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

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+ **ITA 312/2016**

PR. CIT-06

..... Appellant

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel with Mr. Raghvendra Singh, Advocate.

versus

NILKANTH CONCAST PVT. LTD.

..... Respondent

Through: Mr. Ved Jain and Mr. Pranjali
Srivastava, Advocates.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

% **13.05.2016**

1. This appeal by the Revenue is directed against the order dated 14th October 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 2237/Del/2012 & 2730/Del/2012 for the Assessment Year ('AY') 2005-06.

2. The questions sought to be urged by the Revenue in this appeal read as under:

1. Whether the ITAT is competent to adjudicate the order of the Assessing Officer (AO) under the proviso to Section 142(2C) of the Income Tax Act, 1961 ('Act') which is not provided either under section 246A or 253 of the Act?

2. Whether the ITAT is competent to admit an issue for the first time where there was no material in the assessment or in the order of the CIT(A) on the basis of quite the issue of validity of the order of the AO under proviso to Section 142(2C) of the Act could be raised and considered?

3. Whether the AO is competent to extend the period for filing the audit report on the expressed request of the nominated auditor under proviso to section 142(2C) read with section 142(2A) of the Act?

3. As far as the first question is concerned, learned counsel for the Revenue has placed reliance on the decisions of the Supreme Court in *National Thermal Power Co. Ltd. v. CIT* (1998) 229 ITR 383 (SC) and this Court in *M. B. Lal v. Commissioner of Income Tax* (2005) 279 ITR 298 (Del). The learned counsel has also referred to Section 142(2C) of the Act and pointed out that the Assessing Officer ('AO') could have extended the time to submit the audit report. It is submitted that this was not one of the specific grounds raised in the appeal filed by the Assessee in the appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)'] and therefore ought not to have been examined by the ITAT. It is submitted that the Assessee should be taken to have acquiesced the extension granted by AO of time to file the audit report. The Court is unable to agree. The question of extension of such time went to the root of the matter since the question of assessment being barred by limitation hinged on this issue and could have been raised by the Assessee itself before the ITAT.

4. Secondly, in the present case it is seen that the question that was addressed by the ITAT, which is evident from the impugned order, was *inter alia* whether the assessment order passed by the AO under Section 153A of the Act consequent upon the search and seizure operation under Section 132 of the Act conducted in the case of M/s Grain Merchants Group as well as in the premises of the Assessee on 7th October 2004 was barred by limitation. The said question was intrinsically linked to the question whether the AO could '*suo motu*' have extended the date for submission of the audit report under Section 142(2C) of the Act. Since the said question was incidental to the main question urged regarding the assessment being barred by limitation, it has to be necessarily examined not only by the CIT(A) but consequently by the ITAT as well.

5. The observations of the Supreme Court in ***National Thermal Power*** (*supra*) suggests that the powers of the ITAT are wide enough to even consider a point which may not have been urged before the CIT (A) as long as the said question requires to be examined in the interest of justice. In that view of the matter, the Court is unable to agree with the counsel for the Revenue that in the present case the ITAT exceeded its jurisdiction in examining the question whether the AO was justified in extending the time for the auditor nominated under Section 142 (2A) to submit the audit report. The Court accordingly declines to frame any question on this issue.

6. Turning to question concerning the request made to the AO for extending the time for filing audit report, it requires to be noticed that in the proviso to Section 142 (2C), there was no *suo motu* power with the AO to extend the time prior to 1st April 2008. That power was subsequently provided by amending the

said proviso by the Finance Act, 2008. Whether the said amendment was retrospective in nature was considered by this Court in its decision in ***CIT v. Bishan Saroop Ram Kishan Agro Pvt. Ltd. (2011) 203 Taxman 326 (Del)***. The question was answered by holding that the amendment is prospective.

7. Mr. Rahul Chaudhary, learned Senior Standing counsel for the Revenue thus urges that even if the AO in the present case did not have ‘*suo motu*’ power to extend the time since the period with which the present appeal was concerned is AY 2005-06, the request made to the AO by the nominated auditor should be considered to be a request made by the Assessee itself.

8. The Court is unable to agree with the above submission. In terms of Section 142(2A), special audit is conducted under an order passed by the AO, by an accountant as defined in Explanation below Section 288(2) of the Act who is nominated either by the Commissioner and such nominated auditor is permitted to furnish an audit report in the prescribed form. When the said provision is read with Explanation below Section 288(2) of the Act, it is apparent that the said nominated auditor is not expected to be in a relationship of an agent of the Assessee or in any other capacity except as a nominee of the Commissioner. It is perhaps for this reason the proviso to sub-Section 2C of Section 142 specifically states that the extension of time for submitting the audit report can be made by the AO “on an application made in this behalf by the Assessee” If the legislative intent was to permit the application to be made by the auditor nominated by the Commissioner, that would have been expressly provided for in the proviso to Section 142 (2C) of the Act. If the submissions of learned counsel for the Revenue were to be accepted, then it would mean that the application can be made not only by the Assessee but by a Chartered

Accountant of the Assessee nominated by the Commissioner in terms of Section 142 (2A) of the Act. The Court declines to do so. Consequently, the Court declines to frame a question on this issue as well.

9. The appeal is accordingly dismissed.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MAY 13, 2016

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