$~

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

Reserved on: 7th September, 2017
Date of decision: 21st September, 2017

\+ **W.P. (C) No. 1773/2016**

NOKIA INDIA PRIVATE LIMITED ...Petitioner
Through: Mr. Vikas Srivastava, Mr. Jatinder Pal Singh, Mr. Sumit Mangal and Ms. Kanika Jain, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX ...Respondent
Through: Mr. Sanjay Jain, ASG with Mr. N. P. Sahni and Mr. Rahul Chaudhary, Senior Standing Counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

JUDGMENT

% 21.09.2017

Dr. S. Muralidhar, J.:

1. This writ petition by Nokia India Pvt. Ltd. ('Assessee') seeks the quashing of the notice dated 14th September 2015 issued by the Deputy Commissioner of Income Tax, Circle-18 (2), New Delhi (hereafter the Assessing Officer - 'AO') under Section 254 read with Sections 144-C and 143 (3) of the Income Tax Act, 1961 ('Act') for Assessment Year ('AY') 2007-08. The Assessee also challenges the consequential order dated 2nd December 2015 passed by the AO rejecting the plea of the Assessee that in terms of Section 153 (2A) of the Act, the proceedings under the

aforementioned notice dated 14th September 2015 would be time-barred.

Background facts

2. The Petitioner, which is engaged in manufacture and sale of mobile handsets, filed its return of income for the AY 2007-08 on 1st November 2007 declaring an income of Rs. 8,10,62,32,096/-. Since, during the AY in question, the Assessee was involved in international transactions with its Associated Enterprise ('AE'), a reference was made by the AO to the Transfer Pricing Officer ('TPO').

3. The Assessee filed objections to the report of the TPO before the Dispute Resolution Panel (DRP) contesting the transfer pricing (TP) adjustment by which the returned income of the Assessee stood enhanced. These objections were disposed of by the DRP. On the basis of the directions issued by the DRP, the AO completed the assessment by passing an assessment order under Section 143 (3) read with Section 144C (13) of the Act on 29th September 2011. The total income of the Petitioner was assessed at Rs. 12,37,03,19,800/-.

4. In the aforementioned final assessment order, the AO made the following disallowances and additions to the income of the Petitioner:

S. No.	Nature of Addition made	Amount of addition (INR)
1.	Addition on account of disallowance of Marketing Expenses	87,57,71,395/-
2.	Addition on account of allowance of depreciation @ 15% (as against 60%) on computer peripherals.	1,03,96,877/-

3.	Addition on account of disallowance of amount claimed as Price Protection Expenses	62,91,22,970/-
4.	Addition on account of transfer pricing adjustment:	
	a. Advertising, Marketing and Promotion Expenses	2,53,48,30,000/-
	b. Software Development Services	21,07,34,539/-
	Total	2,74,55,64,539/-

Order of the ITAT

5. Aggrieved by the above assessment order, the Assessee filed an appeal being ITA No. 4559/Del/2011 before the Income Tax Appellate Tribunal ('ITAT'). The decision of the ITAT rendered in the aforementioned appeal on 18th May 2012 was as under:

a. As regards disallowance of expenditure incurred on issue of mobile handsets on 'free of cost' basis, the ITAT noted that on an identical issue for AY 2000-01 and 2001-02, as well as for AY 2006-07, the ITAT had set aside the assessment order and remanded the matter to the file of the AO. Accordingly, the impugned assessment order was set aside "to the file of the AO with the directions to decide the issue afresh after affording the assessee a reasonable opportunity of being heard."

b. As regards the applicable rate of depreciation on computer peripherals, the ITAT allowed the Assessee's appeal and directed the AO to allow depreciation on computer peripherals at the rate of 60% instead of 15% as allowed in the original assessment order.

c. As regards disallowance of expenditure on account of price protection expenses, the ITAT observed that "Since we have admitted additional evidence in respect of other distributors to whom trade price protection has been allowed, we set aside this issue to the file of the AO with the directions to examine the case of the assessee in the light of additional evidence filed before this Tribunal and decide the issue on merits. Needless to say the AO will provide the assessee a reasonable opportunity of being heard."

d. As regards the TP adjustments in relation to provision of software development services to its AEs, the ITAT agreed with the Assessee that the DRP had obtained information under Section 133 (6) of the Act and had used such information without affording the Assessee an opportunity of being heard. Consequently, the ITAT held that "the assessment order needs to be aside to the file of the assessing officer who will refer the matter to DRP for providing necessary opportunity of being heard. We order accordingly."

e. As regards working capital adjustment for computing the arm's length price ('ALP') of the international transaction, the ITAT noted that for AY 2006-07, the ITAT had remanded the matter to the file of the AO/TPO for re-consideration in light of the fact that the said adjustment had been allowed to the Assessee in the earlier AYs. Accordingly, the ITAT set aside the matter to the file of the AO with the direction to examine the case of the assessee and decide the issue

afresh in accordance with the provisions of law. The AO was asked to provide the Assessee the necessary opportunity of being heard.

f. As regards the addition on account of Advertising, Marketing and Promotion ('AMP') expenses, it was noted by the ITAT that both the parties agreed that the issue be set aside in the light of the amended provisions of Section 92B of the Act. Accordingly, the ITAT "set aside the matter to the file of the AO with the directions to decide the issue afresh after affording the assessee a reasonable opportunity of being heard."

g. As regards the power of the TPO to determine ALP in respect of international transactions not referred to him by the AO, the ITAT held that, in view of the amended provisions of Section 92CA of the Act with retrospective effect from 1st April 2002, this ground urged by the Assessee had become academic. It was accordingly rejected.

Proceedings on remand

6. On receipt of the ITAT's order, the AO referred the TP issues to the TPO. While the matter was pending with the TPO, the Assessee filed a letter dated 31st March 2014 before the TPO with a copy to the AO's office. In the said letter, the Assessee submitted that under Section 153 (2A) of the Act, the last date for the AO to pass the fresh assessment order was 31st March 2015. The TPO was requested to take the said provision into consideration.

7. On 21st January 2015, the TPO responded to the aforementioned letter of the Assessee. According to the TPO, the limitation for passing the order in

the assessment proceedings had to be calculated under Section 153 (3) (ii) of the Act. According to the TPO, the ITAT had only partly restored the original order by giving directions to various authorities for considering certain issues afresh after giving a reasonable opportunity to the Assessee. Referring to paragraph 29 of the ITAT's order which stated that the appeal of the Assessee was being partly allowed for statistical purposes, the TPO stated that the limitation date for completing and passing of the assessment order had to be calculated in terms of Section 153 (3) (ii) of the Act. Alternatively, the TPO stated that, even in terms of Section 153 (2A) of the Act, the proceedings were not time-barred as of 31st January 2015.

8. On 29th January 2015, the Assessee responded to the TPO and a copy thereof was also sent to the AO. The Assessee reiterated that the limitation period for passage of a fresh order would be calculated in terms of Section 153 (2A) of the Act. Thereafter, the AO issued the impugned notice dated 14th September 2015 calling upon the Assessee to attend the AO's office on 22nd September 2015 for proceedings under Section 254 read with Sections 144C and 143 (3) of the Act for AY 2007-08.

9. On 21st October 2015, the Assessee responded to the above notice reiterating that Section 153 (2A) of the Act was applicable and, therefore, the fresh order of assessment was required to be passed within two years from the end of the financial year in which the order of the ITAT had been received by the Commissioner. It was therefore contended that since the proceedings had become time-barred on 31st March 2015, any notice issued thereafter would be without jurisdiction.

10. By the impugned order dated 2nd December 2015, the AO disposed of the above objections by holding that the case was not covered under Section 153 (2A) of the Act which, according to the AO, was applicable only when a fresh order of assessment has to be made pursuant to an order in appeal or revision. Since the assessment had not been totally set aside or cancelled by the ITAT and, in fact, had been partly upheld on certain issues, the objection regarding limitation was not valid. It was further pointed out that the Revenue was also in appeal before the High Court against the relief allowed by the ITAT as well as to some of the issues restored by the ITAT to the AO/TPO and even to the DRP.

11. The Assessee states that, despite requesting for a copy of a memorandum of appeal stated to be filed by the Revenue in this Court, it was not provided to the Assessee. A letter was issued by the AO on 29th January 2016 calling upon the Assessee to furnish information regarding the claim of marketing expenses on account of issue of mobile handsets on 'free of cost' basis as well as a copy of the additional evidence submitted before the ITAT in respect of the claim on account of price protection expenses. The Assessee replied on 8th February 2016 reiterating that the proceedings were time-barred.

12. The present petition was listed first for hearing on 29th February 2016 and then again on 2nd March 2016. While directing notice to be issued to the Respondents, it was directed that the further proceedings may go on before the AO but no final order will be passed till the next date of hearing. That interim order has continued since.

Submissions of counsel

13. Mr. Vikas Srivastava, learned counsel appearing for the Assessee, submitted that it was erroneous on the part of the AO to conclude that Section 153 (2A) of the Act applied only where a fresh order had to be passed *de novo* on fresh inquiry and not when the proceedings were remanded to the AO with directions from the ITAT. According to him, there was no warrant for such an interpretation on a reading of Section 153 as a whole as was further explained by Circular No. 56 dated 19th March 1971 issued by the Central Board of Direct Taxes ('CBDT'). Mr. Srivastava relied on the decision of this Court in ***Commissioner of Income-tax v. Bhan Textile (P) Ltd [2008] 300 ITR 176 (Del)*** and distinguished its decision in ***Basu Distributors (P) Ltd. v. Income Tax Officer [2007] 292 ITR 29 (Del)***.

14. On the other hand, Mr. Sanjay Jain, learned Additional Solicitor General of India ('ASG'), submitted that Section 153 (2A) of the Act would apply only where the entire assessment was set aside or cancelled. However, as in the present case, where the AO was required to follow certain specific directions issued to him by the ITAT he was 'chained' as far as exercise of discretion was concerned. In such circumstances, Section 153 (2A) of the Act would not apply. According to the learned ASG, it was only Section 153 (3) (ii) of the Act which would apply to the present case.

15. Mr. Jain submitted that Section 153 (3) (ii) of the Act would not only apply where 'appeal effect' had to be given but cases of "assessment and re-assessment" as well. Reference was also made to the phrases 'an assessment of such income for another assessment year' used in Explanation 2 to

Section 153 and 'an assessment of such income on such other person' used in Explanation 3 to Section 153 showed that not only cases of re-computation but also cases of assessment/reassessment on specified aspects are governed by Section 153 (3) (ii) of the Act. Relying on the decision in ***Basu Distributors*** (*supra*), Mr. Jain submitted that the distinction was made by this Court between a situation where the ITAT remands the matter to the AO by setting aside the order under appeal *simpliciter* and a situation where the assessment order is partially set aside with remand only on 'select issues or aspects of assessment'. According to him, the expression 'fresh assessment' used in Section 153 (2A) indicates a situation tantamount to the cancellation or setting aside of the entire assessment and not where some part of the assessment order was upheld. According to him, the ratio of the decision in ***Bhan Textile*** (*supra*) was, in fact, helpful to the Revenue.

16. Mr. Jain painstakingly took the Court through each of the directions issued by the ITAT to emphasize that the setting aside and remanding of the matter to the AO was only in respect of some of the issues and that too with directions and therefore it is Section 153 (3) (ii) of the Act which would apply. He also referred to the decision of Bombay High Court in ***Rikhabdas Jhaverchand v. CIT [2001] 249 ITR 774 (Bom)*** and the Supreme Court in ***Rajinder Nath v. CIT [I979] 120 ITR 14 (SC)*** to distinguish the expression 'finding' from the expression 'direction'.

Legislative History

17. Prior to its amendment by the Taxation Laws (Amendment) Act, 1970, Section 153 of the Act read as under:

"Time limit for completion of assessments and reassessments.

153. (1) No order of assessment shall be made under Section 143 or Section 144 at any time after—

(a) the expiry of—

(i) four years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or before the 1st day of April, 1967;

(ii) three years from the end of the assessment year in which the income was first assessable, where such assessment year is the assessment year commencing on the 1st day of April, 1968;

(iii) two years from the end of the assessment year in which the income was first assessable, where such assessment year is an assessment year commencing on or after the 1st day of April, 1969; or

(b) the expiry of eight years from the end of the assessment year in which the income was first assessable, in a case falling within clause (c) of sub-section (1) of section 271; or

(c) the expiry of one year from the date of the filing of a return or a revised return under sub-section (4) or sub-section (5) of Section 139;

whichever is latest.

(2) No order of assessment reassessment or recomputation shall be made under Section 147—

(a) where the assessment, reassessment or recomputation is to be made under clause (a) of that section, after the expiry of four years from the end of the assessment year in which the notice under Section 148 was served ;

(b) where the assessment, reassessment or recomputation is to be made under clause (b) of that section, after—

(i) the expiry of four years from the end of the assessment year in which the income was first assessable, or

(ii) the expiry of one year from the date of service of the notice under Section 148, whichever is later.

(3) The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may be completed at any time—

(i) where a fresh assessment is made under Section 146 ;

(ii) where the assessment, reassessment or recomputation 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 Section 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 this Act;

(iii) where the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.

Explanation....."

18. The Taxation Laws (Amendment) Act, 1970 inserted sub-section (2A) in the Act with effect from 1st April, 1988 and it reads as under:

"(2A) Notwithstanding anything contained in sub-sections (1) and (2), in relation to the assessment year commencing on the 1st day of April, 1971, and any subsequent assessment year, an order of fresh assessment under section 146 or in pursuance of ah order, under section 250; section 254, section 263 or section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of two years from the end of the financial year in which the order under section 146 cancelling the assessment is passed by the Assessing Officer or the order

> under section 250 or section 254 is received by the Chief Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Chief Commissioner or Commissioner."

19. Simultaneously, in the Taxation Laws (Amendment) Act, 1970, certain highlighted words to that effect were inserted in Section 153(3) as under:

> "(3) The provisions of sub-sections (1), (lA), (IB) and (2) shall not apply to the following classes of assessments, reassessments and re-computations which may**, subject to the provisions of sub-section (2A)**, be completed at any time."

20. By an amendment brought about by the Finance Act, 2001, the general time limit under Section 153 (2A) was reduced to one year. With effect from 1st July 2012, the time limit was increased to two years in certain TP cases. Finally, by the amendment in 2016, the time limit under Section 153 (2A) has been reduced to 9 months.

21. The reason behind the introduction of sub-section (2A) to Section 153 of the Act can be gleaned from para 22 of the Circular No. 56 dated 19th March 1971 issued by the CBDT which reads as under:

> "Time limit for completion of assessments set aside in appeal or reopened under section 146
>
> 22. Section 153, relating to time limits for completion of assessments and reassessments has been amended so as to provide a time limit for completion of fresh assessments, to be made in cases where : (i) the original assessment made under section 144 has been cancelled by the Income Tax Officer on an application by the assessee under Section 146; or (ii) the original assessment is set aside or cancelled in appeal by the Appellate Assistant Commissioner or the Appellate Tribunal or

in revision by the Commissioner. For this sub-section (2A) has been inserted in section 153. Under this sub-section the fresh assessment in the cases mentioned at (i) may be made at any time before the expiry of two years from the end of the financial year in which the original assessment was cancelled by the Income-tax Officer under section 146. In the cases mentioned at (ii) the fresh assessment may be made at any time before the expiry of two years from the end of the financial year in which the order of the Appellate Assistant Commissioner or the Appellate Tribunal is received by the Commissioner or, as the case may be, the order in revision is passed by the Commissioner. Such fresh assessments may be completed within the above-mentioned time limit even if the time limit specified in sub-section (1) or sub-section (2) of section 153 for the completion of assessment or reassessment has expired. **Under the existing provisions of section 153(3), such fresh assessments are not subject to any time limit. The time limit laid down under new sub-section (2A) of section 153 will be operative only in relation to assessments for the assessment year 1971-72 or any subsequent years**." (emphasis supplied)

Analysis and reasons

22. Having perused the impugned order of the ITAT carefully and the operative portions *qua* which the assessment order was set aside and the matter remanded to the AO, the Court is unable to agree with the contention of learned ASG that the aforementioned order of the ITAT did not constitute a complete setting aside of the assessment with directions to the AO to pass a fresh order. The Court does not agree with the submission of the learned ASG that the AO was 'chained' by the ITAT's directions and could not have passed a fresh assessment order *de novo* pursuant to such remand.

23. The Court is also unable to agree with the contention that unless the entire assessment order is wholly set aside, the time limit for passing the

fresh order under Section 153 (2A) would not be attracted. There is no warrant for such an interpretation. The object behind introduction of sub-section (2A) was to prescribe a time limit for completing the assessment proceedings upon the original assessment being set aside or being cancelled in appeal. Clearly, the intention was not to restrict the applicability of sub-section (2A) only to such cases where the 'entire' original assessment order is set aside. It was noted that, "Under the existing provisions of section 153 (3), such fresh assessments are not subject to any time limit." Indeed, Section 153, as it stood at that time, did not prescribe any time limits. Section 153 (3) (ii), in particular, did not require the order passed thereunder to be issued within any particular time limit. Further there is a distinction between an 'assessment' that is set aside and an 'assessment order' being set aside. When the assessment on an issue is set aside and the matter remanded, with a direction that the issue has to be determined afresh, Section 153 (2A) of the Act would get attracted.

24. What is important to note is that, along with the insertion of sub-section (2A), sub-section (3) underwent a simultaneous change. It was expressly made "subject to the provisions of sub-section (2A)." This meant that Section 153 (3) would thereafter apply only to such cases where Section 153 (2A) did not apply. In other words, in all instances of an AO having to pass a fresh assessment order upon remand where Section 153 (2A) would apply, the AO would be bound to follow the time-limit imposed by sub-section (2A). Where the AO was only giving effect to an appellate order, then Section 153 (3) (ii) of the Act would apply.

25. In the present case, of the seven issues, the assessment in respect of five was set aside and the issues remanded for a fresh determination. Whether the remand was to the TPO or the DRP would not make a difference as long as what results from the remand is a fresh assessment of the issue. Clearly, therefore, the time limit for completing that exercise was governed by Section 153 (2A) of the Act.

***The decision in* Basu Distributors**

26.1 Turning now to the judicial precedents, the Court proposes to first discuss the decision in ***Basu Distributors*** (*supra*) since considerable reliance was placed on said decision by the learned ASG. There, the ITAT had allowed the Assessee's appeal and directed that "It is imperative in the interest of justice and fair play to set aside and restore the matter to the AO for re-consideration after giving sufficient reasonable opportunity to the Assessee to furnish necessary details, explanations and evidences in support of the above and to pass fresh order as per law, rule and CBDT circulars."

26.2 The fact situation in the context of which the above directions were issued was that the AO had made additions to the returned income of the Assessee pertaining to cash payments made to Ritz Theatres (P) Ltd. ('Ritz') and to Honey Enterprises ('HE') which, according to the AO, were in violation of Section 40A (3) of the Act. The grievance of the Assessee was that sufficient opportunity had not been given to it to place the complete facts and therefore, offer the necessary explanation and evidence regarding such cash payment. The ITAT agreed with this contention of the Assessee and therefore passed a remand order after setting aside the order of the AO

and the CIT(A). Although the remand order was dated 23rd June 2000, no action was taken by the AO for over four years till 2nd September 2004 and the final assessment order was passed only on 20th February 2005.

26.3 In the above context, the Court in ***Basu Distributors*** (*supra*) was called upon to address the question whether the re-assessment proceedings were time barred under Section 153 (2A) of the Act. The Court observed as under:

> "20. Having had the advantage of perusing the plethora of precedents on the aspect of law which has engaged our attention, we are of the view that Section 153(2A) is not attracted in the facts of the present case; no period of limitation is prescribed as per the provisions of Section153(3)(ii). It is trite that Parliament is continuously concerned with the evils or undesirability of the proverbial sword hanging over the head of an Assessee. Parliament has therefore set-down the parameters within which an assessment must be completed and over the years has shortened the span of time in this regard. It has, however, carved out an exception to the rule where a specific, limited or restricted direction is passed by an Appellate Authority which is of the opinion that it would not be possible to decide the appeal before it without a clarification on this point. The Appellate Authority has also the power to set aside the Assessment Order and direct a de novo enquiry, in which case every aspect, computation and dimension is open for consideration. This partakes of the nature of an assessment which is akin to the original assessment and, therefore, the period of limitation applicable to the original assessment must apply to the fresh assessment. Where the Appellate Authority remands the case for a determination on a selected issue or aspect of the assessment, the uncertainty or discomfort of the sword of uncertainty provides no peril to the assessee. All the parties are fully aware of the parameters within which the fresh enquiry is circumscribed and limited. It is obviously for this reason that the rigours of limitation are totally removed. If the

AO is unduly slow in completing the assessment, it may be open to the assessee to approach the High Court under Articles 226 and 227 of the Constitution seeking a direction for an expeditious end and closure to the restricted enquiry.

21. Reverting to the facts of the case at hand it is manifestly clear that in substance the entire assessment had not been set aside. The Assessee's contention was that Section 40A(3) had not been violated in its spirit since no expenditure exceeding Rupees Twenty Thousand had been incurred in cash; these were incurred by effecting entries in the Books of Accounts and hence were as undisputable as payments made by Account Payee Cheques or Account Payee Bank Draft. It was only on this restricted aspect of the assessment that the Tribunal had remanded the case to the AO. The entire assessment exercise, therefore, had not been undertaken de novo, thereby, rendering Section 153 (2A) of the Act inapplicable to the case.

22. We conclude by holding that a writ petition under Articles 226 and 227 of the Constitution is always maintainable if the High Courts find that any authority is acting contrary to the powers bestowed upon it. Writ petitions, therefore, cannot be dismissed per se. The objection on this score cannot be appreciated; the Revenue would be justified in contending that in the facts of the case invoking the extraordinary Jurisdiction of this Court was not called for. Considerable time of this Court has been needlessly spent on adjudicating on this preliminary objection. However; we dismiss the writ petitions as meritless since, in the facts and circumstances of the case, it cannot be argued that Section 153(2A) is attracted and constitutes an absolute power on assessment proceedings. This is obviously the manner in which all the authorised representatives of the Petitioners understood the law since they chose to address the AO on the merits of the case. The Petitioners have chosen to file the present petitions after considerable delay in the vain attempt to avoid payment of Income Tax on technicalities which do not exist in their favour. We would have dismissed the writ petitions with heavy costs but decline from doing so

because the Revenue has unreasonably raised preliminary objection pertaining to the maintainability of the writ petitions."

27. From para 20 of the aforementioned judgment, it is plain that the ITAT had in fact set aside the entire assessment order and directed a *de novo* enquiry. The Court noted that where the remand is on a "selected issue or aspect of the assessment, the uncertainty or discomfort of the sword of uncertainty provides no peril to the assessee." The enquiry to be undertaken by the AO upon evidence being furnished by the Assessee was indeed a fresh enquiry and if no time limit was prescribed for that exercise, the Assessee would undoubtedly have the sword of uncertainty hanging. Considering the additions made, there was, in fact, no other substantive issue that had to be examined afresh by the AO. Therefore, the Court, in terms of its own analysis of Section 153 (2A) in the aforementioned decision, required a fresh assessment order to be made by undertaking a *de novo* enquiry. For such an exercise the limitation in Section 153 (2A) had to apply. On the facts of ***Basu Distributors*** (*supra*), it is not understood how Section 153 (2A) would not apply.

28. Be that as it may, as far as the present case is concerned, the aforementioned decision in ***Basu Distributors*** (*supra*) would, not in fact, come to the aid of the Revenue. The facts in the present case fully answer the description of the case which in para 20 of the decision in ***Basu Distributors*** (*supra*) was held to be subject to the limitation under Section 153 (2A) viz., where the order of the appellate authority results in the assessment order being set aside and the AO is asked to undertake "a de novo enquiry, in which case every aspect, computation and dimension is

open for consideration."

Other decisions

29. Turning now to the other decision of this Court, i.e. ***Bhan Textile*** (*supra*), it requires to be noticed at the outset that although for some reason, the Court in ***Bhan Textile*** (*supra*) did not refer to the earlier decision in ***Basu Distributors*** (*supra*), its interpretation of Section 153 (2A) did not contradict the interpretation in ***Basu Distributors*** (*supra*). In ***Bhan Textile*** (*supra*), the Court observed that the setting aside of the assessment order became necessary as the AO did not give an opportunity to the Assessee to place its evidence on record. The CIT (A) had in effect cancelled the assessment order although those specific words were not used. This Court held that, in such a situation, "Section 153 (2A) is clearly applicable." This decision, therefore, fully supports the case of the Assessee.

30. A similar view has been taken by the Gujarat High Court in ***Instruments and Control Co. v. Chief Commissioner of Income-tax [2012] 349 ITR 571 (Guj)***. There, the Gujarat High Court discussed the entire scheme of Section 153 and also followed the decision of this Court in ***Bhan Textile*** (*supra*). It was observed by the Gujarat High Court as under:

> "22. Under the circumstances, the class of cases of fresh assessment to be made pursuant to order under section 250 etc. would fall under section (2A) of section 153 of the Act, and the period of limitation prescribed therein would operate. In those cases where there is no need for a fresh assessment and are not covered under section (2A) of section 153 of the Act, but are covered under clauses (i), (ii) and (iii) of section 153, the limitation prescribed under sub-section (2A) of section 153 would not apply and the expression "assessment, reassessment and re-computation be completed at any time" may

enable the revenue to continue the proceedings of assessment even beyond the period prescribed under sub-sections (1) and (2) of section 153 of the Act and would also ;not be hindered by the prescription of limitation under section (2A) of section 153 of the Act."

31. The facts and conclusion of that case are set out by the Gujarat High Court in paras 24 and 25 of the above decision as under:

"24. With this background in mind, we may revert back to the facts of the case. The Tribunal on an appeal filed by the assessee, upheld the assessee's contention that the commission was disallowed in case of two agencies, placing reliance on statements recorded behind the back of the assessee without affording the cross-examination of such witnesses. It was on this count that the Tribunal remitted the matter to the file of Assessing Officer with direction to summon those two parties again and allow the assessee an opportunity to cross-examine them so that true facts may emerge in relation to the payment of commission by the assessee company to these two agencies. While doing so, (be Tribunal also granted liberty to the Assessing Officer to probe into the matter further by way of an inquiry and investigation into the alleged payment of commission to such parties.

25. To our mind, the case on band would fall under sub-section (2A) of section 153 of the Act. The Tribunal may not have used the words of "setting aside the assessment", nevertheless, when it remitted the matter back to the Assessing Officer for summoning two witnesses again for cross-examination by the assessee and permitted further probe to the Assessing Officer, necessarily it must be understood to have set aside the assessment under challenge. The Tribunal, otherwise in law, could not have remitted the proceedings to the Assessing Officer for fresh consideration after summoning two witnesses and carrying out such probe as may be necessary. We may record that such commissions paid to the two agencies was the sole dispute between the assessee and the Department. In the

> original assessment, the Assessing Officer discussed only this issue and made corresponding disallowance. In essence, thus, the Assessing Officer was required to pass a fresh order of assessment which was necessary on account of an order passed by the Tribunal under section 254 of the Act cancelling the assessment framed by the Assessing Officer. The period of limitation prescribed in section 153(2A), therefore, would apply. While such an order was served on the Commissioner on 3.8.1994, within a period of two years of the end of such financial year, a fresh order of assessment had to be passed by the Assessing Officer. The same not having been done, in our view, such proceedings have become time-barred. The assessment placed before the Assessing Officer by the Tribunal's order, therefore, must be treated as having abated. In that view of the matter, the declaration prayed for by the petitioner must be granted."

32. In the considered view of the Court, the aforesaid decision of the Gujarat High Court fully supports the case of the Assessee here. The decisions of the Madhya Pradesh High Court in ***Gulabchand Motilal v. Commissioner of Income-tax [1988] 174 ITR 117 (MP)***, the High Court of Punjab and Haryana in ***Bharti Engineering Corporation v. Union of India [2008] 298 ITR 400 (P&H)*** and ***Deep Chand Jain v. ITO [1984] 145 ITR 676 (P&H)***, and the Karnataka High Court in ***CIT v. Paul Noel Rodrigues [2015] 231 Taxman 811 (Kar)***, all hold likewise. The Kerala High Court in ***Patel R.P. v. ACIT 2015 (5) KHC 370*** held that Section 153 (2A) of the Act would apply even where more than one issue is involved i.e. even where one of the issues has been remanded to the AO for a fresh determination.

33. The analysis of the terms 'finding' and 'directions' by the Supreme Court in ***Rajinder Nath*** (*supra*) was in the context of Section 153 (3) (ii) of the Act at a time when Section 153 (2A) of the Act had not been introduced

since the relevant AY in that case was 1956-57. The said decision is, therefore, not of help to the Revenue.

Conclusion

34. For all the aforementioned reasons, the Court holds that, in the present case, the assessment proceedings had to necessarily be completed by the AO within the time limit specified in Section 153 (2A) of the Act. Inasmuch as the AO failed to do so, the impugned notice dated 14th September 2015 issued by the AO and all proceedings consequential thereto including the order dated 2nd December 2015 passed by the AO are hereby set aside.

35. The writ petition is allowed in the above terms but, in the circumstances, with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 21, 2017
rd