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

Date of decision : August 14, 2018

\+ **W.P.(C) 5684/2017**

RAMESH CHANDRA ..... Petitioner
Through : Mr Vikas Srivastava, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX..... Respondent
Through : Mr Zoheb Hossain, Advocate for Revenue.

\+ **W.P.(C) 5717/2017**

SANJAY CHANDRA ..... Petitioner

Through : Mr Vikas Srivastava, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through : Mr Zoheb Hossain, Advocate for Revenue.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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The petitioners under Articles 226 and 227 of the Constitution of India, seek common relief by way of a direction to the respondent

for quashing the impugned notice dated 30.03.2017 and the impugned order dated 02.05.2017 made under Section 147/148 of the Income Tax Act, 1961(hereafter 'the Act').

2. It is contended that the impugned notice and the order are contrary to the provisions of Sections 150 and Section 153(explanation 3, as it stood then).

3. The facts briefly are that accounts of one M/s. Acorus Unitech Wireless Private Limited were assessed in respect of returns for Assessment Year 2009-2010, after which, matter was carried in appeal.

4. The Commissioner of Income Tax, by the order dated 01.03.2017, formed opinion that the additions made, which were brought to tax on account of Section 2(24)(iv) were to be assessed in the hands of the present assessees/petitioners , i.e. Ramesh Chandra and Sanjay Chandra. The relevant findings of the CIT (A) are as follows:-

> *"11. However, undersigned is of the view that this entire exercise has been done only to favour Sh. Ramesh Chandra and Sh. Sanjay Chandra, the actual beneficiaries of this process. Therefore. this amount needs to be taxed in their hands u/s 2(24)(iv) of the I. T. Act. Considering the same, the addition confirmed as above In the hands of the appellant Is confirmed on protective basis while directions u/s 150(1) are being issued to the Assessing Officer of Sh. Sanjay Chandra and Sh. Ramesh Chandra to tax this amount In their*

hands u/s 2(24)(iv). The total addition of Rs. 72.40.86.000/- shall be allocated in the hands of Sh. Sanjay Chandra and Sh. Ramesh Chandra in the ratio of their respective share holding in M/s. Unitech Ltd on the date of transfer of shares to appellant company. That is if both of them held 1000 shares each of M/s. Unitech ltd. 50% of the amount would be taxable in the hands of each person. If however, one person holds 1200 shares and another person holds 800 shares, the ratio would be 60% and 40%. The Assessing Officer is directed to initiate proceedings in their cases. In case. the jurisdiction of Sh. Ramesh Chandra and Sh. Sanjay Chandra is not with the Assessing Officer of the appellant. these directions shall be deemed to have been issued to the concerned Assessing Officer and the Assessing Officer of the appellant shall forward a copy of this order to the said Assessing Officer immediately for necessary action.

12. In view of the above decision individual sub-grounds of appeal from 2 to 2.14 are not being individually adjudicated as in the multiple sub-grounds of appeal raised, the appellant has only challenged the addition u/s 28(iv) and the market value of shares transferred. Both these issues have been decided against the appellant. Ground no. 1 is of general nature and Ground no. 4 is of consequential nature and these two grounds do not require separate adjudication. The ground no. 3 is regarding the principles of natural justice. The same is dismissed as the assessment order was passed after giving an opportunity of hearing to the appellant. It is further clarified that this order shall not prejudice the powers of AO u/s 154 regarding quantum of addition if the records reflect that MIs Telenor Asia Pte. Ltd had

> *invested in the shares at a premium of Rs. 169 per share and not Rs. 159 per share."*

5. Based upon these findings, notice was issued to the Assessees under Section 142(1) on 01.06.2017; the Assessing Officer (A.O.) proposed to proceed. Earlier also, on 30.03.2017, identically, notices for the assessable income chargeable to tax in respect of the Assessment Year 2009-2010, were issued to the petitioners.

6. The petitioners urged that the pre-condition for issuing re-assessment seeking to re-open concluded assessment for the Assessment Year 2009-2010 was not fulfilled in their case, as the requirement of issuing notice and hearing was not complied with by the Appellate Commissioner whilst recording the findings. It was submitted that this omission is fatal to the attempt on the part of the revenue to re-open concluded assessment in respect of which even extended period permissible for re-assessment under Section 149 of the Act, i.e. six years, had elapsed. Mr Vikas Srivastava, learned counsel, relied upon the judgment of the Division Bench of this Court in *Rural Electrification Corporation Limited versus CIT,* [2013] 355 ITR 345.

7. The Revenue resists these proceedings and contends that the question of giving any notice by the CIT (A) '*before recording the findings in the circumstances of the case'* did not arise. It was stated given that the assessees were issued notices under Section 147 of the Act, it is open to them to urge all the defences and in the event of

adverse assessment, appeal such orders in accordance with law. It is also emphasized that besides the appeals of M/s.Acorus Unitech Private Limited, the main assessee, in whose case the CIT(A) recorded adverse findings against the petitioner, is pending before the Income Tax Appellate Tribunal(ITAT).

8. Counsel for the Revenue stated that in these circumstances, this Court should resist from causing its discretionary power having jurisdiction under Article 226 of the Constitution of India.

9. It is not disputed by the parties that the extended period of limitation as it were, for issuing re-assessment notices under Section 147/148 of the Act, is spelt out in Section 149, i.e. six years provided the other jurisdictional conditions are fulfilled. There is, however, one exception to this absolute bar of limitation as it were : Section 150. That provision is applicable in the case where the assessment of any entity or assessee is considered in Appeal or by the higher authority or Tribunal. The relevant provisions in this regard applicable for such cases are Sections 150 & 153 of the Act. They are extracted below:-

> *"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 re-assessment 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 provision 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(3)(3) Notwithstanding anything contained in sub-sections(1) and (2), an order of fresh assessment in pursuance of an order under Section 254 or Section 263 or Section 264, setting aside or cancelling an assessment, may be made at any time before the expiry of nine months from the end of the financial year in which the order under Section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under Section 263 or Section 264 is passed by the Principal Commissioner or Commissioner :

Provided that where the order under Section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under Section 263 or Section 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April, 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted}"

10. In *Rural Electrification Corporation Limited* (supra), the Division Bench of this Court took note of Section 153(3) especially the third explanation to that provision and also took cognizance to the previous decision, i.e. *A.B.Parikh versus Income Tax Officer,* 203 ITR 186(GUJ).

11. In *Rural Electrification Corporation Limited* (supra), the Court thereafter concluded as follows:-

> *"14. It is apparent from the said decision that before a notice under Section 148 can be issued beyond the time limits prescribed under Section 149, the ingredients of Explanation 3 to Section 153 have to be satisfied. Those ingredients require that there must be a finding that income which is excluded from the total income of one person must be held to be income of another person. The second ingredient being that before such a finding is recorded, such other person should be given an opportunity of being heard. In the context of the present case, when the Tribunal held in favour of the said society by concluding that the interest income was not taxable in its hands and held against the petitioner by concluding that the said interest income ought to have been taxed in the hands of the petitioner, an opportunity of hearing ought to have been given to the petitioner. The fact that such an opportunity was not given, has been recognized by the revenue in the order disposing of the objections dated 20.10.2011, where it has been observed that there was no need to have afforded an opportunity to the petitioner. Even in the counter affidavit, the revenue has taken the stand that it was not at all necessary for the Income Tax Appellate Tribunal to have allowed an opportunity of hearing to*

> *the petitioner because that was in respect of the assessment proceedings pertaining to the said society.*
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> *15. From the above, it is clear that no opportunity of hearing was given to the petitioner prior to the passing of the order dated 13.01.2010 by the Income Tax Appellate Tribunal, Hyderabad in the cases of the said society. As such, one essential ingredient of Explanation 3 was missing and, therefore, the deeming clause would not get triggered. That being the position, Section 150 would not apply and, therefore, the bar of limitation prescribed by Section 149 is not lifted."*

12. In the present case, there is nothing on record to indicate that before the CIT(A) concluded that the amounts were properly assessable in the hands of the present petitioner/assessee, any notice/opportunity of hearing was not afforded to them. It, however, urges that opportunity would be available before the final assessment of such amounts in the hands of the present assessee is completed.

14. We are of the opinion that the revenue's position is untenable; given the expressed mandate, the third explanation to Section 153(3) unequivocally postulates that any adverse order has to be proceeded by adequate opportunity of hearing to the concerned party. In this Court's opinion, although Section 153 enables and in some measure, empowers the Revenue to proceed and complete with assessments beyond the stipulated six year period, in the few exceptional circumstances indicated in the main proviso that empowerment is conditioned upon due exercise of power, i.e. after issuing notice and

granting opportunity to the party likely to be affected adversely. Clearly that procedure is given the go-by in the present case.

15. In these circumstances, the directions issued by the CIT (A) contained in paragraph 11 insofar as it records adverse findings, is hereby quashed. In case, the CIT(A) wishes to proceed against the petitioner, he shall do so provided he shall issue appropriate notice in that regard.

16. The CIT(A) may proceed henceforth in accordance with law, if warranted keeping in mind the findings recorded above. All rights and contentions in such event are kept open.

The writ petitions are partly allowed to the above extent.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

AUGUST 14, 2018
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