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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **W.P.(C) 7734/2017**

CONSULTING ENGINEERING SERVICES (INDIA) PRIVATE LIMITED ..... Petitioner

Through: Mr Salil Kapoor, Ms Ananya Kapoor and Mr Sumit Lalchandani, Advocates

versus

INCOME TAX APPELLATE TRIBUNAL & ANR ..... Respondents

Through: Mr Rahul Kaushik, Senior Standing Counsel

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

<u>O R D E R</u>
% **01.09.2017**

<u>CM 31942/2017 (exemption)</u>

1. Allowed, subject to all just exceptions.

<u>W.P.(C) 7734/2017 & CM 31941/2017 (stay)</u>

2. Notice. Notice is accepted by Mr. Rahul Kaushik, learned Senior Standing Counsel for the Respondent – Revenue.

3. The name of the ITAT (Respondent No.1) is deleted from the array of parties.

4. The Petitioner challenges an interim order dated 8th August, 2017 passed by the Income Tax Appellate Tribunal ('ITAT') in Petitioner's appeal being

ITA No.1443/Del/2014 for the Assessment Year ('AY') 2008 – 2009. By the said impugned order, the ITAT has declined to permit the Petitioner to raise additional ground '22' which reads as under:

> "22. That the assessment order passed on 25.06.2012 is illegal, bad in law, without jurisdiction & barred by time limitation as the reference & order under section 142(2A) of the Act is illegal and bad in law. "

5. According to the ITAT in view of the decision in ***Sahara India (Firm) v CIT (2008) 169 Taxmann 328 (SC)***, it was impermissible to permit the ITAT to examine the validity of order passed under Section 142(2A) of the Income Tax Act, 1961 ('the Act') in order to hold that the assessment has been barred by limitation. In other words, the said decision of the Supreme Court was understood by the ITAT as holding that the challenge to the order under Section 142(2A) of the Act cannot be raised before the ITAT while examining whether the assessment order has been barred by limitation.

6. The Court finds that the ITAT itself has been taking a different position in many other cases, the orders in which have been enclosed with the present petition. For instance, in its order dated 9th December, 2015 passed in ITA No. 2256/Del/2005 (*PHI Seeds Ltd. New Delhi v. Dy. Commissioner of Income Tax, Circle 14(1), New Delhi*), the ITAT after noticing the aforementioned decision of the Supreme Court in ***Sahara India (Firm) v CIT*** (*supra*) held:

> "7.4. In the present proceedings what we are examining, is whether the extended period of limitation as provided under Explanation l (iii) of Section 153 is available to the Assessing Officer for completion of assessment u/s 143(3), or not. The assessee contends that the order u/s 142(2C), extending the period granted for completion and submission of audit report is made without an application being made for

extension by the assessee and for any good and sufficient reason, and hence the extension is bad in law and hence the AO would not get the benefit of the extended period of time to specified in Explanation l(iii) of Section 153 of the Act. In our view, the Tribunal has jurisdiction to adjudicate the issue as to whether an order of assessment 143(3), is passed within the period of limitation prescribed under the Act or not. For coming to such a conclusion, in our view the Tribunal can examine whether the order passed u/s 142(2A) or u/s 142(2C) is in accordance with law or not. The order passed u/s 142(2A) or u/s 142(2C) cannot be appealed separately. But when an assessment order is challenged, then the different aspects which are integral to the process and ultimate completion of amount can be challenged in Appeal. For example a notice u/s 148 or reasons recorded by the A.0 prior to re-opening of assessment cannot be challenged separately. But an assessment order can be challenged in an Appeal before the Ld. CIT(A) or the ITAT on the ground that the re-opening itself is bad in law, as the notice is illegal or not served or that there is no material based on which reasons were recorded etc. Every facet of an assessment can be challenged in appeal to deny once liability to be charged to tax or to challenge the quantum of tax demanded. In the case of hand, the legality of the orders passed u/s 142(2A) or u/s 142(2C) can be challenged to demonstrate that the order of assessment has been passed beyond the period of limitation. Thus, we reject this contention of the Ld. CIT. DR."

7. A similar view was taken by the ITAT in ***Unitech Ltd. v. Additional Commissioner of Income-tax, Range- [2016] 74 taxmann.com 121 (Delhi-Trib.)***. The order of the ITAT on the same lines was upheld by this Court in ***Principal Commissioner of Income-tax v. Nilkanth Concast (P.) Ltd. [2016] 70 taxmann.com 157 (Del)***.

8. The Court notices that the observation in ***Sahara India (Firm) v CIT*** (*supra*) was in the peculiar facts of that case and was not meant to be a general observation applicable across the board for all cases. This is

apparent from the observations in the following paras:

> "24. The upshot of the entire discussion is that the exercise of power under Section 142 (2A) of the Act leads to serious civil consequences and, therefore, even in the absence of express provision for affording an opportunity of pre-decisional hearing to an assessee and in the absence of any express provision in Section 142 (2A) barring the giving of reasonable opportunity to an assessee, the requirement of observance of principles of natural justice is to be read into the said provision. Accordingly, we reiterate the view expressed in Rajesh Kumar's case (supra).
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> 29. There is no denying the fact that the law on the subject was in a flux in the sense that till the judgment in *Rajesh Kumar* (*supra*) was rendered, there was divergence of opinion amongst various High Courts. Additionally, even after the said judgment, another two-Judge Bench of this Court had expressed reservation about its correctness. Having regard to all these peculiar circumstances and the fact that on 14th December, 2006, this Court had declined to stay the assessment proceedings, we are of the opinion that this Court should be loathe to quash the impugned orders. Accordingly, we hold that the law on the subject, clarified by us, will apply prospectively and it will not be open to the appellants to urge before the Appellate Authority that the extended period of limitation under Explanation 1 (iii) to Section 153 (3) of the Act was not available to the Assessing Officer because of an invalid order under Section 142 (2A) of the Act. However, it will be open to the appellants to question before the appellate authority, if so advised, the correctness of the material gathered on the basis of the audit report submitted under sub-section 2A of Section 142 of the Act."

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.

10. The writ petition is allowed and the impugned order dated 8th August,

2017 passed by the ITAT is set aside. The petitioner is permitted to urge the additional ground no.22 before the ITAT, which would decide the Petitioner's appeal including the above additional ground, in accordance with law, while passing the final order.

11. *Dasti* under the signatures of the Court Master to the parties.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

SEPTEMBER 01, 2017
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