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

Date of Decision:-13.01.2020

+ **W.P.(C) 402/2020**

GOLDEN TIMES SERVICES PVT. LTD.

..... Petitioner

Through: Mr. Ved Jain, Ms. Mekhala Benny,
Mr. Kislaya Parashar and Ms. Umang
Luthra, Advocates.

versus

DCIT

..... Respondent

Through: Mr. Kunal Sharma, Senior Standing
Counsel with Mr. Parth Semwal,
Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (ORAL):

C.M.No. 1104/2020

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. The Petitioner company, being left with no statutory remedy, has preferred the present petition under Article 226 of the Constitution of India assailing the order dated 30.08.2019 passed by the Income Tax Appellate Tribunal (hereinafter referred as "ITAT"), dismissing petitioner's application for recall of an *ex-parte* order dated 18.10.2016.

4. Shorn of unnecessary details, the facts of the case are that the Petitioner company filed its return of income for the Assessment Year 2006-07 on 30.11.2006, declaring a total loss of Rs. 42,67,698/-. The said return of petitioner company was picked up for scrutiny and an assessment order dated 28.11.2008 was passed under Section 143(3) of the Income-Tax Act, 1961 (hereinafter referred as "the Act"), assessing the income at

Rs.16,84,945/-, by making an addition of Rs.59,52,643/-. Aggrieved with the aforesaid order, petitioner company preferred an appeal before Commissioner of Income Tax (Appeals) (hereinafter referred as "CIT(A)") who vide order dated 30th September, 2014, granted partial relief by deleting addition of Rs.34,17,138/- and directed the Assessing Officer (AO) to grant further relief of Rs.6,21,890/- after verification. However, the addition of Rs.19,00,000/- was confirmed. The Petitioner company then challenged the said order before the ITAT by filing an appeal on 11.12. 2014, which was heard on 30.08.2016 and later dismissed vide order dated 18.10. 2016. In the said order, the ITAT, while noting that no one was present on behalf of the assessee at the time of hearing, proceeded to dispose of the appeal, observing that notice was sent to the assessee on 15.07.2016 at the address mentioned in the memo of appeal and despite that, the assessee remained unrepresented. It was further noted that notice had come back unserved with a report that *the property was locked for quite some time*. It was also noted that the earlier notice, sent on 01.06.2016 on the same address of the assessee had also been received back unserved with similar comments. The ITAT, thus held that the assessee was presumably not serious in pursuing the appeal and dismissed the same *in limine*. At the same time, the assessee was granted liberty to approach the ITAT for a recall of the order if it was able to show a reasonable cause for non-appearance. Thus, there was no adjudication on the merits of the appeal.

5. Petitioner company submits that on 08.02.2018, when an enquiry was made about the status of the appeal, it came to its knowledge that the appeal had been dismissed *ex-parte* for non-prosecution. Thereafter, on 08.03.2018, an application was filed for recall of the order dated 18.10.2016. The petitioner company filed the application giving grounds for non-appearance, with an explanation that the absence was beyond its control. However to the petitioner company's dismay, the same was dismissed vide order dated 30.08.2019, on the ground that the same is barred by limitation under Section 254(2) of the Act. This order is impugned in the present petition.

6. We have heard learned counsel for the parties and perused the record. The

ITAT has dismissed the application for recall of its order dated 18.10.2016 solely on the ground of limitation, observing that it has no power to condone the delay. The impugned order, *inter alia*, reads as under:

"1. By way of this Misc. Application under Section 254(2) of the Income Tax Act, 1961, assessee requested for recalling the exparte order dated 18.10.2016.

2. At the time of hearing, Ld. Counsel for the assessee stated that the appeal filed by the assessee has been dismissed in default for non-prosecution following the decision in the case of Multiplan Pvt. Ltd. 38 ITD 320 (Del.). He further stated that assessee did not receive the notice of hearing. He further stated that the non-appearance of the assessee is bonafide and requested for recalling the order dated 18.10.2016. In support of his contention, he filed the copy of the decision of the Hon'ble Delhi High Court in the case of Prakash Sangwan Vs. ITO, Ward 33(4), New Delhi 2018 (5) TMI 1789 - Delhi High Court.

3. Ld. DR strongly raised the objection on the request of the Ld. Counsel for the assessee and stated that this misc. application filed by the assessee is time barred and may be dismissed as such.

4. After hearing both the parties and perusing the records as well as the provisions of law as well case laws cited by the Ld. Counsel for the assessee, we note from the office note that this Misc. Application has been filed on 08.03.2018 for recalling the order of the Tribunal dated 18.10.2016, which is beyond the limitation period as prescribed under section 254(2) of the I.T. Act, 1961. For the sake of convenience, the relevant portion of the provisions of section 254(2) is reproduced under:-

(2) The Appellate Tribunal may, at any time within [six months from the end of the month in which the order was passed] with a view to rectifying any mistake apparent from the record, amend any order passed by it under sub-section (1), and shall make such amendment if the mistake is brought to its notice of the assessee or the Assessing] Officer..."

5. Keeping in view of the aforesaid provisions of Section 254(2) of the I.T. Act, 1961, this Bench has no power to even condone the delay. Hence, the Bench is unable to accept the request of the Assessee's counsel for recalling the Tribunal's order dated 18.10.2016 and accordingly, dismiss the misc. application filed by the Assessee.

6. In the result, the Misc. Application filed by the assessee stands dismissed.”

7. On perusal of the record, it emerges that on 18.10.2016, the tribunal had dismissed the appeal *ex-parte*, without deciding the issue on merits. In fact as noted in the order, on the said date, Revenue had sought an adjournment, but such a request was rejected. The ITAT proceeded to dismiss the appeal *in limine* without adverting to the facts and deciding the issues. The ITAT also afforded an opportunity to the petitioner company to apply for recall of the order and restoration of the appeal, provided it was able to show sufficient cause for his non-appearance when the appeal was called for hearing. This liberty is in consonance with the proviso to Rule 24 of the Income-Tax (Appellate Tribunal) Rules, 1963, (hereinafter referred as “ITAT Rules”) which read as under:

“24.Hearing of appeal ex parte for default by the appellant.

Where, on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellant does not appear in person or through an authorised representative when the appeal is called on for hearing, the Tribunal may dispose of the appeal on merits after hearing the respondent :

Provided that where an appeal has been disposed of as provided above and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal.”

Having heard learned Counsel for the parties, we are of the considered opinion that the tribunal lost sight of the main provision as enshrined in Rule 24 of the ITAT Rules, which required the ITAT to dispose of the appeal on merits after hearing the respondent. Since it did not proceed to do so, and specifically gave an option to seek recall of its order, we find no justification for dismissing the application for recall on the ground of limitation. Rule 24 of the ITAT Rules, as noted above, enjoined the ITAT to decide the appeal on merits. The appeal filed in 2014, had ripened for final disposal only in

2016 and therefore, dismissal of the appeal without deciding the merits of the case, merely on the ground for non-prosecution, was certainly unwarranted. In the erstwhile regime, in respect of Section 33(4) of the erstwhile Income-Tax Act, 1922, the Supreme Court in the case of **CIT vs. S.Chenniappa Mudaliar**, (1969) 74 ITR 41, taking into consideration the decision of the special bench of the High Court of Madras in **S. Chenniappa Mudaliar v. CIT** [1964] 53 ITR 323 (Mad.), examined the position of law and held as under:

“The Special Bench of the High Court noticed the previous history of rule 24 as also the terms in which it came to be framed after the passing of the Income-tax Act, 1961, which enables the Tribunal, in its discretion, either to dismiss the appeal for default or to hear it ex parte in case of non-appearance of the parties and further enables the Tribunal to set aside the dismissal on sufficient cause being shown for non-appearance. After referring to various decided cases and examining the relevant provisions of the Act, the Special Bench summed up the position thus [1964] 53 ITR 323, 334 (SB):

“To sum up the position, the Appellate Tribunal is the appointed machinery under the Act for finally deciding questions of fact in relation to assessment of income-tax. Its composition, consisting as it does of qualified persons in law and accountancy, makes it peculiarly qualified to deal with all questions raised in a case, whether there be assistance from the party or his counsel or not.

Section 33(4) obliges it to decide an appeal, after giving an opportunity to the parties to put forward their case. The giving of the opportunity only emphasises the character of the quasi-judicial function performed by the Appellate Tribunal. The fact that that opportunity is not availed of in a particular case, will not entitle the Tribunal not to decide the case. There can be no decision of the case on its merits if the matter is to be disposed of for default of appearance of the parties. Further, an adjudication on the merits of the case is essential to enable the High Court to perform its statutory duty and for the Supreme Court to hear an appeal filed under section 66-A. Section 33 (4) itself indicates by the use of the word 'thereon' that the decision should relate to the subject matter of the appeal. Rule 24, therefore, to be consistent with Section 33(4), could only empower the Tribunal to dispose of the appeal on its merits, whether there be an appearance of the party before it or not. This was indeed the rule when it was first promulgated in the year 1941. The rule in its present form, as amended in the year 1948, in so far as it enables the dismissal

of an appeal before the Income tax Appellate Tribunal for default of appearance of the appellant, will, therefore, be ultra vires, as being in conflict with the provisions of Section 33(4) of the Act.”

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So far as the questions of fact are concerned the decision of the Tribunal is final and reference can be sought to the High Court only on questions of law. The High Court exercises purely advisory jurisdiction and has no appellate or revisional powers. The advisory jurisdiction can be exercised on a proper reference being made and that cannot be done unless the Tribunal itself has passed proper order under section 33(4). It follows from all this that the Appellate Tribunal is bound to give a proper decision on questions of fact as well as law which can only be done if the appeal is disposed of on the merits and not dismissed owing to the absence of the appellant. It was laid down as far back as the year 1953 by S.R. Das J. (as he then was) in Commissioner of Income-tax v. Arunachalam Chettiar [1953] 23 ITR 180 ; [1953] SCR 460 that the jurisdiction of the Tribunal and of the High Court is conditional on there being an order by the Appellate Tribunal which may be said to be one under section 33(4) and a question of law arising out of such an order. The Special Bench, in the present case, while examining this aspect, quite appositely referred to the observations of Venkatarama Aiyar J. in Commissioner of Income-tax v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589; [1962] 1 SCR 788 indicating the necessity of the disposal of the appeal on the merits by the Appellate Tribunal. This is how the learned judge had put the matter in the form of interrogation:

"How can it be said that the Tribunal should seek for advice on a question which it was not called upon to consider and in respect of which it had no opportunity of deciding whether the decision of the court should be sought?"

Thus looking at the substantive provisions of the Act there is no escape from the conclusion that under section 33(4) the Appellate Tribunal has to dispose of the appeal on the merits and cannot short-circuit the same by dismissing it for default of appearance.”

8. More recently, the High Court of Madras in the case of **Smt. Ritha Sabapathy vs. DCIT, Tax Case No.169/2019** has held that the ITAT cannot dismiss an appeal on account of non-appearance of party without giving finding on merits and remanded the matter to the ITAT.

9. Similar views have been echoed by several other High Courts and the decision of the Supreme Court in *CIT vs. S.Chenniappa Mudaliar* (supra) has been relied upon in several matters, and it has been time and again reiterated that in the absence of the party, the ITAT should proceed to decide the matter on merits and it cannot defeat the rights of the parties on its whims and fancies or by procedural wrangles and uncertainties. We have also noticed that in the impugned order, the ITAT has not gone into the question as to what would be the date on which the order was passed for determining the limitation period. The record before the ITAT did not conclusively show that proper service was effected on the Petitioner company-assessee. Notices that were being issued were being returned back unserved with the comments that the house was locked. It has proceeded to reject the application by considering the date of the order passed by the ITAT as the starting point of limitation in submitting the miscellaneous application and not the date of the receipt of the order, which according to the assessee was 08.02 2018, the date wherefrom it gained knowledge of the order. Thus, no attempt was made by the ITAT to ascertain the date of actual receipt of the order passed by the ITAT and the ITAT has proceeded to hold the application to be barred by limitation as provided under Section 254(2) of the Act. Section 254 (2) of the Act was amended by the Finance Act, 2016 with effect from 01.06.2016 and the words “*four years from the date of the order*” were substituted by “*six months from the end of the month in which the order was passed*”. The explanatory notes to the provisions of the Finance Act, 2016, do not throw much light for the purpose of the amendment, except for stating that the period of limitation has been shortened in order to bring certainty to the orders of the ITAT. The relevant extract of the explanatory notes reads as under:

“61.9 The existing provisions of sub-section (2) of section 254 of the Income-tax Act provide that the Appellate Tribunal may rectify any mistake apparent from the record in its order at any time within four years from the date of the order.

61.10 In order to bring certainty to the order of ITAT, the provisions of sub-section (2) of section 254 of the Income-tax Act have been amended to provide that the Appellate Tribunal

may rectify any mistake apparent from the record in its order at any time within six months from the end of the month in which the order was passed.”

10. Be that as it may, the real question before us is as to what would be the relevant date for the purpose of commencement of period of limitation. To hold the date of the order to be the relevant date for the purpose of calculating the period of six months envisaged under Section 254(2) of the Act, can lead to several absurd and anomalous situations. An order passed without the knowledge of the aggrieved party, would render the remedy against the order meaningless as the same would be lost by limitation while the person aggrieved would not even know that an order has been passed. Such an interpretation would not advance the cause of justice and would not be the correct approach and thus cannot be countenanced. A person who is aggrieved or concerned with an order would legitimately be expected to exercise his rights conferred by the provision and unless the order is communicated or is known to him, either actually or constructively, he would not be in a position to avail such a remedy. The words “*six months from the end of the month in which the order was passed*” therefore, cannot be given a narrow and restrictive interpretation. There are several decisions of the Apex Court and other High Courts, where similar question came up for consideration. The Courts have always leaned in favour of an interpretation which would enable an aggrieved party to avail its remedy in a meaningful manner, so that the right conferred by a provision does not remain fanciful or illusory.

11. The Supreme Court in the case of ***Sree Ayyankar Spinning & Weaving Mills Ltd. v. Commissioner of Income Tax*** (2008) 301 ITR 434 (SC), while analysing Section 254 of the Act, prior to the amendment of 2016, while considering a different question, has observed that Section 254 (2) of the Act is divided in two parts. In the first part, the ITAT may, at any time, within four years [as stipulated in the erstwhile provision], from the date of order rectify any mistake apparent from the record and amend an order passed by

it under sub-section (1). Under the second part of Section 254 (2) of the Act, provision has been made for the amendment of the order passed by the Tribunal under sub-section (1), when the mistake is brought to its notice by the assessee or the assessing officer through an application. The first part of Section 254 (2) of the Act refers to *suo moto* exercise of the power of rectification by the ITAT whereas the second part refers to rectification and amendment on an application being made by the assessing officer or the assessee pointing out the mistake apparent from the record.

12. As noted above, Section 254(2) of the Act has undergone certain amendments. However, there is no dispute that the provision still retains the distinctive two parts as observed by the Supreme Court in the abovenoted case. We are presently concerned with a scenario under Section 254 (2) of the Act where the assessee has invoked its jurisdiction seeking rectification / amendment of the order passed by the ITAT. In this situation, the assessee has claimed that it did not have the knowledge of the earlier order passed by the ITAT on 18.10.2016 and the period of limitation of six months should commence from the date of the receipt of the order. In our opinion, the limitation would begin to run when the affected person has the knowledge of the decision. The date when the order was passed cannot be solely determined by referring to the date when the same was signed by the ITAT. We further find that under Section 254 (3) of the Act, the law stipulates that the ITAT shall send a copy of the order passed by it to the assessee and the Principal Commissioner. Further, Rule 35 of the ITAT Rules also requires that the orders are required to be communicated to the parties. For ready reference, Section 254 (3) of the Act and the relevant rule are reproduced hereinunder:

“254. Orders of Appellate Tribunal.

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(3) The Appellate Tribunal shall send a copy of any orders passed under this section to the assessee and to the Principal Commissioner or Commissioner.

35. Order to be communicated to parties.

The Tribunal shall, after the order is signed, cause it to be communicated to the assessee and to the Commissioner.”

13. From the abovenoted provisions, it emerges that the Section and the Rule mandates the communication of the order to the parties. Thus, the date of communication or knowledge, actual or constructive, of the orders sought to be rectified or amended under Section 254(2) of the Act becomes critical and determinative for the commencement of the period of limitation. The ITAT has not applied its mind on this aspect and has been swayed by the literal and mechanical construction of the words “*six months from the end of the month in which the order was passed*”. The ITAT failed to even delve into the question whether the affected party, either actually or constructively, was in knowledge of the order passed by the ITAT.

14. The Supreme Court, in the case of ***D. Saibaba v. Bar Council of India***, (2003) 6 SCC 186, had an occasion to consider a similar question in the context of Advocates Act, 1961 for exercising the remedy to review/reference/appeal. In the said case, the expression used in the provision was “*sixty days from the date of that order*”. The Court noticed several other decisions, rendered under different acts and came to the conclusion that the expression “*the date of that order*” must be construed as meaning the date of the communication or knowledge, actual or constructive of the order sought to be reviewed. The relevant portion of the said judgment has been extracted hereinunder:

“9. So far as the commencement of the period of limitation for filing the review petition is concerned we are clearly of the opinion that the expression “the date of that order” as occurring in Section 48-AA has to be construed as meaning the date of communication or knowledge of the order to the review petitioner. Where the law provides a remedy to a person, the provision has to be so construed in case of ambiguity as to make the availing of the remedy practical and the exercise of power conferred on the authority meaningful and effective. A construction which would render the provision nugatory ought to be avoided. True, the process of interpretation cannot be utilized for implanting a heart into a dead provision; however, the power to construe a provision of law can always be so exercised as to give throb to a sinking heart.

10. An identical point came up for the consideration of this Court in *Raja Harish Chandra Raj Singh v. Dy. Land Acquisition Officer* [AIR 1961 SC 1500 : (1962) 1 SCR 676] . Section 18 of the Land Acquisition Act, 1894 contemplates an application seeking reference to the court being filed within six months from the date of the Collector's award. It was held that “the date of the award” cannot be determined solely by reference to the time when the award is signed by the Collector or delivered by him in his office. It must involve the consideration of the question as to when it was known to the party concerned either actually or constructively. If that be the true position, then placing a literal and mechanical construction on the words “the date of the award” occurring in the relevant section would not be appropriate. It is fair and just that a decision is communicated to the party whose rights will ultimately be affected or who will be affected by the decision. The knowledge, either actual or constructive, of the party affected by such a decision, is an essential element which must be satisfied before the decision can be brought into force. Thus construed, the making of the award cannot consist merely of the physical act of writing an award or signing it or even filing it in the office of the Collector; it must involve the communication of the said award to the party concerned either actually or constructively. A literal or mechanical way of construing the words “from the date of the Collector's award” was held to be unreasonable. The Court assigned a practical meaning to the expression by holding it as meaning the date when the award is either communicated to the party or is known by him either actually or constructively.

11. The view taken in *Raja Harish Chandra Raj Singh* case [AIR 1961 SC 1500 : (1962) 1 SCR 676] by a two-Judge Bench of this Court was affirmed by a three-Judge Bench of this Court in *State of Punjab v. Qaisar Jehan Begum* [AIR 1963 SC 1604 : (1964) 1 SCR 971] . This Court added that the knowledge of the award does not mean a mere knowledge of the fact that an award has been made; the knowledge must relate to the essential contents of the award.

12. In *Asstt. Transport Commr. v. Nand Singh* [(1979) 4 SCC 19] the question of limitation for filing an appeal under Section 15 of the U.P. Motor Vehicles Taxation Act, 1935 came up for the consideration of this Court. It provides for an appeal being preferred “within thirty days from the date of such order”. The taxation officer passed an order on 20-10-1964/24-10-1964 which was received by the person aggrieved on 29-10-1964. The appeal filed by him was within thirty days — the prescribed period of limitation, calculated from 29-10-1964, but beyond thirty days of 24-10-1964. It was held that the effective date for

calculating the period of limitation was 29-10-1964 and not 24-10-1964.

13. In Raj Kumar Dey v. Tarapada Dey [(1987) 4 SCC 398] this Court pressed into service two legal maxims guiding and assisting the court while resolving an issue as to calculation of the period of limitation prescribed, namely, (i) the law does not compel a man to do that which he could not possibly perform, and (ii) an act of the court shall prejudice no man. These principles support the view taken by us hereinabove. Any view to the contrary would lead to an absurdity and anomaly. An order may be passed without the knowledge of anyone except its author, maybe kept in the file and consigned to the record room or the file may lie unattended, unwittingly or by carelessness. In either case, the remedy against the order would be lost by limitation though the person aggrieved or affected does not even know what order has been passed. Such an interpretation cannot be countenanced.

14. How can a person concerned or a person aggrieved be expected to exercise the right of review conferred by the provision unless the order is communicated to or is known to him either actually or constructively? The words “the date of that order”, therefore, mean and must be construed as meaning the date of communication or knowledge, actual or constructive, of the order sought to be reviewed.”

(emphasis supplied)

15. The assessee had challenged the *ex parte* order dated 18.10.2016 and consequently, keeping in view, the aforesaid decisions, we are of the considered opinion that the starting point of limitation provided under Section 254 (2) of the Act has to commence from the date of the actual receipt of the judgment and order passed by the ITAT which is sought to be reviewed.

16. Pertinently, adjudication on the merits of the case by the ITAT is essential for this Court to hear an appeal and the ITAT could not have dismissed the same solely on account of non-appearance of a party. As a result, as of today, the petitioner company is faced with the situation where it cannot exercise its remedy of filing the statutory appeal under Section 260A of the Act, since order dated 18.10. 2016, dismissing the appeal of the appellant, does not adjudicate on the merits of the case. For the assessee to

file an appeal under the said provision before this Court, it is required to satisfy that the case involves a substantial question of law. As the order is not touching upon the merits of the case, it deprives this Court to evaluate, if any, substantial question of law under Section 260A of the Act arises on merits, thereby impinging upon assessee's right to get the issue decided by the final fact finding authority. Thus, the approach adopted by the ITAT in dismissing the application for recall of an order, cannot be countenanced, particularly, since Rule 24 of the ITAT Rules, extracted hereinabove mandates the ITAT to decide the appeal on merits. In fact this approach has rendered the liberty granted in the order dated 18th October, 2016 as nugatory. The sufficient cause for non-appearance of the petitioner company at the time of disposal of the appeal, as provided in the proviso to Rule 24 of the ITAT Rules has also lost its meaning because of the approach adopted by the ITAT, especially, when there is no limitation provided in Rule 24 of the ITAT Rules. The ITAT has chosen to rely upon its own decision in ***Commissioner of Income-Tax vs. Multi Plan India (P) Ltd.*** 38 ITD 320 (Del) and ***Estate of Late Tukojirao Holkar vs. CWT***: 223 ITR 480 (M.P), which is completely misplaced. The ITAT has misread the provision of law and has erroneously dismissed the application for recall. It was necessary for the ITAT to exercise its jurisdiction and afford an opportunity of rehearing the appeal that had been dismissed in the absence of the appeal. Even otherwise, we are of the view that it was the duty and obligation of the ITAT to dispose of the appeal on merits after giving both the parties an opportunity of being heard. The ITAT should have been conscious of the fact that the appellant was not afforded the opportunity to argue the case on merits and for this reason it had given the liberty to apply afresh, while dismissing the appeal for non-prosecution. There was thus no cogent reason for the tribunal not to entertain the application for recall. The ITAT has ignored the decision of the Supreme Court in ***CIT vs. S.Chenniappa Mudaliar*** (supra) in the correct perspective.

17. For the foregoing reasons, the course adopted by the ITAT at the first instance, by dismissing the appeal for non-prosecution, and then

compounding the same by refusing to entertain the application for recall of the order, cannot be sustained. We, therefore have no hesitation in quashing the impugned order. Accordingly, the present petition is allowed. The order dated 30.08.2019 is quashed and the matter is remanded back to the ITAT with a direction that they shall hear and dispose of ITA No. 6739/De1/2014 on merits. The parties shall now appear before the ITAT on 05.02.2020. The registry is directed to send a copy of this order to the ITAT.

SANJEEV NARULA, J

VIPIN SANGHI, J

JANUARY 13, 2020

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