IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'I-2' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND MS. SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No. 1443/DEL/2014
[A.Y 2008-09]

Consulting Engineering Services India Pvt. Ltd, 3rd Floor Platinum Tower, 184, Udyog Vihar, Phase I Gurgaon [Haryana]	Vs.	The A.C.I.T Circle - 3(1) New Delhi
PAN: AAACC 5110 G		

ITA No. 1734/DEL/2014
[A.Y 2008-09]

The Dy. C.I.T Circle - 3(1) New Delhi	Vs.	Consulting Engineering Services India Pvt. Ltd, 3rd Floor Platinum Tower, 184, Udyog Vihar, Phase I Gurgaon [Haryana]
		PAN: AAACC 5110 G
(Applicant)		(Respondent)

Assessee By : Shri Salil Kapoor, Adv
Ms. Soumya Singh, Adv
Shri Ananya Kapoor, Adv

Department By : Ms. Nidhi Srivastava, CIT-DR

Date of Hearing : 30.01.2019
Date of Pronouncement : 05.02.2019

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above two cross appeals by the assessee and Revenue are preferred against the order of the CIT(A), New Delhi dated 31.12.2013 pertaining to A.Y 2008-09. Both these appeals were heard together and are being disposed of by this common order for the sake of convenience and brevity.

2. In the first round of litigation, the assessee had raised the following additional ground, which was not admitted by the Tribunal:

> *"That the assessment order passed on 25.06.2012 is illegal, bad in law, without jurisdiction and barred by time limitation as the reference and order u/s 142(2A) of the Act is illegal and bad in law."*

3. The assessee preferred an appeal before the Hon'ble High Court and the Hon'ble High Court directed the Tribunal to admit the additional ground and adjudicate upon the same. The operative part of the Hon'ble High Court order reads as under:

"9. In the considered view of the Court, the ITAT ought to have permitted the petitioner to raise the aforementioned additional ground and ought to have decided the said additional ground on its merits in accordance with law."

4. Pursuant to the directions of the Hon'ble High Court [supra], the representatives of both the sides were heard at length and case records carefully perused.

5. Briefly stated, the facts of the case are that the assessee filed its return of income on 30.09.2008, which was subsequently revised on 02.07.2009 and finally on 31.03.2010. The return was selected for scrutiny assessment and accordingly, statutory notices were issued and served upon the assessee. As per the provisions of section 153(1) of the Act, the time period for completion of assessment was two years from the end of the A.Y in which the income was first assessable or one year from the end of the F.Y. in which a return or revised return relating to the assessment is filed under sub sec. (4) or (5) of section 139, whichever is later. However, where a reference under sub-section (1) of section 92CA is made during the course of proceedings for the assessment or reassessment, the period available for

completion of assessment or reassessment as the case may be under sub-section shall be extended by 12 months.

6. In the light of the relevant provisions of the Act, since the return was filed on 30.09.2008, the time period for completion of assessment u/s 153(1) without PP reference was 31.12.2010. Since a reference was made to the TPO, the time period for completion of assessment u/s 153(4) was 31.12.2011. Assessment order is framed on 25.06.2012 and, therefore, the assessee strongly contends that the assessment is barred by limitation.

7. However, before us, the ld. DR strongly contended that vide letter dated 21.11.2011 to the appellant, it was made clear by the Assessing Officer that a special audit u/s 142(2A) of the Act was contemplated. It is the say of the ld. DR that the period taken for special audit u/s 142(2A) of the Act should also be excluded and if done so, then the assessment order so framed is well within the period of limitation.

8. The ld. DR further strongly contended that reference to the special audit u/s 142(2A) of the Act is not appealable and, therefore, the same cannot be considered during the present appeal.

9. Per contra, the ld. AR, relying upon the decision of the co-ordinate bench in the case of Unitech Ltd 5180/DEL./2013 pointed out that a similar issue was considered by the co-ordinate bench and the co-ordinate bench held the assessment to be barred by limitation. The relevant finding of the co-ordinate bench reads as under:

> *"43. From the above it is apparent that despite the appellant seeking the basis on which directions for special audit is proposed to be issued, the learned CIT dispensed with that precondition and granted approval which itself vitiates the whole process of granting approval. It is thus apparent that neither the AO nor the learned CIT disclosed the basis of approval after the objection as raised by the appellant to the show cause notice u/s 142(2A) of the Act and hence the order dated 9.12.2011 is a vitiated order.*
>
> *44. Furthermore, the judgments relied upon by the revenue also do not lead us to take different view of the matter The first judgment relied upon is the case of Rajesh Kumar and Ors v CIT (supra). In this case the Hon'ble Court has held in para 34*

that the order of assessment can be subject matter of an appeal; and not, a direction issued u/s 142(2A) of the Act. In this appeal there is no challenge to the directions u/s 142(2A) of the Act. The challenge is that order of assessment is barred by limitation which is a valid contention supported by the judgment of Hon'ble Supreme Court in the case of Sahara India (Firm) v CIT (supra). The challenging to the validity of order u/s 142(2A) of the Act is confined to the extent that order is barred by limitation and not to the extent of refunding the fees or any other consequence flowing out of the order u/s 142(2A) of the Act. Further, observation of Hon'ble Court that principles of natural justice are required to be complied with has also been reaffirmed in the case of Sahara India (Firm) (supra). The judgment of AT&T Communication Services India (P) Ltd. v CIT (supra) is on facts and has no application to the case of appellant company. Also the judgment in the case of DLF Ltd. v Addl. CIT (supra), has no application as hereto none of the contentions raised before us have been decided to the contrary. The learned counsel for the revenue has not been able to point out any material so as to arrive at different view of the matter.

45. In view of the above discussion and conclusion we hold that directions dated 9.12.2011 by the learned Addl. CIT, Range - 18, New Delhi for special audit u/s 142(2A) of the Act were illegal, invalid and not in accordance with law and

thus the assessment so made is barred by limitation and is thus quashed as such. Grounds 1 to 1.3 are therefore allowed."

10. The ld. AR further relied upon another decision of the co-ordinate bench in the case of M/s Jyoti Traders in ITSS No. 60 to 62/MUM/2008 and ITSS 110-112/MUM/2008. The relevant findings of the co-ordinate bench read as under:

"37. Immediately thereafter the AO has in para-5 referred the case for special audit u/s,142(2A) of the Act, In our view the conditions precedent for passing an order u/s. 142(2A) of the Act directing the Assessee to get its account audited by a special auditor viz., the satisfaction of the AO having regard to the nature and complexity of the accounts of the assessee and the interest of the revenue, that is necessary get the assessee's account audited by a special auditor is not fulfilled in the present case and therefore the reference to special audit is held to be invalid. Consequently, the extended time available for passing the order of assessment in terms of Sec.l58BE of the Act cannot also be availed by the AO. The order of assessment is therefore held to be barred by limitation. The order of assessment is therefore invalid and the consequent action u/s.263 of the Act setting aside such invalid assessment cannot also be sustained.

38, *The learned counsel for the Assessee and the learned D.R. addressed arguments on the validity of the order passed u/s.263 of the Act on merits also. Since we have decided the issue on the question of limitation of the assessment order that was revised u/s.263 of the Act, we have not dealt with those submissions,*

39. *For the reasons stated above, the appeal of the Assessee challenging the proceedings u/s.263 of the Act as invalid is allowed and the order u/s.263 of Act is hereby quashed.*

40. As far as IT(SS)A, No, 11 l/Mum/08 is concerned, we have already seen that the CIT(A) did not decide the appeal of the Assessee for the reason that the order of assessment has been cancelled u/s.263 of the Act. The order u/s.263 of the Act, has now been quashed and therefore in normal circumstances, the appeal would be decided by directing the CIT(A) to decide the appeal on merits. We have while deciding the appeal against the order u/s.263 of the Act, already held that the order of the AO was barred by limitation. Therefore there would no useful purpose in setting aside the order of CIT(A) and directing him to decide the appeal on merits afresh. We therefore allow the appeal of the Assessee against the order of the CIT(A) challenging the order of the AO, holding that the order of assessment is barred by time."

11. Our attention was further drawn to the judgment of the Hon'ble High Court of Gujarat in the case of Alidhara Texpro Engineering [P] Ltd 332 ITR 115 where a similar issue was considered by the Hon'ble High Court and the relevant findings read as under:

> *"7. Thus, it becomes apparent that insofar as FFPL and GTPL are concerned, the Assessing Officer has not been able to even prima facie form an opinion that having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, ... direct the assessee to get the accounts audited by an accountant, . . .*
>
> *In the show-cause notice there is no whisper, leave alone any findings, as to any complexity of the accounts of either FFPL or GTPL, and therefore, there was no question of formation of any opinion. In the circumstances, the entire exercise commencing from show-cause notice dated 24-12-2007 and culminating in assessment order dated 31-3-2008 is bad in law and without jurisdiction. The Assessing Officer has not been able to show, as the record reveals, that insofar as the said two companies, namely FFPL and GTPL are concerned, the accounts of the said two companies were ever considered by the Assessing Officer, and thereafter having regard to complexities of said accounts he had formed an opinion to have the said accounts specially audited. In absence of the prerequisite conditions of the provision being fulfilled, the action of the respondent authority insofar as*

Farmsons Fashions (P.) Ltd., and Gokulanand Texturisers (P.) Ltd. are concerned, cannot be sustained.

8. However, insofar as Texpro and Textool are concerned, the Court is of the opinion that the said two petitioners do not deserve any relief only on the limited count of having approached the Court after the order dated 31-12-2007 made under section 142(2A) of the Act had exhausted itself. Admittedly, as noted hereinbefore, vide order of 31-12-2007 special audit was assigned to the auditors named in the order, the auditors tendered their report on 10-3-2008, the petitioners were called for hearing on 20-3-2008 and after that assessments were framed on 31-3-2008, the petitions were moved only on 12-5-2008, despite having been preferred in February, 2008. The Court, therefore, in this peculiar fact situation, does not intend to exercise the extraordinary jurisdiction under article 226 of the Constitution of India and entertain the petitions on this count alone. In the view that the Court has taken, it is not necessary to record and deal with the detailed submissions on merits, considering the fact that the appeals filed by Texpro and Textool are pending and it is open to the said two petitioners to take up all contentions, including challenge to exercise of powers under section 142(2A) of the Act as laid down by the Apex Court in the case of Sahara India (Firm) (supra).

9. The Court is conscious of the fact that even in case of Farmsons Fashions (P.) Ltd. and Gokulanand Texturisers (P.) Ltd., the special audit was over and assessments have been framed on the same day

as noted in case of Alidhara Texpro Engineering (P.) Ltd. and Alidhara Textool Engineering (P.) Ltd. but due to lack of jurisdiction at the threshold, as noted hereinbefore, the said two petitioners have been dealt with separately as a class and differentiated vis-a-vis the other two petitioners, namely Alidhara Texpro Engineering (P.) Ltd. and Alidhara Textool Engineering (P.) Ltd.

10. In the result, insofar as Special Civil Appln. Nos. 7252 of 2008 and 7253 of 2008 are concerned, show-cause notice dated 24-12-2007 and consequential order dated 31-12-2007 under section 142(2A) of the Act are hereby quashed and set aside, as being without jurisdiction. As a consequence, needless to state that, the auditors report dated 10-3-2008 and the consequential assessment orders dated 31-3-2008 also are bad in law and cannot survive. Accordingly Special Civil Appln. No. 7252 of 2008 and Special Civil Appln. No. 7253 of 2008 are allowed in the aforesaid terms. Rule made absolute."

12. It is the say of the ld. AR that similar view was taken by the co-ordinate bench in the case of Nilkanth Concast Pvt. Ltd 48 ITR [Trib] 264. The relevant findings read 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 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 Hon'ble 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 142Aof the Act. Respectfully following the ratio laid down by the Hon'ble 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."

13. The said order of the Tribunal has been upheld by the Hon'ble High Court in Tax Appeal No. 312/2016.

14. The ld. AR vehemently contended that the notice dated 21.11.2011 was issued by the Assessing Officer without any application of mind, in as much as, though the notice referred to the accounts of A.Y 2008-09 but, in fact, financial statement of A.Y 2009-10 were considered for special audit.

15. We have given a thoughtful consideration to the orders of the authorities below and have carefully perused the records qua the issue. It is true that noticed dated 21.11.2011 was for both the A.Ys i.e. 2008-09 and 2009-10. However, each A.Y is considered to be a separate unit and, therefore, for each A.Y, the Assessing Officer must bring out his case. A perusal of the said notice, which is exhibited at pages 67 to 70 of the paper book, clearly reveals that though the notice pertained to accounts of A.Y 2008-09, but entire financial details referred to therein pertain to A.Y 2009-10. Even the order u/s 142(2A) of the Act dated 27.12.2011 which is exhibited at pages 91 to 98 of the paper, the ACIT has specifically mentioned that “the special audit u/s 142(2A) of the Act in the case of captioned assessee for A.Y

2009-10 is ordered accordingly". This clearly proves that while making a reference u/s 142(2A) of the Act and thereafter passing the order u/s 142(2A) of the Act, the Assessing Officer did not apply his mind and mechanically adopted the figure of A.Y 2009-10 and passed the order u/s 142(2A) of the Act for A.Y 2009-10 without realising that he is dealing with A.Y 2008-09.

16. The contention of the ld. DR that the letter to the appellant referred to both the A.Ys i.e. 2008-09 and 2009-10 and, therefore, there is no error in the same. We do not find any force in this contention of the ld. DR. As mentioned elsewhere, since each A.Y is considered as a separate unit the Assessing Officer should have made out a case for A.Y 2008-09 only and since the order framed u/s 142(2) of the Act also refers to A.Y 2009-10, then the same cannot be used for A.Y 2008-09.

17. The quarrel before us is as to whether the assessment order framed u/s 143(3) is passed within the period of limitation period prescribed under the Act or not. In our considered opinion, for coming to such a conclusion, we can examine whether the order passed u/s 142(2A) of the Act is in accordance with law or not. It is true that the

order passed u/s 142(2A) of the Act is not appealable but when an assessment order is challenged, then the different aspects, which are integral to the process and ultimate completion of the amount can be challenged in appeal and since the ground before us is challenged for assessment being barred by limitation, we are well within our rights to consider all material aspects which were considered while framing the assessment order u/s 143(3) of the Act.

18. Considering the facts of the case in totality, we have no hesitation to hold that the assessment order dated 25.06.2012 for the year under consideration is barred by limitation. Since the foundation is removed, the super structure i.e. the assessment order must fall.

19. In the result, the appeal of the assessee in ITA No. 1443/DEL/2014 is allowed whereas the appeal of the revenue in ITA No. 1734/DEL/2014 is dismissed.

The order is pronounced in the open court on 05.02.2019.

Sd/-	**Sd/-**
[SUCHITRA KAMBLE**]**	**[N.K. BILLAIYA]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 05th February, 2019

VL/

Copy forwarded to:

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

Asst. Registrar,
ITAT, New Delhi

Date of dictation	
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Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr.PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
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