that stage the Petitioner did not claim that each year is to be assessed separately and, therefore, the finding of the CIT (A) for AY 2008-09 is not relevant for assessment of income for AY 2009-10. The Petitioner is now somersaulting in its submission and is clearly approbating and reprobating, which is not permissible. Thus, in view of the facts in the present case, where the Petitioner categorically agreed to be bound by the order of the ITAT, the finding rendered by the ITAT is sufficient and Revenue would be entitled to avail the benefit of Section 150.

23. Additionally, Petitioner has harped that there was no ground for

reassessment of the AY 2009-10 and the subject matter of the appeal before ITAT was confined to AY 2008-09. The grounds of appeal, discussion and decisions relied upon before the ITAT, all concentrate on the said year only. Reliance was placed on ***CIT vs. Greenworld Corporation, (2009) 314 ITR 81 (SC)***, wherein issue arose with respect to giving effect to directions of CIT under Section 263 of the Act. While, deciding the said question, the Court held, *"a finding is held to be one, to which effect needs to be given, to comply with the order of the authority concerned"*. The relevant portion of the said decision reads as under:-

> *"**Section 150(1) of the Act is an exception to the aforementioned provision. It brings within its ambit only such cases where reopening of the proceedings may be necessary to comply with an order of the higher authority. For the said purpose, the records of the proceedings must be before the appropriate authority. It must examine the records of the proceedings. If there is no proceeding before it or if the assessment year in question is also not a matter which would fall for consideration before the higher authority, section 150 of the Act will have no application.***
>
> *This Court noticed the development of law as also the fact that the decision of the Income-tax Officer given in a particular year does not operate as res judicata to opine :*
>
> > *"The lifting of the ban was only to give effect to the orders that may be made by the appellate, revisional or reviewing Tribunal within the scope of its jurisdiction. If the intention was to remove the period of limitation in respect of any assessment against any person, the proviso would not have been added as a proviso to sub-section (3) of section 34, which deals with completion of an assessment, but would have been added to sub-*

section (1) thereof."

(emphasis supplied)

24. Further, reference has been made to the decision of ***Marubeni India v. Commissioner of Income Tax, 328 ITR 306 (Del)***, to submit that the ITAT could not have given a finding in respect of an AY which is not the subject-matter of the appeal before it. However, Petitioner lost sight of the fact that it is not a finding in respect of AY 2009-10, rather the aforesaid finding has a direct bearing on the assessment for AY 2009-10. While it is true that in terms of Section 254, while dealing with the proceedings arising out of AY 2008-09, ITAT did not have the jurisdiction to adjudicate on the ground not before it, however, the finding in this case cannot be considered as relevant and limited only to AY 2008-09. The aforenoted findings would also be relevant for AY 2009-10.

25. We are also conscious of the fact that it is only such findings - which are material to decide the subject matter of the appeal that can form the basis of reopening under Section 147. The bar of limitation would be lifted and Section 150 can be invoked, only if there is such a finding. Reopening could be done 'in consequence of or to give effect to' such a 'finding'. The findings of the ITAT in the aforenoted order are not incidental observations. These are categorical findings of fact which are germane for determination of the claim of the Assessee, for deduction under Section 80-IC of the Act. Section 150 also uses the expression "in consequence of", which means that there may be a situation that warrants reopening in view of the finding given by the Appellate/Revisional authority. These findings fall within the scope

of Section 150, as it is a finding, which was necessary for disposal of the appeal before the Appellate authority for AY 2008-09.

26. Adverting now to the ground of limitation raised by the Petitioner, a plain reading of Section 150 reveals that it deals with a situation where an assessment or re-assessment for a particular year or for a particular person is necessitated by an order passed by appellate or revisional authority or on a reference. In such cases, it may not be possible for the Revenue to adhere to the time limits prescribed under Section 149, as the order of appeal, reference or revision or by a Court, proceeding under any other law may be passed beyond the period contemplated under section 149. It is for this reason, the legislature has not placed any time limit for making the assessment or re-assessment in such circumstances and for this reason, Section 150 begins with the non-obstante clause. At the same time, it does not mean that the power under Section 150(1) is uncanalised or unrestricted. The safeguard has been built under Sub-section (2) of Section 150. The entire object of Section 150 (2) is to bar the proceedings under Sub-Section (1) in the matter of assessment/re-assessment or re-computation, which has become the subject matter of the reference or revision by reasons of any other provisions limiting the time limit. Section 150 (1) provides that the power to issue notice under Section 148 in consequence of or giving effect to any finding or direction of the Appellate/Revisional Authority or the Court, is subject to the provision contained in Section 150(2), which provides that directions under Section 150(1) cannot be given by the Appellate/Revisional Authority or the Court if on the date on which the order impugned in the appeal/revision was passed, the re-assessment

proceedings had become time barred. In other words, as per section 150(2), the Appellate Authority could give directions for the re-assessment only in respect of an assessment year, which was within the limitation stipulated under Section 148 in respect of which re-assessment proceedings could be initiated on the date of passing of order under appeal. In this regard, it would be profitable to refer to the decision of ***Praveen Kumari v. CIT (1999) 237 ITR 339*** and ***Sharma (KM) v. ITO (2002) 254 ITR 772 (SC)***, wherein the Court held as under:

> *"20. According to sub-section (2) of section 150 the provisions of sub-section (1) of that section shall not apply where, by virtue of any other provision limiting the time within which action for assessment or reassessment may be initiated, issuance of notice for such assessment or reassessment is barred on the date of the order, which is the subject-matter of appeal, reference or revision, in which the finding or direction is contained. It would, thus, mean that an appellate or revisional authority cannot give a direction for assessment or reassessment which goes to the extent of conferring jurisdiction upon the Assessing Officer if his jurisdiction had ceased due to the bar of limitation. If the issuing of a notice for assessment or reassessment for a particular assessment year had become time-barred at the time of the order, which was the subject-matter of the appeal, the provisions of section 150(1) cannot be invoked to the aid of the Revenue for making an assessment or reassessment.*
>
> *25. In the light of the provisions contained in sub-section (2) of section 150, it cannot be said that the notices issued by the Assessing Officer to the petitioners under section 148 of the Act on March 1, 1996, were within the period of limitation. Even if it is assumed that the order of assessment was the subject-matter of appeal before the Tribunal, that would also not help the Revenue. The orders of assessment in the cases of both the*

> *assessees for the assessment year 1978-79 were passed on January 30, 1989. Thus, the relevant date on which the period of limitation must be available is January 30, 1989. However, sub-section (2) of section 150 refers to the subject-matter of the appeal, reference or revision. In that light, it is actually the appellate order of the Commissioner which can be said to be the subject-matter of appeal before the Tribunal.* ***In that view of the matter, the order of the Commissioner dated March 29, 1990, is the order which was the subject-matter of appeal before the Tribunal. The period of limitation should have been available on the date of the appellate order of the Commissioner****. Since the notices under section 148 have been issued by the Assessing Officer to both the petitioners on March 1, 1996, these notices are beyond the period of limitation as laid down in section 149(1)(b) read with section 150(2) of the Act."*
>
> *(emphasis supplied)*

27. The legislature has designedly not placed any time limit under Section 150, and reading a period of limitation into it, would be incorrect approach. In the present case, the date relevant for deciding the question of limitation in terms of Section 150(2), and the observations in ***Praveen Kumari*** (supra), would be the date of the order of the CIT (A), which was passed on 05.10.2011 and was the subject matter of appeal. Thus, the limitation of six years under Section 149, must be alive on the date of passing of the order of CIT (A). In the present case since, as on 05.10.2011, the time limit for reopening of assessment for A.Y. 2009-10 had not lapsed, the order of the ITAT was well within the limitation.

28. In view of the forgoing decision, we are of the view that the reopening of the assessment under Section 147, read with Section 150, was within the

period of limitation.

29. Needless to say that during the reassessment proceedings, the Asseessee will be entitled to lead fresh material and evidence to prove his entitlement to claim deduction under Section 80-IC for the AY 2009-10, before the AO, and this order does not in any way abrogate or limit his rights to justify his claim before the AO.

30. The present petition is dismissed in the above terms. The interim order made absolute vide order dated 8th May 2019, stands vacated.

SANJEEV NARULA, J.

VIPIN SANGHI, J.

DECEMBER 16, 2019
SS