

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

11

+

ITA 668/2016

PR.COMMISSINOR OF INCOME TAX-5

..... Appellant

Through: Mr. Rahul Chaudhary, Senior Standing
counsel.

versus

JINDAL DYECHEM INDUSTRIES PVT. LTD.

..... Respondent

Through: Mr. Salil Aggarwal with Mr. Madhur
Aggarwal, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE CHANDER SHEKHAR

ORDER

%

05.05.2017

Dr. S. Muralidhar, J.:

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 ('Act') against the impugned order dated 23rd February 2016 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4809/Del/2007 for the Assessment Year ('AY') 2003-04.

2. While admitting this appeal on 5th October 2016, the following question of law was framed for consideration:

“Did the ITAT fell into error in holding that the assessment order for AY 2003-04 was time barred given the pre-condition Clause (iii) of Explanation (i) to Section 153 (1) of the Income Tax Act which led to the amendment to that provision by Finance Act No. 2 Act of 1996?”

3. The Assessee is dealing primarily in Bullion (gold and silver) having operation in various states. The Assessee is a subsidiary of M/s. Jindal Export and Import Private Limited. For the AY in question, the Assessee filed its return on 2nd December 2003 showing total income at Rs. 2,04,84,373 from 'business and profession' and 'income from house property'. The return was picked up for scrutiny and notice was issued to the Assessee under Section 143 (2) of the Act on 10th November 2004.

4. By an order dated 17th February 2006 the Assessing Officer ('AO') directed the Assessee to get its accounts audited under Section 142 (2A) of the Act within a period of 35 days. Thereafter, several extensions were granted by the AO; for 45 days (by direction dated 24th March 2006), further 30 days (on 10th May 2006), for further 10 days (on 9th June 2006) and further 7 days (by direction dated 28th June 2006). As a result of these extensions, the special audit report was required to be furnished to the AO by order dated 7th July 2006. As it transpired, the special audit report was unable to be submitted by 7th July 2006. The report of the Special Auditor dated 7th July 2006 was sent under covering letter dated 12th July 2006 to the Commissioner of Income Tax-II and received by the AO on 13th July 2006. On 14th September 2006 the AO framed the assessment order for AY 2003-04. The AO did not accept all the recommendations in the report of the Special Auditor. Nevertheless certain additions were made to the taxable income.

5. Aggrieved by the assessment order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)'] who by his order

dated 26th September 2007 allowed the appeal. It was noted that the audit report was required to be furnished by 7th July 2006. The limitation for framing the assessment expired on 6th September 2006. Accordingly, the assessment made on 14th September 2006 was clearly barred by limitation in terms of Section 153 (1) of the Act. The assessment was held to be invalid and annulled.

6. Aggrieved by the above order, the Revenue went in appeal before the ITAT. The Assessee filed cross-objections. The Assessee was aggrieved by the CIT (A) not deleting some of the additions made by the AO.

7. The ITAT has, in the impugned order, dismissed the Revenue's appeal. After analysing Section 153 (1) of the Act in light of the facts of the case, the ITAT concluded that CIT (A) was justified in holding that the assessment was barred by limitation. The ITAT placed reliance on the decision of this Court in *CIT v. Bishan Saroop Ram Kishan Agro (P) Limited (2011) 203 Taxman 326 (Del)* and held that the proviso to sub-section 2C to Section 142 of the Act was prospective. There was no application by the Assessee for extension of time for submission of the audit report. Therefore, the ITAT held that the order dated 13th July 2006 of the AO purportedly under Section 142 (2C) of the Act granting extension till 17th July 2006 was not valid. The Assessee's cross-objections were dismissed by the ITAT as having become infructuous.

8. This Court has heard the submissions of Mr. Rahul Chaudhary, learned Senior standing counsel for the Revenue and Mr. Salil Aggarwal, learned counsel for the Respondent-Assessee.

9. Mr. Chaudhary, urged that given the purpose and object behind the insertion of sub-sections 2A, 2B and 2C of Section 142 of the Act , the period between 7th July 2006 and 17th July 2006 the date when the audit report was actually made available should be excluded for the purpose of computation of limitation. Mr. Chaudhary submitted that when there was failure by the Assessee to submit the audit report within the stipulated time, the Assessee should not be allowed to take advantage of its own lapse and claim that the assessment order was barred by limitation.

10. The Court is unable to accept the above submission. The language of the statute is plain. Section 142 (2A) of the Act anticipates timely submission of the report of the Special Auditor. The Auditor who is to conduct special audit in terms of Section 142 (2) of the Act is not an auditor of the choice of the Assessee. The auditor is nominated by the Revenue and his work is not controlled by the Assessee. Where the special audit report is unable to be furnished within the time stipulated by the AO, extension of time can be granted by the AO on an application made by the Assessee. The extension has to be for good and sufficient reasons.

11. From 1st April 2008 a proviso to Section 142 (2C) of the Act was inserted to provide that the AO may 'suo motu' extend the period provided that the aggregate period originally fixed and extended period would not exceed 180 days from the date on which a direction was first issued to the Assessee for submission of report of the Special Auditor. It is an admitted position that in the present case all the extensions granted, except the last one, were on the application of the Assessee. The last date for submission of

the report in terms of these extensions was 7th July 2006. There was no application by the Assessee after 7th July 2006 for extension of time.

12. On the letter dated 12th July 2006 of the Auditor, the AO made an endorsement dated 13th July 2006 extending the time for submission upto the date on which the auditor's report was actually received i.e. 17th July 2006.

13. It was explained by this Court in ***Commissioner of Income Tax v. Bishan Saroop Ram Kishan Agro (P) Limited*** (*supra*) that insertion of the expression 'suo motu' in the proviso to Section 142 (2C) of the Act was only with effect 1st April 2008. Therefore, in the present case, when the AO on his own extended the period of submission of audit report to 17th July 2006, he had no power to do so under Section 142 (2C) of the Act. Consequently, the Court finds no error in the orders of both the CIT (A) as well as the ITAT holding that the submission of audit report on 17th July 2006 was barred by limitation.

14. It was contended by Mr. Chaudhary that the time taken in submission of the audit report dated 7th July 2006 to the Department, i.e., the period between 7th July 2006 and 17th July 2006 should stand excluded. Mr. Chaudhary referred to the decision of the Madhya Pradesh High Court in ***CIT v. Dhariwal Sales Enterprises (1996) 221 ITR 240***. He also referred to the decision of this Court in ***VLS Finance Limited v. Commissioner of Income Tax (2016) 68 Taxman.com 368 (SC)***. It is pointed out that under Section 153 (1) of the Act, the period of limitation for making an order of assessment to be extended during which the said proceeding stands excluded for the purpose of computing the period of limitation for making an

assessment order.

15. The Court is unable to accept any of the above submissions. The Explanation-1 to clause (iii) of Section 153 (1) as it stood at the relevant point in time, reads as under:

“(iii) the period of commencing from the date on which the Assessing Officer directs the Assessee to get his accounts audited under sub-section (2A) of Section 142 and

(a) ending with the last date on which the Assessee is required to furnish a report of such audit under that sub-section, or

(b) where such direction is challenged before a court, ending with the date on which the order setting aside such direction is received by the Principal Commissioner or Commissioner , or” shall stand excluded.

16. In the present case, the last date on which the Assessee was required to furnish the report was 7th July 2006 in terms of Section 153 (1) of the Act. The time for passing the assessment order expired on 6th September 2006 whereas it was passed only on 14th September 2006.

17. The decision in *Dhariwal Sales Enterprises* (*supra*) concerns the execution of time spent “for obtaining a copy of the report”. Here there was no such occasion for granting of extension of time by the AO. In fact, the AO had no such power to do so. There was no question of excluding the time taken for obtaining a report. On the other hand the decision of this Court in *CIT v. Bishan Saroop Ram Kishan Agro (P) Limited* (*supra*) squarely covers the issue and is in favour of the Assessee. In the said decision, the Court took note of the Circular dated 27th March 2009 of the

Central Board of Direct Taxes (CBDT) regarding prospective application for amendment to the proviso to Section 142 (2C) of the Act which gave the AO 'suo motu' power to extend time for furnishing the audit report.

18. For all the aforementioned reasons, the Court finds no error having been committed by the CIT (A) or the ITAT in holding that the assessment order in the present is barred by limitation. The question as framed in the negative, is answered i.e., in favour of the Assessee and against the Revenue.

19. The appeal is accordingly dismissed but, in the circumstances of the case, with no order as to costs.

S. MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 05, 2017

Rm