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

+ ITA Nos. 1528/2010, 1529/2010, 1530/2010 & 1532/2010

CIT Appellant
Through Mr. Abhishek Maratha, Sr.
Standing Counsel & Ms. Anshul Sharma,
Advocate.

versus

ULIKE PROMOTERS PVT LTD Respondent
Through Mr. Aditya Kumar Sharma & Mr.
Shailendra Paul, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

% **ORDER**
24.01.2012

Revenue in these appeals under Section 260A of the Income Tax Act, 1961 (Act, for short) impugns order dated 9th October, 2009 passed in ITA Nos. 1569, 1570, 1571 and 1572/Del/2009 in the case of Ulike Promoters Private Limited, the respondent herein. The appeals pertain to assessment years 1998-99, 1999-2000, 2000-01 and 2001-02.

2. Having heard learned counsel for the parties, we formulate the following substantial question of law:

“Whether the Income Tax Appellate Tribunal was right in holding that the assessment orders under Section 153A dated 29th June, 2007 were barred by limitation?”

3. As we have heard learned counsel for the parties on merits, we proceed to pronounce our decision on the aforesaid question.

4. On 16th December, 2003, search and seizure operation under Section 132 of the Act was conducted in the case of the respondent-assessee. On 30th November, 2004, notice under Section 153A of the Act in respect of the four assessment years was issued to the respondent assessee to file their returns. On 1st January, 2005, the respondent assessee filed their returns of income.

5. On 22nd March, 2006, the Assessing Officer passed an order under Section 142(2A) of the Act directing special audit. This order was made subject matter of challenge by the respondent assessee in W.P. (C) No. 4954/2006. By order dated 31st March, 2006, the High Court was pleased to stay the assessment proceedings. This writ petition was disposed of vide order dated 18th December, 2006, which for the sake of convenience is extracted below:-

“18.12.2006

Mr. R.D. Jolly, learned Standing Counsel for the Revenue states that the decision in *Rajesh Kumar v. Deputy v. Deputy Commissioner 2006 186 ITR (S.C.)* has been referred to a larger bench of the Hon'ble Supreme Court. Nonetheless, he stated that in view of the ratio laid down in *Rajesh Kumar*, the impugned order dated 22.3.2006 may be set aside, on the ground of the failure to issue a show cause notice prior to taking the decision for a special audit in terms of Section 142(2A) of the I.T. Act.

Without expressing any view on the merits of the matter, the impugned order is set aside. The revenue is granted one week's time to issue the assessee a show cause notice as envisaged by *Rajesh Kumar*. If the notice is so issued the assessee shall file its reply within 2 weeks of receipt of such notice. It is expected that the assessee shall co-operate fully with the Revenue after issuance of the notice. Mr. Jolly states that the assessee will be heard and a final decision whether or not to order a special audit shall be taken by the Department within a fortnight of submission of the reply by the assessee to the show cause notice. It is made clear that the time schedule laid down under the Act shall thereafter apply if the special audit is ordered. The time spent in prosecuting this petition shall stand excluded while computing the time for completion of the assessment. With these directions, the writ petition is disposed of. Order be given dasti to both the parties under the signatures of the Court Master."

(emphasis supplied)

6. The time limit prescribed under Section 153B (if we exclude the period of special audit and the period when the

assessment proceedings were stayed), had expired on 31st March, 2006. The Court while passing the order dated 18th December, 2006 was conscious of the said facts. The court was also conscious that the Revenue had to issue a show cause notice and after receiving the reply of the respondent-assessee, make/pass an order whether or not special audit was required. It is in these circumstances, the Court had specifically directed that the time schedule fixed under the Act, i.e., Section 153B shall apply if the special audit was ordered. It was also clarified that the time spent in prosecuting the petition, i.e., the period between the date of filing of the writ petition and the date of disposal shall be excluded for the purpose of computing the time for completion of assessment.

7. Special audit was directed by the Assessing Officer vide order dated 19th January, 2007 to be completed within 105 days. The appellant has submitted that the special audit was conducted, and on 3rd May, 2007, a report was furnished by the Special Auditor to the Assessing Officer. The respondent assessee has submitted that the report was not filed by the Special Auditor before the Assessing Officer. For the purpose of the present appeal, we only note and record that the tribunal has

proceeded on the basis that the report was furnished. Secondly, the Explanation to Section 153B(1) stipulates that the period commencing from the day on which the Assessing Officer directs the assessee to get the accounts audited under Section 142(2A) and day on which the special auditor is required to furnish the report, is to be excluded. Submission of report is not relevant for the exclusion under the Explanation to Section 153B(1) of the Act.

8. The Assessing Officer thereafter passed the assessment order on 29th June, 2007.

9. By the impugned order, the tribunal has held that the assessment order passed on 29th June, 2007 was barred by limitation as per Section 153B of the Act. The tribunal has relied upon the decision of the Supreme Court in the case of **Hope Textile Limited and Another versus Union of India and others**, (1994) 205 ITR 508(SC). The reasoning given by the tribunal in the impugned order reads as under:-

“10. If we read the decision of Hon’ble High Court of Delhi referred supra, to say that the Revenue has been granted one weeks extension from the date of the order being 18.12.2006 for the issuance of the show cause notice and it has been done on 22.12.2006 and the assessee has responded to the same on 05.01.2007 and

the fresh order u/s 142(2A) has been passed only on 19.1.2007 which is again beyond the point of limitation being 20.12.2006. Even if the period from 22.03.2006 to 18.12.2006 is excluded then the limitation expires on 27.12.2006 and the order u/s 142(2A) having been passed only on 19.01.2007, the same is beyond the period of limitation and the limitation for assessment cannot be extended. It is noticed from the order of Hon'ble High Court of Delhi that it has been made clear that the time schedule laid down under the Act shall thereafter apply if the special audit is ordered, the special audit having been ordered only on 19.01.2007 and the limitation after excluding the time spent in prosecuting the petition before the Hon'ble High Court of Delhi expires at the maximum on 27.12.2006, the extended period cannot be considered to be available to the revenue as a consequence of the fresh order u/s 142(2A) issued on 19.01.2007. Further, the limitation cannot be extended as a consequence of the fresh order u/s 142(2A) passed on 19.01.2007 as the same has been passed beyond the limitation of 27.12.2006 and the statute does not extend the limitation just because a show cause notice u/s 142(2A) has been issued on 22.12.2007. Our view also get support from the decision of Hon'ble Supreme Court in the case of Hope Textiles referred to supra wherein it has been held that an authority under the Act cannot be allowed to make an order extending the period of limitation prescribed by the statute. In these circumstances, we are of the view that the limitation for the completion of the assessment after excluding the time spent in prosecuting the writ petition against the order passed u/s 142(2A) dated 22.03.2006 expires on 20.12.2006 and at the most on

27.12.2006 and consequently the assessment order passed on 29.06.2007 is barred by limitation and we hold so.”

10. The appeals require examination and interpretation of Section 153B(1), Explanation and the proviso thereto. The relevant portion of the said Section reads as under:-

“153-B. Time-limit for completion of assessment under Section 153-A.—(1) Notwithstanding anything contained in Section 153, the Assessing Officer shall make an order of assessment or reassessment,—
(a) in respect of each assessment year falling within six assessment years referred to in clause (b) of [sub-section (1) of Section 153-A], within a period of two years from the end of the financial year in which the last of the authorisations for search under Section 132 or for requisition under Section 132-A was executed;
(b) in respect of the assessment year relevant to the previous year in which search is conducted under Section 132 or requisition is made under Section 132-A, within a period of two years from the end of the financial year in which the last of the authorisations for search under Section 132 or for requisition under Section 132-A was executed:

Provided that in case of other person referred to in Section 153-C, the period of limitation for making the assessment or reassessment shall be the period as referred to in clause (a) or clause (b) of this sub-section or one year from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under Section 153-C to the Assessing Officer having jurisdiction over such other person, whichever is

later:

Provided further that in the case where the last of the authorisations for search under Section 132 or for requisition under Section 132-A was executed during the financial year commencing on the 1st day of April, 2004 or any subsequent financial year,—

- (i) the provisions of clause (a) or clause (b) of this sub-section shall have effect as if for the words “two years” the words “twenty-one months” had been substituted;
- (ii) the period of limitation for making the assessment or reassessment in case of other person referred to in Section 153-C, shall be the period of twenty-one months from the end of the financial year in which the last of the authorisations for search under Section 132 or for requisition under Section 132-A was executed or nine months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over under Section 153-C to the Assessing Officer having jurisdiction over such other person, whichever is later:]

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Explanation.—In computing the period of limitation for the purposes of this section,—

- (i) the period during which the assessment proceeding is stayed by an order or injunction of any court; or
- (ii) the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2-A) of Section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section; or
- (iii) the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee of being re-heard under the

proviso to Section 129; or

(iv) in a case where an application made before the Settlement Commission under Section 245-C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under sub-section (1) of Section 245-D is received by the Commissioner under sub-section (2) of that section, or

(v) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of Section 245-Q and ending with the date on which the order rejecting the application is received by the Commissioner under sub-section (3) of Section 245-R, or

(vi) the period commencing from the date on which an application is made before the Authority for Advance Rulings under sub-section (1) of Section 245-Q and ending with the date on which the advance ruling pronounced by it is received by the Commissioner under sub-section (7) of Section 245-R,

(vii) the period commencing from the date of annulment of a proceeding or order of assessment or reassessment referred to in sub-section (2) of Section 153-A till the date of the receipt of the order setting aside the order of such annulment, by the Commissioner, shall be excluded:

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in clause (a) or clause (b) of this sub-section available to the Assessing Officer for making an order of assessment or reassessment, as the case may be, is less than sixty days, such remaining period shall be extended to sixty days and the aforesaid period of limitation shall be deemed to be extended accordingly.”

11. As per Section 153B(1)(a) an assessment under Section 153A is required to be completed within a period of two years from the end of the financial year in which the last of the authorizations of search under Section 132 of the Act was executed. It is accepted that there is no dispute that the limitation period for passing an order under Section 153A in terms of Section 153B(1)(a) came to an end on 31st March, 2006.

12. As noticed above, on 22nd March, 2006, an order under Section 142(2A) had been passed requiring the respondent assessee to get their accounts audited under Section 142(2A). For completing the Special Audit, 105 days were stipulated. By order dated 31st March, 2006, in W.P. (C) No. 4954/2006, the assessment proceedings were stayed. Accordingly, Explanation to Section 153B(1) came into operation. The stay was vacated when Writ Petition (Civil) No. 4954/2006 was disposed of on 18th December, 2006 with the directions given therein. This period between 31st March, 2006 and 18th December, 2006 obviously has to be excluded in terms of the Explanation to Section 153B(1). After the order dated 18th December, 2006 was passed, the proviso to the Explanation became applicable as the

time period for completing the assessment was less than 60 days. Within this period of 60 days, the Assessing Officer passed an order under Section 142(2A) appointing a Special Auditor on 19th January, 2007. This was in terms of the order dated 18th December, 2006 disposing of the Writ Petition (Civil) No. 4954/2006.

13. For the sake of completeness, we may record that this order dated 18th December, 2006 in Writ Petition (Civil) No. 4954/2006 was challenged by the respondent assessee by way of Special Leave Petitions, but it is stated by the respondent assessee that the Special Leave Petitions were disposed of with the direction to the respondent assessee to move an application before the High Court. It is stated by the learned counsel for the respondent assessee that an application was filed but was dismissed as infructuous. The Assessing Officer on 19th January, 2007 had already passed an order under Section 142(2A) of the Act.

14. In terms of the order dated 19th January, 2007 under Section 142(2A), the Special Auditor was required to complete audit within 105 days, i.e., by 4th May, 2007. This period has to be excluded in terms of Explanation Clause (ii) quoted above.

The Assessing Officer passed the assessment order on 29th June, 2007. This order has been passed within a period of 60 days from the day special auditor was required to submit his report. Proviso to the Explanation to Section 153B(1) again became applicable as after excluding the period of special audit, the period available to the Assessing Officer was less than 60 days.

15. The contention of the respondent assessee is that the Assessing Officer was not entitled to period of 60 days in terms of the proviso to the Explanation to Section 153B(1) as in the present case the Assessing Officer had already availed the period of 60 days in view of the stay order passed by the court. He has laid emphasis on the expression “in clause (a) or clause (b) of this Section” used in the proviso and submits that the Assessing Officer is entitled to benefit of 60 days once, either in case of stay order or if there is a Special Audit. He cannot take advantage or benefit of 60 days twice, when there is a stay order and again when there is a special audit in the same proceedings.

16. It is not possible to agree with the contention of the respondent assessee. The following dates, which have been

stated above, may again be noted:-

- (i) Date of limitation for completing assessment under Section 153A in normal course was 31st March, 2006.
- (ii) On 22nd March, 2006 an order under Section 142(2A) was passed.
- (iii) On 31st March, 2006, the assessment proceedings were stayed by an interim order in W.P. (C) No. 4954/2006.
- (iv) On 18th December, 2006, the stay order was vacated with liberty to the Revenue to issue a fresh notice and after considering the reply, pass an order under Section 142(2A).
- (v) On 19th January, 2007, an order under Section 142(2A) was passed (the special audit was to be completed within 105 days, i.e., by 4th May, 2007).
- (vi) On 29th June, 2007, the assessment order was passed.

17. From the aforesaid dates, it is clear that as per the proviso to Explanation to Section 153B, the assessment order could have been passed on or before 3rd July, 2007, i.e., period of 60 days after the special audit report was to be submitted to the Assessing Officer.

18. The proviso quoted above has an object and purpose. It

stipulates that the Assessing Officer should have a minimum period of 60 days to complete the assessment, in case after exclusion of period under the Explanation, the period for completing the assessment is less than 60 days. Every time this situation occurs, the proviso comes into play and has to be applied. The proviso can come into operation on one, two or more occasions in the same assessment/reassessment proceedings. In the present case, the respondent assessee had filed a writ petition. Because of the stay order passed, the period during which the stay order was in operation in the High Court has to be excluded. Thereafter, the Assessing Officer passed an order under Section 142(2A) of the Act and the period for conducting special audit has to be excluded. The proviso to Explanation stipulates that the Assessing Officer can pass the assessment order within 60 days, if after excluding the time mentioned in the Explanation, the time for completing the assessment is less than 60 days. In terms of the said proviso, the Assessing Officer had the extended period to complete the assessment proceedings. The Assessing Officer had to complete the assessment within 60 days from the date on which the special audit report was to be submitted to him.

19. The decision in the case of ***Hope Textiles Limited*** (supra) relied upon by the tribunal is not apposite. In this case, the assessee had preferred an appeal against the decision of the Madhya Pradesh High Court. The contention of the assessee before the Supreme Court was that by virtue of clause (ii) sub-section 3 to Section 153 of the Act, the High Court should have directed the Assessing Officer to pass the reassessment order pursuant to the reassessment notice notwithstanding the expiry of period prescribed in sub-section 2 to Section 153. It is apparent that the Assessing Officer had not passed a reassessment order and in that context the Supreme Court observed that the courts cannot issue a direction to the authority under the Act, to ignore the limitation period as the Assessing Officer was not passing an order in the reassessment proceedings and had allowed the limitation period to lapse. In the present case, we have not given any direction to the authorities contrary to the period prescribed under Section 153B. We have interpreted Section 153B and accordingly computed the period of limitation stipulated therein. We have applied the proviso to Section 153B, which is applicable.

20. In view of the aforesaid discussion, the question of law

mentioned above is answered in favour of the Revenue and against the respondent assessee. The tribunal will now hear the appeals on merits. The parties will appear before the Assistant Registrar, Tribunal on 26th March, 2012, when a date of hearing will be fixed. No costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

**JANUARY 24, 2012
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