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IN THE HIGH COURT OF DELHI AT NEW DELHI*Judgement reserved on: 30.10.2023*

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Judgement pronounced on : 11.12.2023

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ITA 526/2023 & CM APPL. 47329/2023

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ITA 568/2023 & CM APPL. 51976/2023**PR. COMMISSIONER OF INCOME TAX CENTRAL Appellant****Through: Mr Sanjeev Menon, Standing
Counsel.****versus****SOUL SPACE PROJECTS LTD****..... Respondent****Through: Mr Rohit Jain, Mr Abhishek Singhvi,
Mr Deepesh Jain and Mr Aniket D.
Agrawal, Advocates.****CORAM:****HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE GIRISH KATHPALIA****RAJIV SHAKDHER, J.:****Prefatory facts:**

1. These appeals concern Assessment Years (AYs) 2007-08 [ITA 526/2023] and 2008-09 [ITA 568/2023]. Via these appeals, the appellant/revenue seeks to assail the common order dated 03.06.2020 [in short, "impugned order"] passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

2. ITA 526/2023, concerning AY 2007-08, was admitted on 14.09.2023, when the following substantial question of law was framed for consideration by this Court:

Whether the extension given to the Chartered Accountant appointed under the provisions of Section 142(2A) of the Income



Tax Act, 1961 [in short, "Act"] for submission of the audit report was in consonance with the proviso appended to Section 142(2C) of the Act?

2.1 ITA 568/2023, concerning AY 2008-09, was admitted on 09.10.2023 when the Court noted that the same issues arise in both appeals.

3. It is relevant to note at this stage that the Tribunal, *via* the impugned order, disposed of not only the appeals filed by the appellant/revenue *vis-à-vis* the two AYs referred to hereinabove [i.e., AYs 2007-08 and 2008-09], but also ruled on the cross-objections filed by the respondent/assessee *qua* the aforementioned AYs. Besides this, *via* a separate order dated 30.09.2020, the Tribunal has dealt with the issue which arises for consideration in the instant appeal, *albeit* concerning a group company, namely, B.L. Kashyap and Sons Ltd [in short, "BLK"].

4. Thus, having regard to the aforesaid, counsel for the parties agreed that the decision the Court would take *vis-à-vis* the present appeals concerning the question of law framed would also apply to appeals filed by the appellant/revenue in matters concerning BLK.

Background

5. Since the facts and issues which arise in the two above-captioned appeals are identical, reference will be made to the facts obtaining in ITA 526/2023 concerning AY 2007-08. Thus, to adjudicate the appeal, the following broad facts are required to be noticed.

5.1 The respondent/assessee, engaged in the business of construction and allied services, was subjected to a search action on 19.02.2008 under Section 132 of the Income Tax Act, 1961 [hereafter referred to as "Act"].



Resultantly, on 24.12.2008, a notice under Section 153A of the Act was issued to the respondent/assessee by the Assessing Officer (AO).

5.2 Nearly eleven months later, i.e., on 27.11.2009, the AO issued a show cause notice to the respondent/assessee seeking its response to having a special audit conducted concerning its affairs in the exercise of powers under Section 142(2A) of the Act.

5.3 In response to it, on 04.12.2009, objections were filed by the respondent/assessee. The AO, however, *via* order dated 08.12.2009, rejected the objections.

5.4 The record shows that on 09.12.2009, the Commissioner of Income Tax [in short, "CIT"] issued a show cause notice before approving the conduct of a special audit, as proposed by the AO. Once again, the respondent/assessee filed its objections dated 14.12.2009. The CIT, however, rejected the objections, which was communicated *via* letter dated 15.12.2009, *albeit* to the Assistant Commissioner of Income Tax [in short, "ACIT"]. The letter indicated that the approval had been granted based on the reasoning outlined in the order sheet dated 14.12.2009, which was appended as Annexure A to the referred communication. Furthermore, the CIT also indicated that he had appointed a Chartered Accountancy firm named Dinesh Mehta & Co. Besides this, the timeframe for completion of the audit, which was fixed as 120 days, was also indicated in the approval letter.

5.5 On the same day, i.e., 15.12.2009, the AO informed the respondent/assessee that the CIT had approved conducting a special audit of its accounts *via* communication of even date, i.e., 15.12.2019. A copy of the CIT's approval letter was enclosed with the communication addressed to the



respondent/assessee.

5.6 It is important to note that in the usual and ordinary course, i.e., had the special auditor not been appointed, the limitation for framing the assessment order would, concededly, have expired on 31.12.2009. However, since a Special Auditor was appointed, the end date for framing the assessment order was extended to 14.04.2010 by virtue of the provisions of Section 153B Explanation (ii), read with the first proviso appended to the said provision.

5.7 The record shows that the Assessment Order was framed on 10.08.2010. In the interregnum, the initial timeframe granted for completion of the audit, which was 120 days as noted above, was extended by another 60 days, i.e., up to 13.06.2010, at the request of the Special Auditor. The Special Auditor made a request in this behalf *via* communication dated 25.03.2010.

5.8 The AO forwarded the request for an extension of time *via* communication dated 07.04.2010 to the ACIT, who in turn forwarded it to the CIT *via* letter dated 08.04.2010. On 12.04.2010, the DCIT headquarters conveyed to the AO that the CIT had considered the request and had conveyed that an extension of 60 days for furnishing the audit report, as requested by the concerned auditor *via* the letter dated 26.03.2010, had been granted, with a caveat though that no further extension would be allowed. The AO on the very next day, i.e., 13.04.2012, conveyed to the respondent/assessee that the CIT had granted the auditor, i.e., Messrs Dinesh Mehta and co, an extension of 60 days for furnishing the audit report.

6. Thus, the moot issue that arises for consideration is whether the extension of time for submitting the audit report was granted by the



specified authority having regard to the provisions of the proviso appended to Section 142 (2C) of the Act. It is not in doubt that if one were to hold that the extension was granted as envisaged under the said provision, then the assessment order would be within the prescribed period of limitation.

Submissions of Counsel

7. It is against this backdrop that the instant appeal has been preferred by the appellant/revenue. Arguments on behalf of the appellant/revenue were advanced by Mr Sanjeev Menon, standing counsel, while Mr Rohit Jain advanced submission on behalf of the respondent/assessee.

8. Mr Menon's arguments can be broadly paraphrased as follows:

(i) The power conferred under Section 142(2C) of the Act is not a judicial power. The power exercised to grant an extension of time constitutes an administrative act. [See *Yum Restaurant v CIT*, (2005) SCCOnline Del 555].

(ii) Therefore, while one can appreciate that quasi-judicial power cannot be exercised on borrowed satisfaction, this principle does not extend to administrative actions. [See *State of Bihar v J.A.C Saldanha*, (1980) 1 SCC 554]

(iii) It is well-established that whatever the subordinate authority is empowered to do, the same functions can be performed by a superior authority on the administrative side.

(iv) Without prejudice to the aforesaid contention, the facts and circumstances gleaned from the record would show that the AO had satisfied himself that a case was made out for extending the timeframe for the conduct of the audit and therefore, a recommendation was made to the CIT for issuing an appropriate order. Thus, the moment the AO satisfies himself



as to the necessity of an extension being warranted for conducting a special audit, the conditions provided in the proviso appended to subsection (2C) of Section 142 stand fulfilled.

(v) The Tribunal went by the form of the letter dated 13.04.2020 issued by the AO, which cannot determine whether or not he had correctly exercised the statutory power conferred upon him.

(vi) It is well established that so long as the source of power exists and the officer concerned has satisfied himself as to the need for exercising power, the language of the communication cannot vitiate the exercise of power. Thus, a mere reference to an incorrect provision of the statute cannot invalidate an order that was otherwise within the power of the authority making the order. A similar analogy can be drawn in this case: merely because administrative approval was sought from the PCIT, it would not impact the satisfaction arrived at by the AO under the proviso appended to Section 142(2C) of the Act non-est in law. [See *State of Karnataka v Munniyalla*, (1985) 1 SCC 196].

(vii) No person can benefit from his own mistake. The record shows that the timeframe for the conduct of the audit had to be extended because of a lack of cooperation by the assessee. Therefore, to knock off the entire assessment order based on a technicality would be wholly incorrect.

(viii) Assuming that the AO made a mistake by seeking approval of the PCIT, it would not be fatal to the assessment proceedings. The defect can be cured by having recourse to Section 292B of the Act.

(ix) The prejudice test would have to be applied. The assessee has not been able to demonstrate any prejudice caused by the extension of the timeframe. Therefore this case would fall within the purview of Section



292B of the Act [See *CIT v Jagat Novel Exhibitors Pvt. Ltd.*, (2013) 365 ITR 559 (Del); *State of Karnataka v Kuppaswami Gownder*, (1987) 2 SCC 74 and *Fertico Marketing & Investment Pvt. Ltd. & Ors. v Central Bureau of Investigation & Anr.*, (2021) 2 SCC 525].

(x) Procedure is a handmaiden of justice. Therefore, substantive justice cannot suffer at the hands of technical formality.

(xi) Since the approval of the CIT is required to be taken under Section 142(2A) of the Act by the AO for issuance of a direction to the assessee for conducting an audit, it is implicit that the CIT also exercises administrative power while granting such approval. If that be so, Section 21 of the General Clauses Act, 1897 [in short, "GC Act"] would allow him to amend or vary the period within which the audit would have to be conducted. It is well-settled that Section 21 of the GC Act would apply to all legislations, including the subject Act. [See *Kamla Prasad Khetan v Union of India* (1957) SCR 1052 and *Common Cause v Union of India* (2021) SCC OnLine SC 687].

(xii) Thus, the power to extend the time for the conduct of audit impliedly includes the power to extend the original timeframe. This power subsisted even before the insertion of Section 142(2C) and the proviso appended to it. Therefore, if the direction for the conduct of the audit is issued with the approval of the CIT, and the subsequent amendment is only clarificatory, there can be no infirmity in seeking the approval of the same authority for an extension of time. [See *Commissioner of Income Tax, New Delhi v Ram Kishan Das* (2019) 413 ITR 337 (SC)].

9. In rebuttal, Mr Jain, while relying upon the impugned order passed by the Tribunal, sought to emphasize the following aspects concerned with the



issue at hand:

- (i) Only the AO and not the CIT has been vested with the power to extend the initial timeframe accorded to the accountant to conduct the audit. This is evident upon a plain reading of the proviso appended to Section 142(2C) of the Act.
- (ii) The record, however, shows that the extension of time was granted by the CIT and not the AO; the latter, i.e., the AO, only communicated the approval given by the CIT for extending the timeframe.
- (iii) It is on this account that the Tribunal concluded that further extension of 60 days granted by the CIT for completion of the audit was illegal and invalid and thus impaired the viability of the assessment order framed under Section 153A/143(3) of the Act, on a day beyond the prescribed period of limitation, which ended on 13.06.2010.
- (iv) The power to grant extension is invested only in the AO, *albeit* to be exercised at his discretion. Before the AO exercises his discretion, he must ascertain whether good and sufficient reasons exist for granting an extension of time to complete the audit.
- (v) It is well established that when a power or jurisdiction is conferred to do something in a certain way, it must be done that way or not at all, and thus all other performance methods are necessarily excluded. [See *Nazir v King Emperor*, AIR 1975 SC 985; *Babu Varghese v. Bar Council of Kerala*, [1999] 3 SCL 422 (SC); *Dharani Sugars and Chemicals Ltd. v. Union of India*, [2019] 153 SCL 224 (SC); *Dipak Babaria v. State of Gujarat*, [2014] 3 SCC 502].
- (vi) The power/jurisdiction conferred upon a specific authority must be exercised only by such authority; it cannot be abdicated in favour of another



authority even if he is higher in rank than the one in which the authority/jurisdiction is vested. An action contrary to this principle would be *void ab initio* and nullity in the eyes of law, as it would amount to usurpation of jurisdiction. [See *Anirudhsinhji Karansinhji Jadeja v. State of Gujarat*, [1995] 5 SCC 302; *Commissioner of Police v. Gordhandas Bhanji*, AIR 1952 SC 16; *The Purtabpore Co. Ltd. v. Cane Commissioner of Bihar & Ors.*, 1969 (1) SCC 3085; *State of UP v. Maharaja Dharamander Prasad Singh*, (1989) 2 SCC 505; *Rajesh Awasthi v. Nand Lal Jaishwal*, (2013) 1 SCC 501]

(vii) A perusal of the letter dated 08.04.2011 would show that the AO did not just seek approval of the CIT for extension of time but abdicated the discretion conferred on him by the statute regarding extension of time. It is essential to bear in mind that no approval or sanction of the CIT is required for an extension of time. Thus, forwarding the request for an extension of time to CIT amounts to an abdication of power, which the law deprecates. [See *CIT v. SPL's Siddhartha Ltd.*, [2012] 345 ITR 223 (Del.); *Ghanshyam K. Khabrani v. ACIT*, [2012] 346 ITR 443 (Bom)]

(viii) The submission advanced on behalf of the appellant/revenue that the power to extend time for the conduct of audit is a mere administrative act is untenable in law since the power to extend time is discretionary, which has serious civil consequences. It is a substantive/quasi-judicial power invested in the AO.

(ix) As the AO must exercise jurisdiction according to rules of reason and justice and not according to private opinion, the power invested in the AO necessarily has a judicial character, as distinguished from a ministerial or administrative power. [See *Union of India v. Kuldeep Singh*, (2004) 2 SCC



590; *Aero Traders (P.) Ltd. v. Ravinder Kumar Suri*, (2004) 8 SCC 307].

(x) Extension of limitation has substantive civil consequences in the form of the involvement of the assessee's resources to assist and respond to queries and the stigmatic presence/involvement/interference and investigation by a special auditor. [See *Sahara India (Firm) v CIT* (2008) 300 ITR 403 (SC)]

(xi) Since audit proceedings triggered under Section 142(2A) of the Act are part of the assessment proceedings, the said proceedings are judicial and not administrative, as contended on behalf of the appellant/revenue.

(xii) Significantly, extension of time impacts limitation and thus affects a substantive and valuable right conferred on the respondent for completion of assessment proceedings. [See *State of Punjab v. Shreyans Industries Ltd.*, (2016) 4 SCC 769; *State of UP v. Hari Shanker Dubey*, 2002 All LJ 570]. Therefore, the argument advanced on behalf of the appellant/revenue that no prejudice is caused by an extension of time is wholly misconceived.

(xiii) Pertinently, nothing has been brought on record which would suggest that an extension of time for the conduct of the audit was granted for good and sufficient reason, as mandated by the proviso appended to subsection (2C) of section 142 of the Act. Thus, the Tribunal rightly concluded that the extension of time granted in the matter did not align with the provisions of Section 142(2C) of the Act. Therefore, the assessment order dated 10.08.2010 was barred by limitation.

Analysis and Reasons

10. Before we proceed further, reference to the relevant provisions would be in order.

“142. Inquiry before assessment.-



(1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under section 115WD or section 139 [or in whose case the time allowed under sub-section (1) of section 139] for furnishing the return has expired] a notice requiring him, on a date to be therein specified, -

(i) where such person has not made a return [within the time allowed under sub-section (1) of section 139] or before the end of the relevant assessment year], to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, or:

[Provided that where any notice has been served under this sub-section for the purposes of this clause after the end of the relevant assessment year commencing on or after the 1st day of April, 1990 to a person who has not made a return within the time allowed under sub-section (1) of section 139 or before the end of the relevant assessment year, any such notice issued to him shall be deemed to have been served in accordance with the provisions of this sub-section,]

(ii) to produce, or cause to be produced, such accounts or documents as the Assessing Officer may require, or

(iii) to furnish in writing and verified in the prescribed manner information in such form and on such points or matters (including a statement of all assets and liabilities of the assessee, whether included in the accounts or not) as the Assessing Officer may require:

Provided that-

(a) the previous approval of the Joint Commissioner shall be obtained before requiring the assessee to furnish a statement of all assets and liabilities not included in the accounts;

(b) the Assessing Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised nature of business activity of the assessee, and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, direct the assessee to get either or both of the following, namely:-

(i) to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as



the Assessing Officer may require.

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[Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.]

(2B) The provisions of sub-section (2A) shall have effect notwithstanding that the accounts of the assessee have been audited under any other law for the time being in force or otherwise.

(2C) Every report under sub-section (2A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer:

Provided that the Assessing Officer] may, suo motu, or on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee."

10.1 A plain reading of sub-section (2A) of Section 142 of the Act would show that the AO has been invested with the power to direct the assessee to get its accounts audited at any stage of the proceedings, with the previous approval of the authority specified in that provision, if in his opinion it is necessary to do so, having regard to the following:

- (i) Nature and complexity of the accounts.
- (ii) Volume of the accounts.
- (iii) Doubts about the correctness of the accounts.
- (iv) Multiplicity of the transactions in the accounts or specialized nature of the assessee's business activities.
- (v) Lastly, bearing in mind the interest of the revenue.

10.2 Clause (i) of subsection 2A of Section 142 stipulates that the assessee can get his accounts audited only by an accountant, as defined in the Explanation appended to Section 288(2) of the Act, who is nominated by the specified authority.



10.3 The audit report must be submitted in the prescribed form, duly signed and verified by the accountant. The auditor must advert to such aspects as may be prescribed and other particulars as the AO would require.

10.4 The specified authority for sub-sections 2A and clause (i) can be any of the following officers, i.e., Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

10.5 Sub-section (2C) of Section 142A provides that the assessee shall furnish the audit report as alluded to in Section 142(2A) within the period specified by the AO.

10.6 The proviso appended to sub-section (2C) of Section 142 confers a discretion on the AO to extend the timeframe initially stipulated by the AO for submission of audit report by the assessee, either on his own, i.e., *suo motu*, or on an application being made in that behalf by the assessee.

10.7 In both situations, the timeframe extension can be granted only if good and sufficient reasons subsist.

10.8 The extension can be for one or more periods, as is deemed fit by the AO, with a caveat that the aggregate timeframe, which includes the original period and the extended period or periods, does not exceed 180 days, commencing from the date on which the assessee received a direction under sub-section (2A) of section 142 to get its accounts audited.

11. Thus, it is evident from a plain reading of the provisions mentioned above that both the discretion to trigger the process for issuance of a direction to the assessee for getting the accounts audited within a specified timeframe and the extensions, if any, that are granted is that of the AO. Both sub-sections (2A) and (2C) read with the proviso appended to the latter make that abundantly clear.



12. The only role envisaged for the specified authority in triggering an audit of the assessee's account is to grant approval to the proposal framed by the AO for getting the accounts audited and nominate the accountant to audit the account.

13. As noticed above, it is the AO who, in his proposal, sets up a case for issuance of a direction to the assessee to get its accounts audited, having regard to the circumstances referred to in subsection (2A) of Section 142, keeping in mind the interests of the revenue. Once the specified authority grants its approval, it is obliged to nominate the accountant who would then proceed to audit the assessee's account and generate a report which would advert to the particulars indicated in the prescribed form and, more importantly, other particulars which the AO may require the accountant to elicit from the assessee's accounts. Significantly, this exercise is to be completed within the timeframe that the AO prescribes.

13.1 Therefore, the circumstances which, according to the AO, propel him to seek an audit of the assessee's accounts, the information that he wants the accountant to ferret out, and the timeframe within which the said exercise is to be completed by the AO are aspects which are within the sway of the AO. The provision is clearly AO-centric. AO centricity is quite understandable as the AO dons two hats, i.e., that of an adjudicator and an inquisitor.

14. Therefore, under the proviso appended to sub-section (2C) of Section 142 of the Act, the legislature has invested the power in the AO to grant an extension of time as well, which can be for one or more periods, with a maximum timeframe (which includes the original period specified by the AO for completion of the audit) not exceeding 180 days.

15. Since the initial timeframe for the conduct of the audit is mandatorily



required to be fixed by the AO as per the provisions of sub-section (2C) of section 142 of the Act, the power to vary the original timeframe by way of extension under the proviso appended to it has been consciously conferred by the legislature only on the AO.

16. Therefore, we are required to construe based on the construction of the provisions at hand, i.e., sub-section (2A), (2C) and the proviso appended to Section 142(2C), whether the power conferred on the AO can be exercised by an authority other than the AO. The answer to this poser, in our opinion, lies in ascertaining the authority in which the legislature has invested statutory discretion. As long as the authority retains the power to exercise the discretion vested in it by the statute, no fault can be found if it employs ministerial means in effectuating the exercise of discretionary power by the authority in which such power is reposed. In sum, the discretionary power invested in the specified authority should be exercised by that authority alone and none else, even if it causes administrative inconvenience, except in those cases where it is reasonably inferred to be a delegable power. [See Administrative Law (10th Edition) H.W.R. Wade & C.F. Farsyth, Page 259-260.]

17. The facts on record disclose that for the reasons given in the objections dated 04.12.2009, the respondent/assessee had asserted that the circumstances outlined in the show cause notice dated 27.11.2009 did not exist. The AO rejected the objections *via* an order dated 08.12.2009, and consequentially, the discretion exercised by the AO to trigger an audit received the approval of the CIT on 14.12.2009, which he communicated to the ACIT on 15.12.2009. The relevant parts of this communication are captured hereafter:



“To

Asst. Commissioner of Income Tax
Central Circle – 17
New Delhi.

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2. Based on your proposal containing the facts an opportunity of being heard was granted to the assessee on 9/12/2009. The matter was fixed for 14/12/2009. On the said date, Sh. Raj Kumar Gupta CA appeared and filed the details. The same have been considered. After consideration, **I am satisfied that it is necessary to get the accounts of the assessee M/s Soul Space Projects Ltd. for AY 2006-07 to 2008-09 audited having regard to the nature and complexity in [sic of] the accounts and in the interest of revenue as pointed out by you in your letter cited above.**

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[Emphasis is ours]

17.1 As alluded to above, on the same date, i.e., 15.12.2009, the AO communicated the CIT's approval to the respondent/assessee.

17.2 In the interregnum, though, as noted above, the CIT had also issued a show cause notice on 09.12.2009, *qua* which objections were filed by the respondent/assessee on 14.12.2009.

17.3 The record shows that the auditors of both the respondent/assessee and its group company, i.e. BLK, had sought an extension of time, which the AO forwarded *via* letter dated 07.04.2010 to the CIT, *albeit* through the ACIT. The DCIT headquarters, *via* communication dated 12.04.2010, informed the AO about the CIT's decision to grant an extension of 60 days for furnishing the audit report. The AO communicated this CIT decision to the respondent/assessee *via a* letter dated 13.04.2020. Since these communications are vital for arriving at a decision in the case, the relevant parts are extracted hereafter:

“F.No.CIT/(C)-II/10-11/24

Date: 12/04/2010

To,

The Dy. Commissioner of Income Tax
Central Circle-17



New Delhi

Sir,

Sub:- Special audit u/s 142(2A) of I T Act, 1961 in the cases of

(i) M/s. Soul Space Projects Ltd., AY 2006-07 to 2008-09.

(ii) M/s B.L. Kashyap & Sons Ltd., AY 2002-03 to 2008-09 –
Regarding.

Please refer to your letter nos. 22 & 23 dated 07/04/2010 as received through Addl. CIT CR-2 letter dated 08/04/2010 on the subject cited above.

The same have been considered by the Ld. CIT. In view of the facts mentioned in the report, **I am directed to convey [an] extension of 60 days for the purpose of furnishing the audit report, as requested by the auditors vide letter dated 25/03/2010.** No further extension will be allowed and the auditors may be asked to adhere to the extended time limit for the purpose.

Yours faithfully

Sd/-

(A.K. Taneja)

Dy. Commissioner of Income Tax
(Hqrs.) Central-II, New Delhi.”

“Date: 13/04/2010

To,

The Principal Officer,

M/s Soul Space Projects Ltd.

A-21/B-1 Extn., Mohan Co-operative Industrial Area,
Mathura Road, New Delhi.

Sub: In the matter of M/s Soul Space Projects Ltd. – Assessment
Year 2006-07 to 2008-09 – Special Audit under section
142(2A) of the Income Tax Act, 1961 – regarding.

Sir,

Please refer to the above.

In this connection you are hereby informed that the Commissioner of Income Tax (Central) – II, New Delhi vide his office letter F.No. CIT/(C)-II/10-11/24 dated 12/04/2010 has granted extension of 60 days to the special auditors M/s Dinesh Mehta & Co., Chartered Accountants, for furnishing the audit report u/s 142(2A) in your case.

Please acknowledge the receipt of this letter.

Yours faithfully,

s/d

(B.L. Sharma)

Deputy Commissioner of Income Tax,
Central Circle-17, New Delhi.”



18. A perusal of the aforesaid documents would show that the CIT, in fact, granted the extension of time. The AO simply transmitted the request received by the auditors to his superiors, who then processed the matter and directed a grant of extension of time for completion of the audit.

18.1 The record also shows that while the matter was pending adjudication with the Tribunal, internal communication was exchanged between departmental representatives to elicit the recommendation of the AO concerning the extension of time. The recommendation of the AO is part of the communication dated 11.02.2020 exchanged between the departmental representative tasked with canvassing the case of the appellant/revenue before the Tribunal and the ACIT. Since much emphasis is laid on this communication, the relevant part of the same is extracted hereafter

"F.No.ACIT/CC-15/2019-20/1605

Date : 11.02.2020

To

*The Commissioner of Income Tax (DR)
G-Bench, ITAT, 7th Floor
Lok Nayak Bhawan, Khan Market, New Delhi.*

Sir,

Subject: Second appeal in the cases of ACIT Vs Soul Space Projects Ltd., ITA No.193/Del/2015 for AY 2007-08, 1849/Del/2015 for AY 2008-09 and 4352/Del/2015 for AY 2009-10 – matter reg.

Ref: F.No.CIT/DR/ITAT/G-Bench/2019-20/195 dated 27.01.2020.

Kindly refer to the above noted subject.

2. *On perusal of assessment and special audit records in the case of Soul Space Projects Ltd., it is found that M/s Dinesh Mehta & Co., Special Auditor appointed in the case of Soul Space Projects Ltd., has filed an application on 08.04.2010 related to [the] extension of time for furnishing the special audit report. Accordingly, the then AO has forwarded a letter to Ld. CIT, Central-II, New Delhi on 08.04.2010 regarding extension of special audit in this case and stated as under:-*

"2. M/s Dinesh Mehta & Co. has filed a request vide letter dated 25.03.2010 for granting [an] extension of time for a further period of two months for submission of the aforesaid report because there is delay on the part of assessee to furnish details and information required by the auditors as per annexure appended by the auditors



with the aforesaid letter (Copy of letter with enclosures is enclosed for ready reference).

3. In this connection, it is also informed that the auditors M/s Sanjay Satpal & Associates appointed for special audit in the case of the flagship company for the group i.e. M/s B.L. Kashyap & Sons Ltd. has also requested for extension of time for further 2 months for the similar reasons. The application filed by M/s Sanjay Satpal & Associates has already been forwarded to your good self on 07.04.2010 for favourable consideration. Since, M/s Soul Space Projects Ltd. has large numbers of intergroup transactions with M/s B.L. Kashyap & Sons Ltd., it is necessary that both the auditors should work in close cooperation with each other and should exchange one other's finding(s) before reaching any conclusion. Hence, it is recommended that the extension of time may also be granted to M/s Dinesh Mehta & Co. if [the] extension of time is granted by your good self to M/s Sanjay Satpal & Associates.”
3. Further, the Ld. CIT, Central – II, New Delhi, vide letter No. CIT/(C)-II/10-11/24 dated 12.04.2010 has conveyed the extension of 60 days for the purpose of furnishing the audit report and directed “No further extension will be allowed and the auditors may be asked to adhere to the extended time limit for the purpose”. Accordingly, the assessing officer vide letter F.No.DCIT-CC-17/Special Audit/2010-11/40 dated 13.04.2010 has informed that the extension of further 60 days granted to the Special Auditors M/s Dinesh Mehta & Co., Chartered Accountants, for furnishing the audit report u/s 142(2A) in the case and also requested to the assessee to provide the requisite information immediately under information to the undersigned so that special audit may be completed in a smooth manner.
4. On perusal of relevant records, it is ascertained that the Assessing Officer has applied his mind in the letter dated 08.04.2010 therein he has given the reasons for extension for furnish the special audit report. Consequently, the Ld. CIT has considered the facts (application of mind of AO) and directed to the AO to convey the extension of 60 days for the purpose of furnishing the special audit u/s 142(2A). Therefore, it is clear that the extension of period u/s 142(2C) was granted by the AO after applying his mind, not by the Ld. CIT, Central-II and the Ld. CIT, Central-II has only directed to [sic] the AO to convey the extension of [the] period to the Special Auditors. The above referred letters are also enclosed herewith for ready reference.

Yours faithfully,
s/d

(Parbodh Kumar)

Asstt. Commissioner of Income Tax,
Central Circle-15, New Delhi.”



18.1 A perusal of this document would show that the AO made a recommendation broadly on two grounds. First, the request made by the auditor of the respondent/assessee, i.e., Mr Dinesh Mehta, was similar to the request made by the auditors of the Group company, i.e., Messrs Sanjay Satpal and Associates. Second, both these requests were founded on the ground that the concerned assessee had not cooperated in the audit; since inter-group transactions were involved, cooperation in exchange of information was required to obtain a conclusive audit report.

19. We must state at the outset that on the aspect concerning purported delay, the counsel for the respondent/assessee had much to say, including that this assertion in the AO's recommendatory letter to the CIT was not put to the respondent/assessee. It was the respondent/assessee's stand that both cooperation and information was furnished as sought by the concerned auditor. Regarding the interconnection of transactions, two separate auditors appointed in the matter had enough time to coordinate. That said, according to the respondent/assessee, without prejudice to the contention made on its behalf, one way or the other, the AO had to decide as to whether the extension of time for conducting the audit was mandated. The letter dated 08.04.2010, the extract of which was embedded in the letter dated 11.02.2020, needed to demonstrate that there was good and sufficient cause for extending the timeframe.

20. Having noted the diametrically opposite assertions made on the aspect of delay, in our opinion, the legal tenability of the decision taken in the matter depends on which specified authority was invested with the power to extend the timeframe. As discussed above, since the legislature vested the discretion to extend the timeframe solely in the AO, he could not have



abdicated that function and confined his role to only making a recommendation to the CIT. The CIT had no role in extending the timeframe as the AO was in *seisin* of the assessment proceedings.

21. As has been correctly submitted on behalf of the respondent/assessee, the decision taken to get an audit conducted under Section 142(2A) of the Act is a step in the process of assessment proceedings and, therefore, is clearly not an administrative power; as the appointment of a special auditor entails civil consequences. In this context, the following observations made in **Rajesh Kumar's** case are extracted hereafter:

“24. If an assessee files a return the same is not presumed to be incorrect. When the assessing officer, however, intends to pass an order of assessment, he may take recourse to such steps including the one of asking the assessee to disclose documents which are in his power or possession. He may also ask third parties to produce documents. Section 136 of the Act by reason of a legal fiction makes an assessment proceeding, a judicial proceeding. The assessment proceeding, therefore, is a part of judicial process. When a statutory power is exercised by the assessing authority in exercise of its judicial function which is detrimental to the assessee, the same is not and cannot be administrative in nature. It stricto sensu is also not quasi judicial. By way of example, although it may not be very apposite, we may state that orders passed under Order XII of the Code of Civil Procedure by a court cannot be held to be administrative in nature. They are judicial orders and subject to the order which may be passed by higher courts in regard thereto. Indisputably, the prejudice of the assessee, if an order is passed under Section 142(2A) of the Act, is apparent on the face of the statutory provision. He has to undergo the process of further accounting despite the fact that his accounts have been audited by a qualified auditor in terms of Section 44AB of the Act. An auditor is a professional person. He has to function independently. He is not an employee of the assessee. In case of a misconduct, he may become liable to be proceeded against by a statutory authority under the Chartered Accountants Act, 1949.”

22. We may note that the decision relied upon on behalf of the appellant/revenue in the matter of **Yum Restaurant** has been disapproved in **Rajesh Kumar's** case. Furthermore, the judgment in **Rajesh Kumar's** case



has been reaffirmed by the Supreme Court in the ***Sahara India Firm*** case [See para 20], with some moderation with regard to the Court's exposition concerning the scope and impact of Section 136 of the Act.

23. Notwithstanding the observation made in this behalf, the Court in ***Sahara India*** has emphasized that because there are civil consequences, the distinction between quasi-judicial and administrative functions is obliterated. The following observations bear this out:

"22. ... It is the civil consequence which obliterates the distinction between quasi judicial and administrative function. Moreover, with the growth of the administrative law, the old distinction between a judicial act and an administrative act has withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice. (Also see: Mrs. Maneka Gandhi Vs. Union of India & Anr. and S.L. Kapoor Vs. Jagmohan & Ors. . As already noted above, the expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non pecuniary damages. Anything which affects a citizen in his civil life comes under its wide umbrella. Accordingly, we reject the argument and hold that since an order under Section 142 (2A) does entail civil consequences, the rule audi alteram partem is required to be observed."

24. Given that the initial exercise of the power has been explicated as one that is not administrative, the CIT(A) could not have extended the time based on the recommendation of the AO. However, the enunciation of this legal principle does not derogate from our observation above that since the discretionary power was vested in the AO (which was non-delegable), it could not have been exercised by the CIT, irrespective of the nature of the power.



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25. Thus, for the preceding reasons, the question of law, as framed, is answered against the revenue and in favour of the assessee. The appeals are disposed of in the aforesaid terms.

(RAJIV SHAKDHER)
JUDGE

(GIRISH KATHPALIA)
JUDGE

DECEMBER 11, 2023 / tr

Signature Not Verified

Digitally Signed By: ATUL
JAIN

Signing Date: 12.12.2023
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