

आयकर अपीलीय अधिकरण "D" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI
BEFORE SHRI C.N PRASAD, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.4815/Mum/2016

(निर्धारण वर्ष / Assessment Year: 2008-09)

ACIT,Circle 2(2)(2) R.No. 545, 5 th floor, Aayakar Bhavan, M.K. Road Churchgate, Mumbai 400020	बनाम/ v.	M/s. Monarch Innovative Technologies Pvt. Ltd., Monarch House, Master Mind-II, Aarey Colony, Mayur Nagar, Goregoan(E), Mumbai 400063
स्थायी लेखा सं./PAN : AACCM6709P		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Surji Chheda
Revenue by :	Shri. Ram Tiwari

सुनवाई की तारीख /**Date of Hearing** : **31-01-2018**

घोषणा की तारीख /**Date of Pronouncement** : **12-02-2018**

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue , being ITA No. 4815/Mum/2016 for the assessment year 2008-09 is directed against the appellate order dated 18.04.2016 passed by learned Commissioner of Income-tax (Appeals)-5, Mumbai (hereinafter called "the CIT(A)") for assessment year 2008-09, appellate proceedings had arisen before learned CIT(A) from the assessment order dated 27-03-2014 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s 147 of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

“1. *The order of the CIT(A) is opposed to law and facts of the case.*

2. *On the facts and in the circumstances of the case and in law, the Ld CIT(A) has erred in directing the Assessing Officer to allow the assessee's claim u/s.80IC as reopening was not valid being only change of opinion, without appreciating that the case was reopened on the basis of material which was brought on record that the same was wrongly allowed to the assessee as no claim was made in the original return and the failure of the AO to take notice of this fact constitutes a new information/tangible material on the basis of which the assessment can be reopened.*

3. *For these and other grounds that may be urged at the time of hearing, the decision of the CIT(A) may be set aside and that of the AO restored.”*

3. The assessee is engaged in the business of development of software and sale and import of computer hardware cards mainly used for videography and photography. The assessee has two units, one at Mumbai and the other at Haridwar. The assessee filed return of income with Revenue u/s 139(1) on 30.09.2008, declaring total income of Rs. 8,14,50,880/-. Thereafter the assessee filed revised return of income with Revenue on 25.02.2010 declaring total income of Rs. 62,02,600/-. In the revised return of income filed with Revenue, the assessee made an claim of deduction u/s 80IC w.r.t. Haridwar unit which was not originally claimed in the return of income filed by the assessee with Revenue u/s 139(1). This revised return of income was filed by the assessee with Revenue within time stipulated u/s 139(5) of the 1961 Act. Thereafter notices were issued by the AO to the assessee u/s 143(2) on 01-09-2010 and the Revenue framed an assessment vide orders dated 29-11-2010 u/s. 143(3) , wherein the income of the assessee was determined at Rs. 1,28,86,701/- . It is pertinent to mention that in the assessment framed by the AO u/s 143(3) vide orders dated 29-11-2010, the Revenue allowed the claim of deduction u/s 80IC to the assessee to the tune of Rs. 6,89,97,805/- as against the deduction u/s 80IC to the tune of Rs.7,52,48,284/- claimed by the assessee vide revised return of income filed with the Revenue on 25-02-2010. Thereafter, proceedings u/s. 147 of the Act were initiated by the AO after recording the reasons for reopening of the assessment vide order sheet entry dated 21.03.2013 , the details of which are as under:-

“In this case, the assessment was completed u/s 143(3) on 29-10-2010 determining the total income at Rs.1,28,86,700/- and Book profit

u/s 115 JB at Rs.8,64,93,460/- . On verification of the records, it is seen as follows:-

The assessee originally filed return of income for A.Y 2008-09 in the month of September 2008, where in deduction u/s. 80IC, was not claimed. The books of accounts were audited and the requisite certificate in Form 3CD w.r.t. original return was issued on 19.9.08 by Chartered Accountant firm, namely M/s. Gala Parikh and Associates. As assessee company was certified ineligible for deduction u/s 80IC. Assessee company paid the entire tax dues by way of self assessment tax.

The assessee company subsequently got its account re-audited by another Chartered Accountant firm namely M/s. Kaushik Das and Associates on 22.2.2010 and obtained revised 3CD report and certificate in Form 10CCB and claimed deduction u/s. 80IC of Rs. 7,52,48,284/- Assessee filed revised return in the month of February 2010 in order to claim aforesaid deduction u/s. 80IC. The deduction u/s. 80IC claimed with reference to revised return was admitted and was restricted to Rs.6,90,45,684/- for reason recorded in the assessment order u/s. 143(3).

On verification of the records, it is seen that:-

(a) Assessee Company had not claimed deduction u/s. 80IC in the original return of income filed u/s 139(1), as mandatorily required under the provision of Sec 80AC.

(b) Section 139(5) of the Act permits filing of revised return if assessee discovers any bona-fide omission or wrong statement. In this case revised return was filed in view of change of opinion expressed by another accountant that too at a later date.

(c) The mandatory certificate required in Form 10CCB was also obtained on 22.02.2010. From this, it is obvious that deduction claimed cannot be construed as claimed within the due date specified u/s 139(1).

Accordingly, the assessee had failed to fulfil mandatory condition of filing return of income within time limit stipulated u/s 139(1) and entertaining the claim of deduction with reference to revised return. In the scenario cited above was against the provision of Section 80IC as well as the legislative intent behind it Thus, the deduction u/s 80IC is needed to be withdrawn.

In view of the above, I have reason to believe that income has escaped assessment for A Y.2008- 09 and the same is required to be brought to tax. "

Notices were issued by the AO to the assessee u/s. 148 of the Act on 22.03.2013 . The copy of reasons recorded for reopening of the assessment were supplied by the AO to the assessee . In response the assessee submitted that the return of income filed u/s. 139(1) on 30.09.2008 and thereafter revised return of income filed on 25.02.2010 may be treated as

return of income filed in response to the notices u/s. 148 . The objections were raised by the assessee to the reopening of the assessment u/s 147 which was disposed of by the AO vide orders dated 20.01.2014 which was also served on the assessee by the AO.

Since the assessee had not claimed deduction u/s. 80IC in the return of income filed u/s. 139(1) of the Act , the A.O held that the assessee has failed to fulfil mandatory condition of filing return of income within time stipulated u/s. 139(1) and entertaining claim of the deduction with reference to the revised return of income wherein even mandatory certificate issued by chartered accountant as required in form no. 10CCB to claim the deduction u/s 80IC was also obtained on 22.02.2010 and hence the AO held that the deduction cannot be allowed to the assessee u/s. 80IC of the 1961 Act keeping in view provisions of Section 80AC which is reproduced hereunder:-

"80 AC Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-1D or section 80-IE, no such deduction shall be allowed to him unless he furnishes a return of his "income for such assessment year on or before the due date specified under sub-section (1) of section 139."

As the assessee did not file its claim for deduction u/s 80IC in the return of income filed u/s 139(1) but raised such claim only in the revised return of income filed u/s 139(5) beyond the time stipulated u/s 139(1) , the AO disallowed the claim of deduction u/s 80IC keeping in view provisions of Section 80AC, vide assessment order dated 27-03-2014 passed u/s 143(3) r.w.s. 147 of the 1961 Act.

4. Aggrieved by the assessment order dated 27-03-2014 passed by the AO u/s 143(3) r.w.s. 147 of the 1961 Act, the assessee filed first appeal before the learned CIT-A and submitted its contentions . The learned CIT-A rejected contentions of the assessee by holding as under, vide appellate orders dated 18-04-2016:-

" 3.3 I have considered the appellant's submissions. In this case appellant had filed Return of income for A.Y. 2008-09 on 30.9.2008 in which he had declared total income of Rs.8,14,50,880/-. Later Appellant filed revised return on 25.2.2010 declaring total income of Rs.62,02,600/-. The appellant's account was re-audited by Chartered Accountant firm M/s Kaushik Das and Associates on 22.2.2010 and

obtained revised 3CD report and certificate in Form No. 10CCB and claimed deduction u/s 80IC of Rs.7,52,48,285/-. Appellant has two units, one in Haridwar and second one in Mumbai. Appellant had maintained separate account books for both units. For Haridwar unit appellant had claimed deduction u/s 80IC. However, AO after raising various queries and considering the revised return had allowed the 80IC claim of the appellant for Rs. 6,90,45,684/-. However, after the original assessment order was passed on 29.11.1010, AO had reopened the assessment after recording the following reasons:

In this case, the assessment was completed u/s 143(3) on 29.10.2010 determining the total income at Rs. 1,28,86,700/- and Book profit u/s 115JB at Rs.8,64,93,460/-. On verification of the records, it is seen as follows:

The assessee originally filed return of income for A.Y. 2008-09 in the month of September 2008, wherein deduction u/s 80IC was not claimed. The books of accounts were audited and the requisite certificate in Form 3CD w.r.t. original return was issued on 19.9.08 by CA firm namely M/s Gala Parikh and Associates. As assessee company was certified ineligible for deduction u/s 80IC. Assessee company paid the entire tax dues by way of self-assessment tax

The assessee company subsequently got its account reaudited by another CA firm namely M/s Kaushik Das and Associates on 22.2.1010 and obtained revised 3CD report and certificate in Form No. 10CCB and claimed deduction u/s 80IC of Rs.7,52,4B,284/-. Assessee filed revised return in the month of February 2010 in order to claim aforesaid deduction u/s 80IC. The deduction u/s 80IC claimed with reference to revised return was admitted and was restricted to Rs. 6,90,45,684/- for reason recorded in the assessment order u/s 143(3).

On verification of the records, it is seen that:

(a) Assessee company had not claimed deduction u/s 80IC in the original return of income filed u/s 139(1), as mandatorily required under the provision of section 80IC.

(b) Section 139(5) of the Act permits filing of revised return if assessee discovers any bonafide omission or wrong statement. In this case revised return was filed in view of change of opinion expressed by another accountant that too at a later date.

(c) The mandatory certificate required in Form 10CCB was also obtained on 22.02.2010. From this, it is obvious that deduction claimed cannot be construed as claimed within the due date specified u/s 139(1).

Accordingly, the assessee had failed to fulfil mandatory condition of filing return of income within time limit stipulated u/s 139(1) and entertaining the claim of deduction with reference to revised return in the scenario cited above was

against the provision of section 80IC as well as the legislative intent behind it.

Thus, the deduction u/s 80IC is needed to the withdrawn. In view of the above, I have reason to believe that income has escaped assessment for A. Y. 2008-09 and the same is required to be brought to tax.

On perusal of the above reasons, it is clear that according to the AO appellant is not eligible to claim 80IC benefit as appellant had not filed the mandatory certificate required in the Form No.10CCB while filing the original return of income u/s 139(1) of the Act on 30.9.2008. According to the AO, appellant should have filed Form No.10CCB with the original return of income. As appellant had not filed Form No.10CCB with the original return of income u/s 139(1), appellant is not eligible to claim the deduction u/s 80IC of the Act. Hence in the reopened assessment order AO has withdrawn the appellant's claim of Rs.6,89,97,805/- which was allowed earlier u/s 80IC of the Act.

3.4 In the submissions of the appellant, appellant states that the facts mentioned in the reasons recorded were, already existing while considering the appellant's claim u/s 80IC based on the revised return filed along with Form No. 10CCB was considered during the assessment proceedings and this reopening of assessment without any tangible material is not permissible in law. According to the appellant, this reopening was based on merely change of opinion. To examine the claim of the appellant, original assessment order was perused. In the original assessment order it is clearly mentioned that AO had considered the revised return filed by the appellant and also Form No.10CCB filed alongwith it. In this original assessment order even AO had raised the query regarding allocation of expenses under the head Salary and Staff welfare expenses and later recomputed the eligible deduction u/s 80IC at Rs. 6,89,97,805/- after allocating the expenses between Haridwar Unit and Mumbai Unit. On perusal of the facts of the original assessment and facts mentioned in the reasons recorded, all the facts which are mentioned in the reasons recorded are available before the AO at the time of original assessment. Hence here AO had reopened the assessment merely on the same facts which were available during the original assessment and there was no new tangible material before the AO in order to reopen the assessment. This shows that this reopening was done based on the change of opinion, It is clear from the reasons recorded that there was no new tangible material before the AO, hence reopening of the assessment merely on change of opinion or to review completed assessment without any material facts does not confer jurisdiction of reassessment in view of the decision in the case of CIT v. Kelvinator Ltd. 320 ITR 561. Further it is also clear on perusal of original assessment that AO had considered the revised return and also Form No. 10CCB and raised a query. After raising the query AO recomputed the 80IC deduction claimed by the appellant. In such a situation Bombay High Court in the case of GNK Sinter Metals Ltd. v. Ms. Ramapriya Raghvan, acit(2015) 114 dtr 121 (Bom)(High Court) held that once a query has been raised during the assessment proceeding and assessee has responded to the query to the satisfaction of the AO then it must follow that there is due application of

mind of AO to the issue raised, hence merely due to change of opinion, assessment cannot be reopened. /same view is also held in Asteroids Trading and Investments (P) Ltd. v. DCIT(2009) 308 ITR 190 (Bom.)(HC), Asian Paints Ltd. v. DCIT(2009) 308 ITR 195(Bom)(HC).

3.5 It is clear from the above decisions that AO had reopened the assessment merely due to change of opinion than any new tangible material available. Hence reopening of assessment without any tangible material and merely due to change of opinion is not permissible in law and reopening of assessment is invalid.

3.6 Further on the merits of the case AO reopened the assessment on the ground that appellant had filed Form No.10CCB alongwith the revised return. This issue was considered by Gujarat High Court in the case of ITO v.VXL India Ltd.[2009] 312 ITR 187 where it is held that non-furnishing of such report at the time of filing of return of income but at a subsequent stage before the assessment proceedings get completed, would not result in denial of such benefit. It is clear from the above Gujarat High Court case that Form No. 10CCB can be filed later. In this case Form No. 10CCB was filed alongwith revised return, hence appellant is eligible to claim 80IC benefit. Further even AO is of the opinion that Form No. 10CCB has to be filed only with original return of income. This issue was considered in the case of Parmeshwar Cold Storage (P) Ltd. v ACIT(2011) B ITR 172(Ahm) (Trib.) where it is held that only condition for claiming the benefit as per 80IC is that original return should be filed in time and if a claim is not made in original return, it can be made subsequently. In the present case, the original return was filed in time but claim of 80IC was made while filing the revised return. In view of the above, appellant is eligible to claim 80IC benefit even with the revised return.

3.7 Hence in view of the above detailed discussion, here this case was reopened merely on the change of opinion without any tangible material, hence reopening is not sustainable in law. Further on the merits of the case appellant can claim 80IC benefit with revised return filed alongwith with. Form 10CCB in view of the above decisions. Here as appellant has filed original return in time, so appellant's claim of 80IC benefit has to be allowed though Form No. 10CCB was filed alongwith revised return. Hence here AO is directed to allow the claim of the appellant u/s 80IC as per original assessment order. Grounds of appeal are allowed.”

5. Aggrieved by the appellate orders dated 18-04-2016 passed by learned CIT(A), the Revenue has come in an appeal before the tribunal . The Ld. DR submitted that the assessee claimed deduction u/s. 80IC which was not claimed in the original return of income filed by the assessee with Revenue u/s 139(1) infringing Section 80AC , while the same was claimed in revised return of income filed by the assessee with Revenue on 25-02-2010 u/s 139(5) of the 1961 Act. It was submitted by learned DR that the case of the

assessee was reopened by the AO u/s 147 after recording reasons for reopening of the concluded assessment and the reasons were duly furnished by the AO to the assessee and also objections raised by the assessee to the reopening of the assessment u/s 147 was disposed of by the AO in compliance with the decision of Hon'ble Supreme Court in the case GKN Driveshafts (India) Ltd. v ITO (2002) 259 ITR 19(SC). It was submitted by learned DR that for claiming deduction u/s. 80IC , it is mandatory to file return of income in time u/s. 139(1) and filing of return of income either u/s. 139(4) or 139(5) will not be treated as compliance. It was submitted by learned DR that as original assessment was framed u/s. 143(3) by the AO, deduction u/s 80IC was allowed erroneously by the AO which was later denied by Revenue keeping in view provisions of section 80IC r.w.s. 80AC. The Ld. DR relied upon the decision of Hon'ble Bombay High Court in the case of Eleganza Jewellery Limited v. CIT (2014) 52 taxman.com 46(Bom) to contend that the reopening was justified as issue of compliance of claiming deduction u/s 80IC in the return of income u/s 139(1) was not deliberated by the AO in the assessment framed u/s 143(3) as this aspect was never looked into by the AO and hence this is not a case of change of opinion. The Ld. DR submitted written submissions which are duly taken on record and placed in the file. In the said written submissions, the learned DR relied upon following case laws:-

- a) Eleganza Jewellery Limited v. CIT (2014) 62 taxmann.com 46(Bom HC).
- b) CIT v. National Tyre & Rubber Tyres Co. Of India Limited (2011) 15 taxmann.com (ker.)
- (c) ITO v. Lakmani Mewal Das (1976) 103 ITR 437(SC)
- (d) Phool Chand Bajrang Lal v. ITO (1993) 203 ITR 456(SC)
- (e) Raymond Woolen Mills v. ITO (1999) 236 ITR 34(SC)
- (f) Desh Raj Udyog v. ITO (2009) 318 ITR 6(All.)

The Ld. AR on the other hand submitted that originally return of income was filed in time by the assessee with the Revenue as stipulated u/s. 139(1). It was submitted that conditions of Section 80IC is to file return of income in

time u/s 139(1) as stipulated u/s. 80AC which return of income u/s 139(1) was duly filed on 30.09.2008 which is placed in paper book page no. 1 . It was submitted by learned counsel for the assessee that revised return of income u/s 139(5) was filed by the assessee on 25.02.2010 wherein the assessee filed claim for deduction u/s. 80IC . It was submitted that no claim was made by the assessee u/s. 80IC in the original return of income filed by the assessee with revenue u/s 139(1). It was submitted that original assessment was framed u/s. 143(3) and the assessment order dated 29-11-2010 is placed in paper book/ page no. 40 to 44 . It was submitted that in the original assessment order dated 29-11-2010 framed by the AO u/s 143(3) , the AO has discussed the issue of allowability of the claim of deduction u/s 80IC in details before allowing deduction u/s. 80IC , wherein deduction of Rs.6,89,97,805/- was allowed by the Revenue out of the claim of deduction of Rs.7,52,48,284/- made by the assessee in revised return of income filed u/s 139(5) , thereby claim of deduction u/s. 80IC was rejected to the tune of Rs. 62,50,479/-. It was submitted that original assessment order dated 29-11-2010 framed by the AO u/s 143(3) is placed in paper book/page 40-44. It was submitted that although the claim of deduction u/s 80IC was made in revised return of income but the same was supported by revised tax audit report in form no 3CB/3CD and certificate in form no 10CCB issued by chartered accountant. It was submitted by learned counsel for the assessee that there was a proper application of mind by the AO while framing assessment order dated 29-11-2010 passed by the AO u/s. 143(3). The original as well revised tax-audit reports , certificate in form no. 10CCB as well revised return of income are placed in paper book filed by the assessee with the tribunal. Our attention was also drawn to page no. 39 wherein reply was submitted by the assessee before the AO during the course of assessment proceedings. Our attention was also drawn to page no. 47 to 51/paper book wherein the assessment order dated 24-12-2009 passed by Revenue u/s 143(3) for assessment year 2007-08 is placed , wherein deduction u/s. 80IC was allowed by the AO. Our attention was also drawn to page no. 59 of the paper book wherein assessee has submitted various contentions before the AO in the proceedings u/s 148 of the 1961 Act vide letter dated 17-12-2013 filed on 18-12-2013. In the said reply before the AO, the assessee has relied upon the decision of ITAT-Panaji Bench decision in the case of Sesa Industries Ltd., (2010) 132 TTJ 730 (Panaji),

decision of ITAT in the case of Ramesh Kumar Rathi (2005) 143 Taxman 33 (Kol) (Magadh) . The assessee also relied upon the decision of ITAT-Ahmedabad in the case of Parmeshwar Cold Storage Pvt. Ltd. v. ACIT (2012) 49 SOT 67 (Ahm). It was submitted that claim for deduction u/s 80IC can be made at any time before the completion of assessment . Our attention was also drawn to page no.66- 68 of the paper book wherein the AO has disposed of the objections raised by the assessee to the reopening of the assessment u/s 147, vide orders dated 20-01-2013. It was submitted that filing of audit report within time stipulated under the provisions of the 1961 Act is directory in nature and the same can be filed even during assessment stage . It was submitted by learned counsel for the assessee that revised return of income is an extension of original return of income and no tangible incriminating material is in the possession of the Revenue to reopen concluded assessment. The assessee relied upon the decision of Hon'ble Bombay High Court vide orders dated 28-01-2015 in ITA No. 285 of 2013 in the case of CIT v. Jet Speed Audio Pvt. Ltd. Bombay High Court. The assessee also relied upon the decision of Hon'ble High Court of Gujarat in the case of Adani Exports v. DCIT (1999)240 ITR 224 (Gujarat). The assessee also relied upon decision of Hon'ble Supreme Court in the case of Indian & Eastern Newspaper Society (1979) 119 ITR 996(SC) . It is contended by learned counsel for the assessee that Revenue has reopened the concluded assessment u/s 147 based on audit objections and it was submitted that audit team cannot raise objections on interpretation of law points/legal grounds as they are not legally trained persons in the field of law. Our attention was drawn to paper book/page 93-94 wherein the letter bearing number DCIT-2(2)/Monarch Innovative/Audit obj/2012-13 is written on 15-03-2013 by learned DCIT to CIT seeking approval for reopening of the assessment u/s 148 based on revenue audit team objections. Thus, it was submitted that it is only based on revenue audit objection the case was reopened u/s 147. The assessee also relied upon the decision of the Hon'ble Gujarat High Court in the case of Gujarat Paguthan Energy Corporation Private Ltd. v. DCIT reported in (2014) 45 Taxman.com 564(Guj) and decision of Hon'ble Bombay High court in the case of M.J. Pharmaceuticals Limited(2008)297 ITR 119(Bom.) and it was submitted that reopening of concluded assessment cannot be made based on change of opinion as in the instant case it was merely change of opinion by the

Revenue as no new incriminating material has come into possession of the AO . The assessee relied on the decision of Hon'ble Bombay High Court in the case of Asian Paints Limited (2009) 308 ITR 195(Bom.) and also decision of Hon'ble Bombay High Court in the case of Asteroids Trading and Investments P. Ltd v. DCIT reported in (2009) 308 ITR 190(Bom.). The assessee also relied upon the decision of Hon'ble Bombay High court in the case GKN Sinter Metals Ltd. v. ACIT reported in (2015) 371 ITR 225(Bom). The assessee on merit drew our attention to para no. 3.6 of the appellate order of the learned CIT-A . The assessee relied upon decision of ITAT-Ahmadabad in the case of Parmeshwar Cold Storage Private Limited (2011) 16 taxmann.com 88(Ahd.) and it was submitted that audit report can be filed later even after filing of the return of income . The assessee also relied upon the decision of the Hon'ble Bombay High Court in the case of CIT v. Pruthvi Brokers & Shareholders (2012) 349 ITR 336(Bom.).

The Ld. DR submitted in the rejoinder that query with respect to compliance of claiming deduction u/s 80IC in the return of income filed u/s. 139(1) was not raised during the original assessment. The Ld DR relied upon the decision of Hon'ble Supreme Court in the case of Kalyanji Mavji & Co. V. CIT reported in (1976) 102 ITR 287(SC). It was also submitted that this is Revenue's appeal and no grounds of appeal challenging the issue on merits has been raised by the Revenue and the grievance of the Revenue is that since the claim of deduction u/s 80IC was not filed by the assessee in return of income filed u/s 139(1) thereby infringing 80AC of the 1961 Act and was raised later in the revised return of income filed u/s 139(1), the said claim of deduction u/s 80IC cannot be allowed.

6. We have considered rival contentions and perused the material on record including orders of authorities below and case laws relied upon by both the parties. We have observed that the assessee is engaged in the business of development of software and sale and import of computer hardware cards mainly used for videography and photography. The assessee has two units, one at Mumbai and the other at Haridwar. The assessee originally filed return of income with Revenue u/s 139(1) on 30.09.2008, declaring total income of Rs. 8,14,50,880/-.The said return of income filed by the assessee with Revenue u/s 139(1) on 30-09-2008 was duly supported by tax-audit report dated 19-09-2008 in form no. 3CA/3CD as is required u/s 44AB in

which no claim of deduction u/s 80IC was reflected as being allowable to the assessee in the opinion of the chartered accountant issuing the said tax-audit report. Consequently, the assessee did not file any claim of deduction u/s 80IC in the return of income filed u/s 139(1) on 30-09-2008 for the AY 2008-09. In the meantime, in the assessment framed by the Revenue u/s 143(3) for AY 2007-08 vide assessment order dated 24-12-2009, the claim of the assessee for deduction u/s 80IC w.r.t. Haridwar unit stood partly allowed by the Revenue wherein some common expenses stood disallowed on the grounds of allocation between eligible and non-eligible unit. The assessee obtained revised tax-audit report dated 22-02-2010 in form no. 3CA/3CD as is required u/s 44AB and also certificate in form no. 10CCB dated 22-02-2010 from another chartered accountant who in his report opined that the assessee is entitled for deduction u/s 80IC of the 1961 Act with respect to Haridwar unit. Thereafter, the assessee argued with allowability of its claim for deduction u/s 80IC for AY 2007-08 by Revenue in assessment framed u/s 143(3) for preceding year i.e. AY 2007-08 as also by tax-audit report and certificate in form no 10CBB issued by a chartered accountant for AY 2008-09 filed revised return of income u/s 139(5) with Revenue on 25-02-2010 wherein the assessee made an claim for deduction u/s 80IC w.r.t. Haridwar unit which was not originally claimed in the return of income filed by the assessee with Revenue u/s 139(1). This revised return of income was filed by the assessee with Revenue within time stipulated by statute u/s 139(5) of the 1961 Act. Thereafter, Revenue framed an assessment u/s 143(3) of the 1961 Act vide orders dated 29-11-2010 wherein the AO partly allowed the claim of deduction u/s 80IC of the 1961 Act to the assessee for the impugned assessment year while some common expenses were disallowed on the grounds of the allocation of the expenses between eligible and non-eligible unit. The AO while framing aforesaid assessment u/s 143(3) vide assessment order dated 29-11-2010 has dealt with the allowability of deduction u/s 80IC in details after duly considering the revised return of income filed by the assessee on 25-2-2010 which led to partial allowability of claim of deduction u/s 80IC wherein the AO allowed deduction u/s 80IC to the tune of Rs.6,89,97,805/- as against the claim of deduction to the tune of Rs. 7,52,48,284/- filed by the assessee u/s 80IC leading to denial of deduction to the tune of Rs. 62,50,479/- on the grounds of apportionment of the common expenses between eligible and non-eligible

unit. The detailed discussions w.r.t. allowability of claim for deduction u/s 80IC found mentioned in the assessment order framed by Revenue u/s 143(3). Thereafter revenue audit team raised an objection that since the claim of deduction u/s 80IC was never raised in the return of income filed u/s 139(1) , the same cannot be allowed keeping in view express provisions of Section 80AC of the 1961 Act. The AO accepted the contentions of the revenue audit team and moved proposal dated 15-3-2013 before learned CIT for reopening of the concluded assessment u/s 147 which stood accepted by learned CIT vide approval dated 22-03-2013. Thereafter , Revenue reopened the concluded assessment u/s 147 which led to framing of an assessment by Revenue vide assessment order dated 27-03-2014 passed u/s 143(3) r.w.s. 147 wherein claim of deduction u/s 80IC filed by the assessee was rejected by the revenue in toto. Aggrieved by the assessment framed by Revenue u/s 143(3) r.w.s. 147, the assessee filed first appeal before learned CIT(A) which stood allowed by learned CIT(A) vide appellate order dated 18-04-2016. This is the background and genesis of the denial of deduction u/s 80IC of the 1961 Act to the assessee w.r.t. Haridwar unit so far as previous year relevant to the impugned assessment year is concerned. There is no dispute between rival parties so far as allowability of deduction u/s 80IC to the assessee w.r.t. Haridwar unit so far as merits are concerned as the AO itself allowed deduction u/s 80IC to the assessee w.r.t. Haridwar unit for AY 2007-08. The only dispute surviving between rival parties as supported by grounds of appeal raised in memo of appeal filed by the Revenue with the tribunal for the impugned assessment year is w.r.t. non filing of the said claim of deduction u/s 80IC by the assessee in the return of income filed u/s 139(1) on the grounds that it infringes upon provisions of Section 80AC of the 1961 Act as the said claim for allowability of deduction u/s 80IC was filed for the first time by the assessee in the return of income filed u/s 139(5) of the 1961 Act for the impugned assessment year and not in the return of income filed u/s 139(1) and it is alleged by Revenue that the AO while in assessment proceedings u/s 143(3) r.w.s. 143(2) failed to take notice of the said fact which in the opinion of Revenue constituted tangible incriminating material calling for interference u/s 147/148 of the 1961 Act. In our considered view, the AO has duly deliberated the claim of deduction filed by the assessee u/s 80IC in the revised return of income filed on 25-02-2010 while framing assessment order dated 29-11-2010 u/s 143(3). The AO did considered

revised return of income filed by the assessee with Revenue on 25-02-2010 in which the said claim of deduction u/s 80IC was filed by the assessee for the first time before allowing the claim of deduction u/s 80IC to the assessee w.r.t. Haridwar unit, in an assessment originally framed u/s 143(3). While allowing claim of deduction u/s 80IC while framing original assessment u/s 143(3), the AO partially disallowed the deduction u/s 80IC on the grounds of allocation of common expenses between eligible and non eligible unit. Provisions of Section 80AC contemplates that for allowing deduction u/s 80IC, the assessee is required to file return of income u/s 139(1). The assessee did file return of income u/s 139(1) within stipulated time albeit no claim of deduction u/s 80IC was filed in the said return of income, which claim of deduction u/s 80IC was later filed for the first time for the impugned assessment year vide revised return of income filed by the assessee with revenue u/s 139(5). The said revised return of income u/s 139(5) was filed by the assessee with the Revenue within stipulated time as prescribed under the statute. The provisions of Section 80AC did not lay down condition that deduction u/s 80IC to be allowed must be claimed in the return of income filed u/s 139(1) rather it stipulates that return of income is required in these cases to be filed u/s 139(1) and if the assessee filed belated return u/s 139(4) or did not file any return at all will disentitle assessee for the claim of deduction u/s 80IC as was applicable for the year under consideration. Section 80AC is reproduced hereunder:

"80 AC Where in computing the total income of an assessee of the previous year relevant to the assessment year commencing on the 1st day of April, 2006 or any subsequent assessment year, any deduction is admissible under section 80-IA or section 80-IAB or section 80-IB or section 80-IC or section 80-1D or section 80-IE, no such deduction shall be allowed to him unless he furnishes a return of his "income for such assessment year on or before the due date specified under sub-section (1) of section 139."

We have also gone through Finance Bill, 2006 and relevant notes on clauses and memorandum to Finance Bill, 2006 which introduced Section 80AC and we could not find any indication that the deductions u/s 80IC will only and only be allowed if and only if the same is claimed in the return of income filed u/s 139(1). It is not allowed to read words into taxing statute which are not mentioned therein by the legislature as it is not permissible to add or

delete words in the taxing statute which are not there in the statute when the provisions of the statute is simple, plain , clear and unambiguos . The taxing statute are to be strictly construed as per the language used by legislatures if the words used are simple , clear , plain and unambiguous. The law-makers have only stipulated that the assessee is required to file return of income u/s 139(1) in order to be eligible for claiming deduction u/s 80IC which assessee complied by filing return of income on 30-09-2008 u/s 139(1) albeit it filed its claim of deduction u/s 80IC for the first time for the impugned assessment year in the revised return of income filed on 25-02-2010. The assessee had a bonafide reasons for filing claim of deduction u/s 80IC late for the first time in the revised return of income filed u/s 139(5). The claim of the assessee for AY 2007-08 u/s 80IC stood partly allowed by the AO vide assessment framed u/s 143(3) vide orders dated 24-12-2009 which on the touchstone of preponderance of probabilities triggered assessee to file claim for deduction u/s 80IC for A Y 2008-09. The first tax-audit report dated 19-09-2008 in form no. 3CA/3CD as is required u/s 44AB issued by chartered accountant for AY 2008-09 had opined that the assessee is not entitled for deduction u/s 80IC which prompted assessee to not lodge its claim for deduction u/s 80IC in the return of income filed u/s 139(1) as filing claim of deduction u/s 80IC in violation of tax-audit report could had triggered severe consequences in the form of liabilities towards tax, interest and penalties as well criminal liability by way of prosecution, but once the revenue after scrutinising the claim for AY 2007-08 in scrutiny proceedings u/s 143(2) r.w.s. 143(3) had allowed deduction u/s 80IC vide assessment orders dated 24-12-2009 passed u/s 143(3), then there remains nothing for the assessee to have not lodged its claim for AY 2008-09 which triggered assessee to obtain fresh tax audit report dated 22-02-2010 in form no. 3CA/3CD u/s 44AB and certificate in form no. 10CCB to lodge its claim for deduction u/s 80IC vide by filing revised return of income u/s 139(5) which was filed on 25-02-2010 and hence filing of revised return of income u/s 139(5) was supported by a bonafide reasons and is in fact extension of the original return of income filed by the assessee on 30-09-2008. Section 139(5) allows assessee to file revised return of income wherein the assessee finds some bonafide mistake and error in the return of income filed u/s 139(1) which return of income is an extension of the return of income filed u/s 139(1). Similar view has been taken by the ITAT-Ahmadabad in the case of

Parmeshwar Cold Storage Private Limited (supra) wherein it is held that Section 80AC only stipulates that for claiming deduction u/s 80IB , it is essential to file return of income u/s 139(1) within stipulated time while claim for deduction can be filed even at appellate stage . Hon'ble Supreme Court has held in Goetze India Limited (supra) that claim for the deduction can be raised for the first time before the appellate authorities while in the instant case the assessee did raised its claim of deduction u/s 80IC by filing revised return of income u/s 139(5) within time stipulated under the statute and the same was filed before completion of assessment . The assessee duly filed tax audit report dated 22-02-2010 in form no 3CA/3CD along with certificate in form no. 10CCB and filed revised return of income u/s 139(5) on 25-02-2010 within time stipulated by provisions of 1961 Act wherein said claim of deduction u/s 80IC was filed which in our considered view is a sufficient compliance for claiming deduction u/s 80IC read in conjunction with Section 80AC keeping in view peculiar factual matrix of the case. It is a clear case of change of opinion by the AO as all the material facts were before the AO when assessment was framed u/s 143(3) vide assessment order dated 29-11-2010 wherein claim of deduction u/s 80IC was allowed by the AO. No doubt the assessment was reopened by the revenue within four years from the end of the assessment year but powers conferred on the Revenue u/s 147/148 is to power to reassess and not power to review. The AO in original assessment framed u/s 143(3) vide orders dated 29-11-2010 has elaborately discussed the issue of deduction u/s 80IC wherein revised return of income filed by the assessee on 25-02-2010 was duly considered by the AO while framing assessment u/s 143(3) and thus assessment order dated 29-11-2010 was passed by the AO u/s 143(3) was finalised by the AO after due application of mind . The Revenue has also allowed the claim of deduction u/s 80IC to the assessee w.r.t. Haridwar unit for AY 2007-08 after detailed deliberation and discussions in an assessment framed u/s 143(3) vide assessment orders dated 24-12-2009. The decision of Hon'ble Bombay High Court in the case of Jet Speed Audio Private Limited(supra) supports the contention of the assessee. The reliance of Revenue on the decision of Hon'ble Supreme Court in the case of Kalyanji Mavji & Co(supra) is not correct as on this aspect of the oversight in passing assessment order will give AO the jurisdiction to issue notice u/s 148 was held by Hon'ble Supreme Court in the case of Indian and Eastern Newspaper Society v. CIT

(119 ITR 996) to be not a correct view . The Hon'ble High Court of Bombay in Jet Speed Audio Private Limited(supra) in para 11 has dealt with this in details. This position was reiterated by Hon'ble Supreme Court in the case of ALA Firms v. CIT (183 ITR 285) . The decision of Hon'ble Supreme Court in the case of Kelvinator of India Limited(Supra) as well following decisions of Hon'ble Bombay High Court in the case of GKN Sinter Metals Limited(supra) and decision in the case of Asteroid Trading and Investments Private Limited (supra) and Asian Paints Limited(supra)supports the contentions of the assessee that powers u/s 147/148 is to reassess and not to review the decisions of the AO as change of opinion is not permissible for reopening of the concluded otherwise there will be no end to litigation. The assessee has rightly relied upon cited case laws filed before us keeping in view factual matrix of the case. The Revenue has relied upon following decisions :

- a) Hon'ble High Court of Bombay in the case of Eleganza Jewellery Limited(supra)- In this case , the deduction u/s 10AA was allowed by the Revenue despite the fact that the assessee had not received full amount of export proceeds in convertible foreign exchange within six months and to that extent the assessee was allowed excess deduction u/s 10AA in original assessment which triggered reopening of the concluded assessment u/s 147/148 of the 1961 Act. The Hon'ble Bombay High Court held that in this case reopening of the assessment is done within four years from the end of the assessment year and the jurisdictional requirement of there being a failure to make true and full disclosure would not be applicable and even if there is no failure on the part of the assessee to make full and true disclosure of all relevant material necessary for assessment, there is no bar/prohibition for issuing a notice u/s 147/148 for reopening of an assessment. It was observed by Hon'ble Bombay High Court that thing to be examined is whether or not the AO had the reasons to believe that income chargeable to tax has escaped assessment while issuing notice u/s 148 but the reasons cannot be founded on the change of opinion. In the instant case before us, all the material was fully disclosed by the assessee and it was deliberated in detail by the AO before partly allowing the claim of deduction u/s 80IC in the original assessment u/s 143(3) wherein revised return as well revised tax audit report was before the AO. We are afraid that this decision is of

no help to the assessee as this is a clear case of change of opinion which is not permissible in proceedings u/s 147/148 of the 1961 Act.

- b) Hon'ble Kerala High Court decision in the case of National Tyres and Rubber Co of India Limited(Supra), in the said case the assessee did not returned capital gains u/s 45(2) on the sale of land and hence the AO also did not had any occasion to consider the said capital gains which was not disclosed in return of income as returned income stood accepted, the reopening of the assessment u/s 147 was held to be valid while in the instant case , all the material necessary for framing assessment was before the AO and the AO did considered the allowability of claim for deduction u/s 80IC in details while partly allowing the said claim in assessment framed u/s 143(3) vide assessment orders dated 29-11-2010. Thus, this case is clearly distinguishable and is of no help to Revenue so far as factual matrix of the instant appeal before us is concerned.
- c) With respect to the other cited case laws by learned DR which found mentioned in written submissions filed before the Bench, it has not been specifically pointed out by learned DR as to how those case laws are applicable to factual matrix of the case . In any case, we have gone through the complete written submissions but we are afraid that it is not of any help to the Revenue in the instant appeal before us as far as the conclusions arrived upon by us in the instant appeal which found mentioned in this order.
- d) Thus, in view of our afore-stated detailed discussions , the claim of the assessee for deduction u/s 80IC as originally allowed by the AO while framing assessment order dated 29-11-2010 u/s 143(3) stood allowed . The Revenue fails in this appeal. We order accordingly.

7. In the result appeal of the revenue is dismissed.

Order pronounced in the open court on 12.02.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 12.02.2018 को की गई ।

Sd/-

(C.N PRASAD)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 12.02.2018

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, H
6. Master File

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BY ORDER
DY/ASST. REGISTRAR
ITAT, MUMBAI

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