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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 292/2018

Date of decision: 20 August, 2018

PR. COMMISSIONER OF INCOME TAX, DELHI – 1 Appellant
Through Mr. Zoheb Hossain, Sr. Standing
Counsel with Mr. Deepak Anand,
Advocates for Revenue

versus

AT & T GLOBAL NETWORK SERVICES
(INDIA) PVT. LTD. Respondent
Through Mr. Sachit Jolly and Mr. Sidharth
Joshi, Advocates

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

The present appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (the Act, for short) in the case of **AT & T Global Network Services (India) Pvt. Ltd.** arises from the order dated 18.09.2017 of the Income Tax Appellate Tribunal (the Tribunal, for short) deciding cross appeals, ITA Nos. 4882/Del/2013 and 4870/Del/2013 relating to the Assessment Year 2008-09.

2. The impugned order holds that the draft assessment order dated 09.08.2012, passed by the Assessing Officer under Section 144C read with Section 143 (3) of the Act, was invalid as it was passed beyond the prescribed statutory period. Accordingly, the final assessment order dated 17.06.2013 passed by the Assessing Officer on the

directions of the Dispute Resolution Panel has been held to be void and invalid.

3. By order dated 12.03.2018, the following substantial question of law was framed in the present appeal:-

“Did the ITAT fall into error in interpretation of the proviso to Explanation I (iii) {sic. (iv)} to Section 153 of the Income Tax Act in concluding that the search (sic. draft) assessment framed in the present case was time barred?”

4. Relevant facts may be noticed. For the Assessment year 2008-09, the respondent assessee in its return filed on 30.09.2008 had declared taxable income of ₹ 36,35,27,736/-. The return was taken for scrutiny/regular assessment. Accordingly, the regular/draft assessment order was required to be passed by the assessing Officer on or before 31.12.2011. During the course of the assessment proceedings, the Assessing Officer vide order dated 26.12.2011 had directed the respondent-assessee to get his accounts audited under Section 142(2A) of the Act. Report of the special audit was received by the Assessing Officer on 22.06.2012. Thereafter, the draft assessment order was passed by the Assessing Officer on 09.08.2012. Objections raised by the respondent assessee to the draft assessment order were considered and decided by the Dispute Resolution Panel vide order dated 27.05.2013 under section 144C(8) of the Act. Consequent to the said order, the final assessment order was passed on 17.06.2013.

5. The issue raised in the present appeal is whether draft assessment order dated 09.08.2012 was passed within the prescribed

time.

6. Revenue relies on clause (iv) to Explanation 1 to Section 153 of the Act for exclusion of period of special audit between 26.12.2011 and 22.06.2012. Further on exclusion of this period as the time left for passing of the draft assessment order was 6 days, the Assessing Officer was entitled to pass the draft assessment order on or before 21.08.2012 in terms of first proviso of Explanation 1 to Section 153 of the Act. Accordingly, it is submitted that the draft assessment order passed on 09.08.2012 was within limitation.

7. The Tribunal vide the impugned order on interpretation of the said provisions has held that the clause (iv) to Explanation 1 and the first proviso would not apply as the special audit report was received after 31.12.2011. The Tribunal observed that *"the time limits under section 153 are sacrosanct and are to be strictly followed unless an exception has been provided in the section for the extension of the same. Meaning thereby that even in cases where a report under 142(2A) is to be issued, the same should be issued and received within the time limit prescribed under 153(1) of the Act. The intention of legislature is also evidenced from the fact that the period of 180 days has been made part of section 142- Inquiry before assessment and not time limit for completion of assessment under section 153 (1) of the Act."* The Tribunal further held that *"With regard to the protection of the interest of the Revenue where the report or information called under the explanation is received beyond time and the time limit for completion of assessment has expired, the court held that the AO should complete the assessment keeping in mind the limitation as per*

the provisions of the Act."

8. The relevant portion of the Explanation 1 to Section 153 and the first proviso to the said Explanation is reproduced below-

"Explanation 1.—In computing the period of limitation for the purposes of this section—

(iv) the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under subsection (2A) of section 142 and ending with the last date on which the assessee is required to furnish a report of such audit under that subsection,

shall be excluded.

Provided that where immediately after the exclusion of the aforesaid time or period, the period of limitation referred to in sub-sections (1), 12[(1A), (1B),] 12a[(2), (2A) and (4)] available to the Assessing Officer for making an order of assessment, reassessment or recomputation, 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."

9. Clause (iv) of Explanation 1 to Section 153 of the Act states that the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited and ending

with the last date on which the assessee is required to furnish a report of such audit, shall be excluded for computing the period of limitation. Thus clause (iv) to Explanation 1 clearly states that the period from the date when the Assessing Officer directs the special audit till the last date of furnishing such report under Section 142 (2A) of the Act shall be excluded and not counted for limitation. Accordingly, the period or time taken for conduct of special audit between 26.12.2011 and 22.06.2012 has to be excluded.

10. First proviso to Explanation 1 is equally clear and categorical. Where ever after exclusion of the time or period, the period of limitation for passing of an assessment order is less than sixty day, the limitation period for passing of the assessment order shall be extended to sixty days. Accordingly, as the period for passing of the draft assessment order on report of special audit was six days, by virtue of the first proviso it was extended to sixty days. In view of the statutory exclusion under clause (iv) to the Explanation 1 and statutory extension vide first proviso the Assessing Officer was entitled to pass the assessment order by 21.08.2012. The draft assessment order passed on 09.08.2012 was within limitation and not void or invalid.

11. The aforesaid interpretation and reasoning in not res integra, for an identically worded Explanation and proviso to Section 153 B of the Act was considered and interpreted in ***Commissioner of Income Tax vs. Ulike Promoters P. Ltd., (2013) 356 ITR 507 (Delhi)***. It was held that time taken for conduct of special audit has to be excluded for the purpose of computation of time limit for completion of proceedings under Section 153 A of the Act and proviso would apply when the

time left for completion of the assessment is less than sixty days. Accordingly the time for assessment would be extended to provide for a minimum period of sixty days to complete the assessment. ***Ulike Promoters P. Ltd.*** holds :-

"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."

12. Explanation 1 (iv) and first proviso to Section 153 being identical and *pari materia* to the Explanation to Section 153 B, the ratio in ***Ulike Promoters P. Ltd. (supra)*** would equally apply to the present appeal. Object, purpose and scope of exclusion clause and the proviso are same.

13. Learned counsel for the assessee has submitted that in some cases, the Assessing Officers invoke and refer the case for special audit to postpone or extend period of limitation. However, this issue and contention does not arise in the present case as the respondent assessee had filed a writ petition challenging the direction for special audit, which petition was dismissed as withdrawn.

14. Learned counsel for the Revenue has also drawn our attention to the judgment of the Supreme Court in ***VLS Finance Limited and Another vs. Commissioner of Income Tax and Another***, (2016) 384 ITR1 (SC), in which it was held as follows;-

"The assessing officer had, after going through the matter, formed an opinion that there was a need for special audit and the report of special audit was necessary for carrying out the assessment. Once such an opinion was formed, naturally, the assessing officer would not proceed with the assessment till the time the special audit report is received, inasmuch as in his

opinion, report of the special audit was necessary. Take a situation where the order of special audit is not challenged. The assessing officer would naturally wait for this report before proceeding further. Order of special audit followed by conducting special audit and report thereof, thus, become part of assessment proceedings. If the order directing special audit is challenged and an interim order is granted staying the making of a special report, the assessing officer would not proceed with the assessment in the absence of the audit as he thought, in his wisdom, that special audit report is needed. That would be the normal and natural approach of the assessing officer at that time. It is stated at the cost of repetition that in the estimation of the assessing officer special audit was essential for passing proper assessment order. If the court, while undertaking judicial review of such an order of the assessing officer directing special audit ultimately holds that such an order is wrong (for whatever reason) that event happens at a later date and would not mean that the benefit of exclusion of the period during which there was a stay order is not to be given to the Revenue. Explanation 1 which permits exclusion of such a time is not dependent upon the final outcome of the proceedings in which interim stay was granted.”

Aforesaid view in *VLS Finance Limited and Another (supra)* supports and affirms the view expressed in *Ulike Promoters P. Ltd.(supra)*.

15. In view of the above, we are of the considered opinion that it was not necessary that the special audit report should be received within the period of limitation to avail the benefit of clause (iv) to Explanation 1 and the first proviso to Section 153, rather receipt of the special audit report beyond the original time prescribed would not matter in view of the exclusion under clause (iv) to Explanation 1. Time or period excluded is not counted and accordingly the period of limitation is to be computed. Further, benefit of the first proviso cannot be denied when upon exclusion, the time left for passing an order is less than sixty days. Clause (iv) to Explanation 1 and the first proviso would certainly apply in the present case as special audit was directed by the Assessing Officer before the expiry of prescribed period and only six days were left to complete the assessment. Statutory time period is fixed by the Act. The same enactment can also provide for exclusion of period, and extension of time. We must abide by the legislative enactment.

16. Accordingly, the substantial question of law is answered in favour of the appellant -revenue and against the respondent-assessee. The draft assessment order was passed within the prescribed time and was not barred by limitation.

17. We clarify that we have not expressed any opinion on merits of the assessment. An order of remanded is passed, observing the Tribunal would decide the appeal afresh and on merits.

18. To cut short delay, parties are directed to appear before the Tribunal on 12.09.2018, when a date of hearing would be fixed. There would be no order as to costs.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

AUGUST 20, 2018/b

