

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'E': NEW DELHI**

**BEFORE SHRI INTURI RAMA RAO, ACCOUNTANT MEMBER
AND
SHRI KULDIP SINGH, JUDICIAL MEMBER**

ITA No. 2237/Del/2012
Assessment Year: 2005-06

M/s Nilkanth Concast Pvt. Ltd., C/o- Cargo Conveyor, BBZ, North-66, Zanda Chowk, Gandhidham (PAN: AABCN8500A) (Appellant)	Vs.	Dy. Commissioner of Income Tax, Central Circle-10, New Delhi. (Respondent)
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And

ITA No. 2730/Del/2012
Assessment Year: 2005-06

Asstt. Commissioner of Income Tax, Circle-10, New Delhi (Appellant)	Vs.	M/s Nilkanth Concast Pvt. Ltd. 21 & 22, 2 nd Floor, Indira Place, H-Block, Connaught Circus, New Delhi (PAN: AABCN8500A) (Respondent)
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Assessee by : Sh. Ved Jain, CA
Department by: Sh. Ravi Jain, CIT(DR)

Date of hearing: 18.09.2015
Date of pronouncement: 14.10.2015

ORDER

PER INTURI RAMA RAO, A.M.:

These cross appeals, filed by the assessee as well as by the Department, are directed against the order of CIT(A)-XXXII, Delhi, dated 26.03.2012 passed for the assessment year 2005-06. The assessee filed appeal in ITA No.

2237/Del/2012 and the Revenue filed appeal in ITA No. 2730/Del/2012. The assessee raised the following grounds of appeal in ITA No. 2237/Del/2012:

- i. The grounds of appeal mentioned hereunder are without prejudice to one another.
- ii. The learned Commissioner of Income-tax (Appeals)-XXXII, New Delhi [hereinafter referred as "CIT(A)"] erred on facts as also in law in confirming addition of Rs. 3,80,00,000/- being unsecured loans received from the following concerns. The addition may kindly be deleted:

Sr. No.	Name of the Creditors	Amount (Rs.)
01	M/s Baba Kishore Enterprises	85,00,000
02	M/s G.R.S. & Co.	1,00,00,000
03	M/s Mahadev Enterprises	1,45,00,000
04	M/s Pradipkumar Vikaskumar	50,00,000
	Total (Rs.)	3,80,00,000

- iii. The learned CIT(A) erred on facts as also in law in confirming addition of Rs. 75,00,000/- being unsecured loan received from Shri Raj Pal. The addition may kindly be deleted.
- iv. The learned CIT(A) erred on facts as also in law in retaining disallowance of Rs. 9,94,380/- being 20% of Rs. 49,71,904/- made u/s 40A(3) of the Act. The disallowance may kindly be deleted.
- v. The learned CIT(A) erred on facts as also in law in retaining addition of Rs. 92,01,500/- out of total addition of Rs. 1,12,01,500/- made u/s 69 of the Act being alleged investment made in construction of factory building. The addition may kindly be deleted.
- vi. The learned CIT(A) erred on facts as also in law in confirming addition of Rs. 4,21,40,138/- made u/s 69 of the Act being alleged payment made to M/s Ishwar Construction Co. for construction of factory building. The addition may kindly be deleted.
- vii. The learned CIT(A) erred on facts as also in law in confirming addition of Rs. 70,00,000/- being amount received from Shri Ram Kishan Dass. The addition may kindly be deleted.
- viii. Your Honour's appellant craves leave to add, amend, alter or withdraw any or more grounds of appeal on or before the hearing of appeal.

2. The Revenue raised the following grounds of appeal in ITA No. 2730/Del/2012:

- i. That the Commissioner of Income Tax(Appeals) erred in law and on facts of the case in deleting the addition of Rs. 4,25,00,000/- made by the Assessing Officer on account of bogus loan.
- ii. That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs. 68,78,346/- made by the Assessing Officer on account of unexplained expenditure u/s 69C of the Income Tax Act, 1961.
- iii. That the Commissioner of Income Tax (Appeals) erred in law and on facts of the case in deleting the addition of Rs. 20,00,000/- out of the total addition of Rs. 1,21,01,500/- made by the Assessing Officer on account of unexplained investment in construction of factory building.
- iv. (a) The order of the CIT(A) is erroneous and not tenable in law and on facts.
(b) The appellant craves leave to add, alter or amend any/all of the grounds of appeal before or during the course of the hearing of the appeal.

3. First, we shall take up the appeal filed by the assessee company since the issues raised in the appeal relate to the validity of the assessment. During the course of hearing, the assessee raised some additional grounds, which read as under:

Additional Grounds of appeal:

9. On the facts and circumstances of the case, the learned Assessing Officer (AO) has erred in making reference for special audit under Section 142(2A) in a mechanical way without application of mind and without there being any complexity in the accounts. Accordingly the order passed under Section 142(2A) is bad in the law and in consequence the assessment framed is vitiated and bad in law.

10. On the facts and circumstances of the case, the AO was not justified, both on facts and in law, in asking the appellant to get its accounts audited under Section 142(2A) of the Act.

11. On the facts and circumstances of the case, the extension granted by the AO in carrying out the audit under Section 142(2A) is against the statutory provision of the Act, as applicable in the relevant assessment year whereby no such extension can be given unless the appellant makes a request for the same.

12. On the facts and circumstances of the case, the order passed by Id. AO is bad & liable to be quashed, being barred by limitation.ö

4. Ld. counsel for the assessee submitted that the additional grounds raised are purely legal in nature, does not require any verification of facts and therefore he prayed that the additional grounds of appeal may be admitted.

5. Ld. Sr. DR has no objection for admission of additional grounds of appeal.

6. We find from the additional grounds of appeal that they are purely legal grounds and does not require any verification of investigation into the facts. Having regard to the ratio laid down by the Honøble Supreme court in the case of NTPC Ltd. Vs. CIT, 229 ITR 383 (SC), we admit the additional grounds of appeal for adjudication. Hence, we proceed to adjudicate upon the additional ground of appeal, since it goes to the very validity of the assessment. The factual matrix leading to the present appeal is as under:

6.1 A search and seizure operations under Section 132 of the Income-tax Act, 1961 (for short öthe Actö) were conducted in the case of M/s Grain Merchant Group as well as the assessee company on 07.10.2004. Last punchnama was drawn on 06.12.2004. Thereafter, notice under Section 153A of the Act was issued to the assessee company on 23rd September, 2005. During the course of assessment proceedings, the Commissioner of Income Tax (Circle)-II, New Delhi, vide order dated 12.12.2006, ordered for the special audit under the provisions of Section 142(2A) of the Act. As per the said order, the time limit for filing the audit report was 90 days, which means audit report was to be

completed on or before 12th March, 2007. However, the Assessing Officer at the request of the Chartered Accountant, namely, M/s P. Bholusaria & Co., extended the due date for furnishing of the audit report upto 5th June, 2007 by three different orders. The audit report was finally submitted on 4th June, 2007 and the assessment order was passed by the Assessing Officer on 3rd August, 2007.

7. Ld. counsel for the assessee company submitted that the order passed under Section 153A of the Act was barred by limitation. Ld. counsel contended that as per the provisions of Section 142(2A) of the Act prevailing at the relevant time, the Assessing Officer did not have the *suo motu* power to extend the due date for filing the special audit report under section 142A of the Act, therefore, he submitted that the assessment was barred by limitation. In this connection, he relied upon the decision of this Tribunal in the case of M/s Bishan Saroop Ram Kishan Agro Pvt. Ltd. Vs. DCIT, in ITA No. 3413/Del/2008 (A.Y. 1999-2000) along with other appeals, dated 18th September, 2009 and this decision was confirmed by the Honøble Delhi High Court vide order dated 27th May, 2011, in ITA No. 1775/2010 (CIT Vs. Bishan Saroop Ram Kishan Agro Pvt. Ltd.) along with other appeals. Copies of the above orders have been filed before us.

8. On the other hand, the Id. CIT(DR) placed reliance on the orders of the lower authorities.

9. We heard the rival submission and perused the material on record. The issue for adjudication in this case is whether the assessment is barred by limitation under Section 153(1B) of the Act or not. In this case, admittedly the Assessing Officer extended the time for submission of the special audit report *suo motu*. At the relevant point of time, the Assessing Officer did not have the power of *suo motu* extension of submission of the audit report under the provisions of Section 142(2A) of the Act. Such power was granted by the statute to the Assessing Officer only from the assessment year 2008-09. This provision was made clear by the CBDT Circular No. 7, issued on 27th March, 2009. The similar issue had come up before a coordinate bench of this Tribunal, in the case of M/s Bishan Saroop Ram Kishan Agro Pvt. Ltd. Vs. DCIT, in ITA No. 3413/Del/2008 (A.Y. 1999-2000) along with other appeals and the Tribunal vide order dated 18th September, 2009, held as under:

5.2 Further, a perusal of the proviso to Section 142(2C) shows that the AO did have the powers to extend the period by further period or periods as he thinks fit subject to the maximum limitation of a period of 180 days from the date on which the direction u/s 142(2A) was received by the assessee. On the facts of the present case, it is noticed that the assessee has not made any application for the extension of the period of special audit. Therefore extension which has been done vide letter dated 07.03.2007, 17.04.2007 and 17.05.2007 made on the request of the auditor could duly be taken as the suo motu action of the A.O. A perusal of the memorandum explaining the provisions of Finance bill 2008 as also the Circular No. 01 dated 27.03.2008 which explains the amendment to the proviso to Section 142(2C) shows that the term "suo motu, or" had been inserted w.e.f. 01.04.2008. In these circumstances, it would have to be held that the power to suo motu extend the period for completion of the special audit was available to the A.O. only w.e.f. 01.04.2008 and before such date, the extension can be made only at the request of the assessee on an application made in this behalf by the assessee. If it is to be read otherwise, there was no reason for such amendment. The fact that the term "suo mota" has been

inserted with effect from 01.04.2008 shows that before 01.04.2008, the A.O. did not have the inherent powers to extend the time limit without an application from the assessee. Further, even such extension would be controlled in view of the term "for any good & sufficient reason". Here as the period in the present case is before 01.04.2008 and as it is noticed that the assessee has not made any application for the extension of the period given vide order for special order dated 12.12.2006, the extensions made by the A.O. vide his order dated 7.03.2007, 17.04.2007 and 17.05.2007 are without jurisdiction and consequently such extensions as made vide those letters/orders cannot be said to extend the limitation. The exclusion as provided in the Exp. (ii) to Section 153B would have to be read. to be 90 days being a period between 12.12.2006 to 12.03.2007. Consequently, it would have to be held that the time period u/s 142(2A) is controlled by the the provisions of Section 142(2C) and the exclusion provided in explanation (ii) to Section 158B was for the period from 12.12.2006 to 12.03.2007 and consequently the claim of the assessee that the assessment is barred by limitation, would have to be upheld and we do so.

10. The above order was confirmed by the Honøble Delhi High Court in ITA

No. 1775 of 2010, vide order dated 27th May, 2011 as under:

"19. It was to rationalize the said proviso that the word "suo motu" came to be added by way of amendment with effect from 1st April 2008. As per Clause 27.3 of the Circular dated 27th March, 2009 while the Assessing Officer shall continue to have the power to grant extension on an application made in this behalf by the Assessee, he could also grant extension of his own when there are good and sufficient reasons for such extension. Thus, it is noticed that sub section (2C) before the amendment did not empower the Assessing Officer to extend the time for submissions of special audit report under sub Section (2A). Further, the power of extension of time for submission of special audit report is also subject to limitation of a period of 180 days from the date on which the directions under [section 142\(2A\)](#) of the Act for the audit was received by the Assessee. It is an admitted fact that in the present case, the assessee had not made any application for extension of period of audit report. Therefore, the extension which was granted by the Assessing Officer on the request of the Auditor could be taken to be a suo motu action of the Assessing Officer which power, as noted above, was not available with the Assessing Officer prior to the amendment with effect from 1 st April, 2008. Not only this, said power of extension was also further controlled in the words, "for any good and sufficient reasons". This would mean that the Assessing Officer was supposed to record reasons for granting extension on his own. Clause 27.4

of the Circular also clarifies that this amendment has been made applicable with effect from 1 st April, 2008 and it is from this date onwards that the Assessing Officer shall have power to extend the period of furnishing of special audit report suo motu.

20. *In the light of interpretation of the proviso as is existed before or after the amendment and the legislative intent behind the amendment as gathered from the memorandum and the circular noted above, we are not persuaded to agree with the interpretation as given by the Punjab and Haryana High Court in the case of Jagjit Sugar Mills Company Limited (supra). Further in view of our above discussion, it comes to be concluded that the Tribunal was correct in holding that the Assessment Order was barred by limitation. That being so, we answer Question No.1 in affirmative in favour of the Assessee and against the revenue.*

21. *In view of foregoing discussion that the amendment whereby the word „suo motu“ were inserted in sub section (2C) of [Section 142](#) of the Act was to be applicable with effect from 1st April, 2008 only, the amendment cannot be said to be clarificatory or retrospective in nature. The amendment was prospective and was to be applicable with effect from 1st April, 2008 only. Accordingly, we answer Question No.2 against the revenue.”*

11. The facts in the cases mentioned supra are identical with the facts of the present case. Even in the present case, there was no evidence on record suggesting that the assessee sought *suo motu* extension of time for submission of audit report under Section 142(2A) of the Act. It is clear from the record that the Assessing Officer had *suo motu* extended time for furnishing the audit report under Section 142A of the Act. Respectfully following the ratio laid down by the Honøble Jurisdictional High Court, we hold that the assessment framed in this case is also barred by limitation and does not survive in the eye of law. Accordingly, the assessment order is quashed, as such.

12. In the appeal filed by the assessee i.e. ITA No. 2237/Del/2012, we have quashed the assessment order as barred by limitation, hence, the issue raised by

the Revenue in appeal no. 2730/Del/2012 does not survive and therefore, we deem it not necessary to adjudicate the grounds of appeal raised by the Revenue. Accordingly, the appeal filed by the Revenue is dismissed, as such.

11. In the result, the appeal filed by the assessee is allowed and the appeal of the Revenue is dismissed.

The decision is pronounced in the open court on 14th October, 2015.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(INTURI RAMA RAO)
ACCOUNTANT MEMBER

Dated: 14th October, 2015.

RK/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi