IN THE INCOME TAX APPELLATE TRIBUNAL "A"
BENCH CHANDIGARH

Before Shri Sanjay Garg, Judicial Member &
Shri Vikram Singh Yadav, Accountant Member

I.T.A. No.1325/CHANDI/2010
Assessment Year: 2006-07

Shri Rajiv Kumar
H. No.123, Phase-3B1,
Mohali.
[PAN: AFYPK8488H] **…….Appellant**

vs.

ACIT, Central Circle, Chandigarh **……. Respondent**

I.T.A. No.274/CHANDI/2014
Assessment Year: 2006-07

Shri Rajiv Kumar…… …….. Appellant
H. No.123, Phase-3B1,
Mohali.
[PAN: AFYPK8488H]

vs.

DCIT, Central Circle, Chandigarh……. Respondent

I.T.A. No.1326/CHANDI/2010
Assessment Year: 2006-07

Shri Sohan Lal Arora…… …….. Appellant
H. No.123, Phase-3B1,
Mohali.
[PAN: ACLPA9483C]

vs.

ACIT, Central Circle, Chandigarh…… Respondent

I.T.A. No.1421/CHANDI/2010
Assessment Year: 2006-07

DCIT, Central Circle-1, Chandigarh…… Appellant

vs.

Shri Sohan Lal Arora…… …….. Respondent
H. No.123, Phase-3B1,
Mohali.
[PAN: ACLPA9483C]

Appearances by:
Shri Parikshit Aggarwal, CA, appeared on behalf of the appellant.
Shri Rohit Sharma, CIT, DR, appeared on behalf of the Respondent

I.T.A. No.275/CHANDI/2014
Assessment Year: 2006-07

Shri Sohan Lal Arora..... ..... Appellant
H. No.123, Phase-3B1,
Mohali. [PAN: ACLPA9483C]

vs.

DCIT, Central Circle-1, Chandigarh..... Respondent

Appearances by:
Shri Parikshit Aggarwal, CA, appeared on behalf of the appellant.
Smt. Amanpreet Kaur, Sr.DR appeared on behalf of the Respondent.

Date of concluding the hearing : October 20, 2022
Date of pronouncing the order : December 30, 2022

ORDER

Per Sanjay Garg, Judicial Member:

The present are bunch of five appeals related to two assessees namely, Rajiv Kumar and Sohan Lal Arora. ITA Nos. 1325/Chd/2010 and 1326/Chd/2010 have been preferred by the assessees Rajiv Kumar and Sohan Lal Arora respectively, whereas ITA No. 1421/Chandi/2010 has been preferred by the Revenue in the case of DCIT vs. Sohan Lal Arora, all against the separate orders of the Commissioner of Income Tax dated 22.09.2010 and 17.09.2010 respectively, involving the issues in relations to the quantum additions made/confirmed by the lower authorities.

ITA Nos. 274 & 275/Chd/2014 are separate appeals filed by both the assessees agitating against levy/confirmation of the penalty under section. 271(1)(c) of the Act, levied pursuant to the aforesaid quantum additions.

2. So far as the appeal agitating the quantum additions are concerned, the assessees apart from contesting the additions on merits, have taken the following additional grounds in both the appeals:

> *"8. That on law, facts and circumstances of the case, the appointment of special auditor u/s 142(2A) deserves to be declared illegal since the said appointment is without examination of books of accounts and also without providing reasonable opportunity of being heard to the appellant.*
>
> *9. That on the law, facts and circumstances of the case, the Ld. AO has erred in making various additions which are based on the report of an illegally appointed special auditor u/s 142(2A).*
>
> *10. That on the law, facts and circumstances of the case, the impugned assessment deserves to be quashed having been passed beyond the limitation period prescribed u/s 153 since the appointment of Special auditor u/s 142(2A) is illegal and therefore, the period for assessment could not have been extended."*

3. The Ld. Counsel for the assessees has submitted that aforesaid grounds taken by the assessee are purely legal grounds and further that all the facts relevant to decide these grounds are already available on record and that no new fact is required to be gone into to decide these grounds. He has relied upon the decision of the hon'ble Supreme court in the case of " National Thermal Power Co. vs. CIT" (SC) 229 ITR 383 (1998) pleading that the legal additional ground can be taken for the first time even before the appellate authorities. He has further contended that the Hon'ble Delhi High Court in

"Consulting Engineering Services (India) Ltd. vs ITAT" WP No. 7734/2017 dated. 01.09.2017 has reversed the decision of the Delhi Bench of the Tribunal and directed the Tribunal to admit the issue of expiry of limitation to pass assessment order since based on illegal appointment of Special Auditor.

4. The Ld. DR, on the other hand, objected to the aforesaid legal grounds and has further relied upon by the decision of Hon'ble Supreme Court in the case of Sahara India (Firm) vs. CIT & Anr., reported in (2008) 169 taxmann 0328. He has further submitted that as per law laid down by the Hon'ble Supreme Court in the aforesaid case, the order passed under section 142(2A) by the Assessing Officer (in short 'the AO') appointing the Special auditor cannot be challenged in appeal before this Tribunal.

5. We have heard the rival contentions on this issue and have gone through the material available on record. Admittedly, the issue raised through the aforesaid grounds taken by the assessees in their appeals, contesting the appointment of special auditor u/s. 142(2A), is purely legal issue and all the facts determinative of the aforesaid legal issue are on the record and no new fact is required to be looked into. Further since the aforesaid legal issue raised by the assessees goes to the root of the case and hits at the very validity of the impugned assessment orders, therefore in the light of the decision of the Hon'ble Supreme Court in the case of National Thermal Co. Ltd. vs. CIT (Supra), we admit the additional legal grounds for adjudication.

Since the aforesaid legal grounds will be determinative by the validity of the entire assessment framed by the Assessing Officer, therefore, we take this issue/ grounds first for adjudication. The ITA No. 1325/Chd/2010 in the case of Shri Rajiv Kumar is taken as the lead case.

6. The issue before us is whether the Assessing Officer was justified to order the appointment of special auditor u/s. 142(2A) of the Act, and thereby getting additional time to frame the assessment in terms of explanation 1 (iii) to sub-section (3) of Section 153 of the Act.

7.1 The relevant extract of s. 142(2A), as existing at the relevant time, for the sake of ready reference is reproduced as under :

> *(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts 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 [Chief Commissioner or Commissioner], direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the [Chief 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 :*
>
> ***[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.]***
>
> (emphasis supplied by us)

7.2 The relevant extract of s. 153B prescribing limitation to pass assessment order, in search cases, is reproduced as under :

> ***Time-limit for completion of assessment under section 153A*** .
>
> *153B.(1) …….*
>
> *……*
>
> *Explanation.—In computing the period of limitation for the purposes of this section,—*
>
> *(i) …….*
>
> *(ii)* ***the period commencing from the day on which the Assessing Officer directs the assessee to get his accounts audited***

under sub-section (2A) of section 142 and ending on the day on which the assessee is required to furnish a report of such audit under that sub-section*; or*

(iii) to (vii) ……

shall be excluded :

Provided that where immediately after the exclusion of the aforesaid period, the period of limitation referred to in clause (a) or clause (b) of this sub-section available to the Assessing Officer for making an order of assessment or reassessment, 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.

(2) ……"

8. The contention of the Ld. Counsel for the assessee in this case has been that the assessment order framed in this case is invalid being barred by limitation having been passed in the extended time period availed by the AO in terms of explanation 1 (iii) to sub-section (3) of Section 153 of the Act by wrongly referring the matter to Special Auditor under section 142A(2A) of the Act. That since the reference to the special auditor in the case of was not required the Assessing Officer would not get the extended time period and that the assessment framed in the extended time period being barred by limitation was bad in law.

9. Sh. Parikshit Aggarwal, the ld. AR of the Assessee, has submitted that the issue relating to the jurisdiction of this Tribunal to go into the question of validity of the appointment of Special Auditor, so as to decide the validity of assessment order passed in extended period availed by the Assessing officer is no longer res-integra, having already been decided in favour of the

assessee by the various High Courts and different benches of the Tribunal. He in this respect has also relied upon the following decisions:

1) Consulting Engineering Services (supra) (Delhi High Court) (2019) 198 TTJ 21.
2) Bal Krishan Sood vs. ITO (2021) 125 taxmann.com 276(Chandigarh Trib.)
3) Sunder Mal Sat Pal vs. DCIT ITA No. 154 to 157/Chd/2013 (Chd I.T.A.T.) dtd. 15.6.2018.
4) Ms. Meenakshi R. Sundaram Proprietor, M/s. R.M. Sundram Caterers & Decorators vs. ITO. (ITA NO. 3196 TO 3202/MUM./2008)
5) Peerless General Finance & Inv Co. Ltd. vs. DCIT (Cal.) (1999) 236 ITR 0671.
6) ITO vs. Vilsons Particle Board industries Ltd. (I.T.A.T. Pune Bench) (2017) 88 taxmann.com 889.
7) Rajesh Kumar & Ors. Vs. DCIT (SC) (2006) 287 ITR 0091 .
8) Hind Samachar Ltd. vs. ACIT (High Court of P& H (2010) 45 DTR 0057
9) M/s. Unitech Ltd. vs. ACIT ITA No. 5180/Del/2013.
10) CIT vs. Bajrang Textiles (Rajasthan (2007) 294 ITR 0561

10. The Ld. DR, on the other hand, has relied upon the decision of the Hon'ble Supreme Court in the case of Sahara India (Firm) vs. CIT (Supra).

11. Before proceeding further, it will be relevant to refer to the decision of the hon'ble Supreme Court in the case of "**Rajesh Kumar & others vs. DCIT**" (supra), wherein, the hon'ble Supreme Court has held that if, due to an action on part of statutory authority, civil or evil consequences ensue, then principles of natural justice were required to be followed and that even though no express provision is laid down in this behalf, but compliance of

principles of natural justice would be implicit. The hon'ble Supreme Court further held that since, the Deputy Commissioner passed order under section 142(2A) without giving an opportunity of hearing to assessee for auditing of books of account of assessee and refused to hear assessee's request for supply of reasons thereof, hence, action of Deputy Commissioner was vitiated in law.

12. The correctness of the above principles laid down by the hon'ble Supreme Court in the case of **"Rajesh Kumar vs DCIT**" (supra) came for consideration before the larger bench of the Hon'ble Supreme Court in the case of '**Sahara India (Firm) vs. CIT"** (Supra). The relevant/operating part of the decision of the Hon'ble Supreme Court in the case of '**Sahara India (Firm) vs. CIT" (Supra)** is reproduced as under:

> *"21. In the light of the aforenoted legal position, we are in respectful agreement with the decision of this Court in Rajesh Kumar (supra) that an order under Section 142 (2A) does entail civil consequences. At this juncture, it would be relevant to take note of the insertion of proviso to Section 142 (2D) with effect from 1st June, 2007. The proviso provides that the expenses of the auditor appointed in terms of the said provision shall, henceforth, be paid by the Central Government. In view of the said amendment, it can be argued that the main plank of the judgment in Rajesh Kumar (supra) to the effect that direction under Section 142 (2A) entails civil consequences because the assessee has to pay substantial fee to the special auditor is knocked off. True it is that the payment of auditor's fee is a major civil consequence, but it cannot be said to be the sole civil or evil consequence flowing from directions under Section 142 (2A). We are convinced that special audit has an altogether different connotation and implications from the audit under Section 44AB. Unlike the compulsory audit under Section 44AB, it is not limited to mere production of the books and vouchers before an auditor and verification thereof. It would involve submission of explanation and clarification which may be required by the special auditor on various issues with relevant data, document etc., which, in the normal course, an assessee is required to explain before the Assessing Officer.*

Therefore, special audit is more or less in the nature of an investigation and in some cases may even turn out to be stigmatic. We are, therefore, of the view that even after the obligation to pay auditor's fees and incidental expenses has been taken over by the Central Government, civil consequences would still ensue on the passing of an order for special audit.

22. We shall now deal with the submission of learned counsel appearing for the revenue that the order of special audit is only a step towards assessment and being in the nature of an inquiry before assessment, is purely an administrative act giving rise to no civil consequence and, therefore, at that stage a pre-decisional hearing is not required. In Rajesh Kumar (supra) it has been held that in view of Section 136 of the Act, proceedings before an Assessing Officer are deemed to be judicial proceedings. Section 136 of the Act, stipulates that any proceeding before an Income Tax Authority shall be deemed to be judicial proceedings within the meaning of Sections 193 and 228 of Indian Penal Code, 1860 and also for the purpose of Section 196 of I.P.C. and every Income Tax Authority is a court for the purpose of Section 195 of Code of Criminal Procedure, 1973. Though having regard to the language of the provision, we have some reservations on the said view expressed in Rajesh Kumar's case (supra), but having held that when civil consequences ensue, no distinction between quasi judicial and administrative order survives, we deem it unnecessary to dilate on the scope of Section 136 of the Act. 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.

23. We are also unable to persuade ourselves to agree with the proposition canvassed by learned counsel for the revenue that since a post-decisional hearing in terms of sub-section (3) of Section 142 is contemplated, the requirement of natural justice is fully met. Apart from the fact that ordinarily a post- decisional hearing is no substitute for pre-decisional hearing, even from the language of the said provision it is plain that the opportunity of being heard is only in respect of the material gathered on the basis of the audit report submitted under sub-section (2A) and not on the validity of the original order directing the special audit. It is well settled that the principle audi alteram partem can be excluded only when a statute contemplates a post decisional hearing amounting to a full review of the original order on merit, which, as explained above, is not the case here.

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).

25. It is pertinent to note that by the Finance Act, 2007, a proviso to Section (2A) has been inserted with effect from 1st June, 2007, which provides that no direction for special audit shall be issued without affording a reasonable opportunity of hearing to the assessee.

26. In the light of the afore-noted legal position, we may now advert to the facts of both the cases to consider the validity of orders dated 14th March, 2006, requiring the appellants to have their accounts for the assessment year 2003-04 audited by a chartered accountant, named in the order.

27. Indubitably, before passing the said orders, no show cause notice was given to the appellants. On the contrary, it appears from the record that on 9th March, 2006, the appellants were required to furnish by 20th March, 2006 details/explanation in respect of queries raised vide order sheet entry dated 16th February, 2006 but in the

meanwhile, the impugned orders were passed on 14th March, 2006 itself. It is manifestly clear that when the impugned orders were made, the Assessing Officer had no occasion to have even a glimpse of the accounts maintained by the appellants. Therefore, in the light of the legal position noted above, we have no option but to hold that the impugned orders dated 14th March, 2006, are vitiated by the failure to observe the principle audi alteram partem.

28. The next crucial question is that keeping in view the fact that the time to frame fresh assessment for the relevant assessment year by ignoring the extended period of limitation in terms of explanation 1 (iii) to sub-section (3) of Section 153 of the Act is already over, what appropriate order should be passed. As noted above, the learned Additional Solicitor General had pleaded that if we were not inclined to agree with him, the interpretation of the provision by us may be given prospective effect, otherwise the interest of the revenue will be greatly prejudiced.

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."

13. A perusal of above reproduced observations made by the Hon'ble Supreme Court would reveal that:

In 'Para 21' of the decision, the Hon'ble Supreme Court has observed that they are in respectful agreement with the decision the Hon'ble Supreme Court in the case of **Rajesh Kumar and Ors.** (supra) and that an order u/s. 142(2A) does entail civil consequences. The Hon'ble Supreme Court has further observed that despite insertion of proviso to Section 142(2D) w.e.f. 1st June, 2007, which provides that expenses of the auditor appointed in terms of the said provision shall be borne by the Central Government, civil consequences would still unsue on the passing of an order for special audit. The Hon'ble Supreme Court also observed that the special audit has implications which involve submission of explanation and clarification on various issues with relevant data, document etc. before the Special Auditor, which, in normal course the assessee is required to explain before the Assessing Officer, therefore, special audit is more or less in the nature of an investigation and in some cases may even turnout to be stigmatic.

In Para-22 of the said decision, the Hon'ble Supreme Court has dealt with the contention of the Revenue that the order of Special Audit is only a step towards assessment and being in nature of an enquiry before assessment, hence, is purely an administrative act giving rise to no civil consequence.

The Hon'ble Supreme Court, rejecting the aforesaid contention of the Revenue, held that when the civil consequence unsue, no distinction between quasi judicial and administrative order survives and that even a purely administrative order which entails civil consequence, must be consistent with the rules of natural justice. The Hon'ble Supreme Court rejected the argument of the Revenue that the order appointing the special auditor u/s 142(2A) was merely an administrative order, rather, held that since an order under section

142A does entail civil consequence, the rule *audi alteram partem,* which means that "let the other side be heard as well" is required to be observed.

Further, the Hon'ble Supreme Court in Para 23 of the said decision has rejected the contention of the Revenue that since post decisional hearing in terms of sub Section 3 and Section 42 is contemplated, the requirement of natural justice is fully met. The Hon'ble Supreme Court held that in the post decisional hearing, the opportunity of being heard is only in respect of the material gathered on the basis of audit report **and not on the validity of the original order directing the special audit ,** thus, the Hon'ble Supreme Court in clear terms held that an assessee should be given an opportunity before passing of order appointing the Special Auditor. That the post decisional is not a substitute to the pre decisional hearing and that principle of *audi alteram partem* can be excluded only **when a statute contemplates in a post decisional hearing full review of the original order on merit,** which, was not in the case before them. Therefore, Supreme Court in clear terms has held that the assessee should be given opportunity to contest the appointment of special auditor before passing an order of appointment of Special Auditor and thereby the Hon'ble Supreme Court has duly recognized the right of an assessee to contest the appointment of Special Auditor under section 142(2A) of the Act.

In Para 24, the Hon'ble Supreme Court has concluded the discussion by holding that since 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, the requirement of observance of principles of natural justice is to

be read into the said provision. The Hon'ble Supreme Court, therefore, reiterated the view expressed in Rajesh Kumar's case (supra). The Hon'ble Supreme Court , thus, deliberating upon pre amended provisions before passing the Finance Act, 2007, held that even in the absence of express provision for affording an opportunity of hearing to the assessee before passing of an order for appointment of Special Auditor u/s. 142(2A), still the principle of natural justice are to be followed and opportunity of hearing to the assessee for objecting to such appointment of Special Auditor should be given.

In para 25 of the said decision, the Hon'ble Supreme Court, thereafter, took note of the proviso to sub Section 2A inserted w.e.f. 1st June, 2007, which provides that no direction for special audit shall be issued without affording a reasonable opportunity of hearing to the assessee.

Therefore, the Hon'ble Supreme Court in Para 24 and 25 has concluded the discussion and laid down the proposition of law that the even prior to the insertion of proviso to sub Section 2A, which provides that the opportunity of hearing is to be given to be assessee before directing for special audit, the principle of natural justice have to be followed and that even without such specific provision, the opportunity of hearing is to be given to the assessee. However, with the insertion of proviso to sub section 142A, now the statute, itself, provides that the opportunity of hearing is to be given before directing for special audit. The legal proposition thus, laid down by the Hon'ble Supreme Court in clear terms is that the assessee has the right to contest the order passed by the AO u/s. 142(2A) of the Act for appointment of Special

Auditor and before issuing such order/direction the assessee has to be given opportunity of hearing and that the such an opportunity can be excluded only in case if the assessee has the right to contest the validity of such order in the post decisional hearing on full review of the original order on merit.

The Hon'ble Supreme Court after laying the aforesaid proposition of law, thereafter in Para 26 onwards proceeded to discuss the peculiar factual aspects of the case before them i.e. of the Sahara India (firm) in the light of the afore-noted legal position *for considering* the validity of orders dated 14th March, 2006, requiring the appellants {Sahara India (firm)} to have their accounts for the assessment year 2003-04 audited by a chartered accountant, named in the said order.

In para 27 of the decision, the hon'ble Supreme court observed that it was manifestly clear that when the impugned orders were made, the Assessing Officer had no occasion to have even a glimpse of the accounts maintained by the appellants (Sahara India Firm). The Hon'ble Supreme Court thus held that in the light of the legal position as noted above, they have no option but to hold that the impugned orders dated 14th March, 2006, were vitiated by the failure to observe the principle *audi alteram partem.*

However, having held so, the Hon'ble Supreme Court in Para No. 28 of the said decision, proceeded to consider the question that since the time to frame fresh assessment for the relevant assessment year by ignoring the extended period of limitation in terms of explanation 1 (iii) to sub-section (3) of Section 153 of the Act was already over, what appropriate order should be passed in that case i.e. in the case of Sahar India (Firm).

The learned Additional Solicitor General pleaded before the hon'ble Supreme Court that if the hon'ble Supreme Court was not inclined to agree with him, the interpretation of the provision by the supreme court be given prospective effect and that the same should not be applied to the case of assessee [Sahara India (firm)], otherwise the interest of the Revenue would be greatly prejudiced.

The Hon'ble Supreme Court, thereafter, considering the above argument of the Revenue observed that there was no clear position of law before the judgment of the Hon'ble Supreme Court in the case of Rajesh Kumar (Supra) and further 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 the Hon'ble Supreme Court had expressed reservation about its correctness. Hence, considering that the law was not clear on this issue prior to the laying down of the above legal position by the Supreme Court and further having regard to all the peculiar facts and circumstances of the case before them (Sahara India Firm) and further taking note of the fact that on 14th December, 2006, the hon'ble supreme Court had declined to stay the assessment proceedings in the said Sahara India Firm's case, the Supreme Court showed reluctance to quash the assessment order in the case before them and held that the law laid down by the Hon'ble Supreme Court that the assessee has the right to challenge the validity of the order directing appointment of Special Auditor u/s 142(2A) will apply prospectively i.e. to future cases only.

The Hon'ble Supreme Court thus, applied the doctrine of '**prospective overruling'** which meant that the proposition of law laid down by the

hon'ble Supreme Court in the case of Sahara India (Firm) would apply to future cases only, but not in the case before them i.e. of Sahar India(Firm).

14. We are conscious of the fact that we will be deviating from the facts of this case in further deliberating on prospective application of the law declared by Supreme court, but for the sake of clarity that the doctrine of prospective overruling had been applied by the hon'ble Supreme court of India for the first time in the famous case " I.C. Golak Nath vs. State of Punjab" AIR 1967 SC 1643 (popularly known as Golk Nath Case), wherein, the hon'ble Supreme Court held that the Parliament has no power to abridge or take away the fundamental rights. However, having held so, the hon'ble Supreme Court did not apply the said decision to earlier constitutional amendments whereby the 'Right to property', which was earlier a fundamental right under article 31 of the constitution was abridged by the Parliament. Though, the court asserted, that fundamental rights are inviolable, however observed that applying this decision across the board to earlier constitutional amendments would lead to chaos, confusions and serious inequities, even though the validity of such amendments was under challenge before the hon'ble Supreme Court. Though, **Kesvananda Bharti vs. State of Kerala (**AIR 1973 SC 1461) overruled the Golaknath judgement, but the Doctrine, as laid down in the Golaknath judgement, remained intact and in the words of the court in Kesvananda Bharti (supra), ''*left the court with the consolation that posterity will enjoy the fruits of walnut tree planted by them."*

The doctrine of prospective overruling also finds reference in the case of Indra Sawhney v. Union of India AIR 1993 SC 477 often known as the Mandal Commission Case. In this case, hon'ble Supreme court held that

the ruling in that case would be effective after five years from the date of the ruling. The Court thus postponed giving effect to the ruling for five years from the date of the judgment.

Though it was held in Golak Nath's case that doctrine of prospective overruling can be applied by the Supreme court only and that too in decisions relating to constitutional amendments only, but since then the law has evolved and it has now been held that application of the doctrine of prospective overruling has been extended to the interpretation of the ordinary statutes as well. The Hon'ble Supreme Court in the case of Managing Director Ecil Hyderabad Etc. Etc. vs. B. Karunakar Etc. Etc. (1993) 4 SCC 727 has observed:

> *"Accepting the lead given in the above decision, this Court has since extended the doctrine to the interpretation of ordinary statutes as well.*
>
> *In Waman Rao v. Union of India, (1981) 2 SCR 1 : (AIR 1981 SC 271), the question involved was of the validity of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 and again the device of prospective overruling was resorted to.*
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> *In Atam Prakash v. State of Haryana, (1986) 2 SCC 249 : (AIR 1986 SC 859), the question was of the validity of the Punjab Pre-emption Act, 1913. The Court while holding that the relevant provisions of the Act were ultra vires the Constitution gave a direction that the suits and appeals which were pending in various courts will be disposed of in accordance with the declaration made in the said decision, Where, however, the decrees had become final they were directed to be binding inter partes and it was held that the declaration granted by the Court with regard to the invalidity of the provisions of the Act would be of no avail to the parties to such decree.*
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> *In Orissa Cement Ltd, v. State of Orissa, 1991 Supp 1 SCC 430: (AIR 1991 SC 1676), the question involved was about the validity of the royalty and related charges for mining leases. Although the Court held*

that the levy was invalid since its inception, the Court held that a finding regarding the invalidity of the levy need not automatically result in a direction for a refund of all collections thereof made earlier. The Court held that the declaration regarding the invalidity of a provision of the Act enabling levy and the determination of the relief to be granted were two different things and, in the latter sphere, the Court had, and it must be held to have, a certain amount of discretion. It is open to the Court to grant moulded or restricted relief in a manner most appropriate to the situation before it and in such a way as to advance the interest of justice. It is not always possible in all situations to give a logical and complete effect to a finding. On this view, the Court refused to give a direction to refund to the assessees any of the amounts of cess collected until the date of the decision since such refund would work hardship and injustice to the State. We may also in this connection refer to Victor Linkletter v. Victor G. Walker,(l965) 381 US 618 :14 Law ed 2d 601, ***where it was held that a ruling which is purely prospective does not apply even to the parties before the court.*** *The Court held that in appropriate cases a court may in the interest of justice make its ruling prospective and this applies in the constitutional area where the exigencies of the situation require such an application.*

The direction with regard to the prospective operation of the law laid down in Mohd. Ramzan Khan's case (AIR 1991 SC 471) (supra) was followed by various Benches of this Court, viz., S. P. Viswanathan v. Union of India, (1991) Supp 2 SCC 269 : (1991 AIR SCW 730); Union of India v. A. K. Chatterjee (1993) 2 SCC 191 and Managing Director, Food Corporation of India v. Narendra Kumar Jam, (1993) 2 SCC 400."

Furthermore, explaining the principle, in the case of **Harsha Dhingra v. State of Haryana (2001) 9 SCC 550**, the Honourable Supreme Court has held:

"Prospective declaration of law is a device innovated by this Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a device adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of

law it is deemed that all actions taken contrary to the declaration of law, prior to the date of the declaration are validated. This is done in larger public interest. ***Therefore, the subordinate forums which are bound to apply law declared by this Court are also duty bound to apply such dictum to cases which would arise in future.*** *Since it is indisputable that a court can overrule a decision there is no valid reason why it should not be restricted to the future and not to the past. Prospective overruling is not only a part of constitutional policy but also an extended facet of stare decisis and not judicial legislation."*

15. Reverting to the issue before us, the hon'ble Supreme Court in the case of Sahara India (Firm) (supra) held that the legal position clarified by them will apply " **prospectively".** That it would not be open to the appellants [Shara India (Firm)] 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.

Thus, a careful reading of the decision of the Hon'ble Supreme Court in the case of Sahara India (Firm) (Supra) would reveal that the Hon'ble Supreme Court categorically and in clear terms has held that the Assessing Officer is bound to afford an opportunity of hearing to the assessee before ordering appointment of Special Auditor u/s 142(2A) of the Act and that an assessee has right to contest the order asking appointment of Special Auditor under section 142(2A) of the Act and to urge that the extended period of limitation to pass assessment order was not available to the AO because of an invalid order u/s 142(2A) of the Act.

Thus, the decision in the case of Hon'ble Supreme Court in Sahara India (Firm) in no way has restricted the right of an assessee to contest such an order of reference to the Special Auditor under section 142(2A) of the Act, rather, the Hon'ble Supreme Court in clear terms has recognized such right of the assessee to contest the validity of such an order.

We may add here that though, the order directing for appointment of Special Auditor u/s 142(2A) of the Act passed by the AO is not appealable per se, however, since the very appointment of Special Auditor and subsequent proceedings and consequential aspects thereof are integral part of the final assessment order and the fact that such an appointment gives the AO the extended time period to frame the assessment, hence, is capable of being challenged in an appeal filed against such an assessment order. As held by the Hon'ble Supreme Court in the case of Sahara India (Firm) (Supra), the Special Audit is an investigative process ensuing civil consequences and the same being integral part of the assessment proceedings, hence, determinative of the very validity of such an assessment order passed in the extended period availed by the AO. Hence, the assessee, in our view, can very well challenge in appeal the validity of such an assessment order pleading with reference to the Special Auditor was bad in law and that the extended period of limitation in such circumstances was not available to the AO.

16. Now, coming to the facts of the present case before us, the Ld. AR of the assessee has made following submissions to contend that the reference to the Special Auditor by the AO was bad in law:

a) Before issuing the Statutory Show Cause Notice (SCN) dated 07.11.2008 u/s 142(2A), the accounts were never called for by the Ld. AO, they were never produced by the assessee and they were never examined by the Ld. AO. Having not even looked at the accounts of the assessee, the jurisdictional condition, being complexity in accounts of the assessee, to appoint spl. auditor u/s 142(2A) was not fulfilled. Therefore, the appointment of spl. auditor was only to extend the limitation period.

b) On a look at the proof of service of the notices issued to satisfy the statutory procedure u/s 142(2A), the relevant documents are at Pgs. 353 to 403 of assessee's PB Vol. II. It is evident that on the same day the notice server was deputed to serve the notice, same day he reported that notice could not be served, same day it was served through affixture. In all notices, there are signatures of same income tax inspector, same notice server and same witness being Raju press man. Who is this Raju Pressman ? Why not the neighbors not taken as witness and instead some roving person was taken as witness whose identity is unknown. Rule 17 of Order V of CPC, 1908 mandates that for valid affixture, there has to be a witness who has to be an "independent" "local person". In the present case, how is Raju a *local person* and the neighbors are not ? It is also an important fact that this was a case based on search conducted u/s 132 and the assessment of block period of AYs 2001-02 to 2007-08 was being conducted at the same time by the same AO. The assessment for AYs 2001-02 to 2005-06 was conducted and concluded at the same time. In those proceedings, there is no non-

compliance and all notices were always served and the assessment orders were passed in December 2008. But it is only qua the notices issued u/s 142(2A) for appointment of spl. auditor for AYs 2006-07 & 2007-08 that these notices were shown to have not been served. It is also an important fact that the final order dtd. 26.12.2008, directing the conduct of spl. Audit, was duly served upon the assessee. Copy thereof is at Pgs 398 to 403. All these facts goes to show that the statutory mandatory procedure prescribed u/s 142(2A) on the basis of which it can be concluded that this is a fit case for conduct of spl. audit has not been followed in this case and hence the appointment of spl. auditor u/s 142(2A) was bad in law. Hence, the extension of limitation period for passing the assessment order was also bad in law.

c) It is also evident from the SCN and the order passed u/s 142(2A) that it mentions the issues/ allegations Group-Wise and not assessee-wise. Further, the spl. audit has been ordered for 2 years out of block of 7 years. Further, no distinction has been made in issues and figures of even those 2 years. No figure has been discussed in the SCN. No document has been referred in the SCN. Everything discussed in the SCN as well as in the order is subjective without any objective finding. This shows that spl. audit in this case was ordered without having any specific finding.

d) It is also evident from the SCN that the issues raised/alleged are not such on the basis of which accounts can be dubbed as complex. AO can not delegate his duties and powers to the Special Auditor.

e) On a look at the order of the Worthy CIT, granting statutory approval u/s 142(2A), attached at Pg. 397, it is evident that he did not look into any material at all and it was only the SCN that was produced before him. Neither the assessment record nor the seized record was produced before him and he granted approval mechanically. Further, on a reading of said approval granted in this case, it is also evident that he did not approve the case or that he did not record that it is a fit case for conduct of spl. audit, rather he merely nominated the name of a person to be the spl. auditor. In proceedings u/s 142(2A), the CIT must record that this is a fit case for conduct of spl. audit and only thereafter the spl. auditor is nominated. But mere nomination of spl. auditor is not the requirement of section 142(2A). Hence, the statutory approval of the CIT as contemplated u/s 142(2A) is missing in this case.

f) The final spl. audit order dtd. 26.12.2008 passed by the Ld. AO (Pgs 398 to 403) is totally unreasoned and non-speaking. The final order has to have its own reasons and it cannot stand on the legs of the SCN.

g) When the AO directs special audit merely to get extension of time to frame assessment, the said assessment has been held to be barred by limitation.

17. It is pertinent to mention here that as per the provisions of section 142(2A) as in force during the relevant period, it was only the nature and complexity of the accounts, for which the matter could be referred by the AO to the special auditor. The Ld. DR, in this case, could not rebut the aforesaid

contentions of the Ld. AR of the assessee that the AO even did not look to the accounts at all before forming the opinion that the same were complex. Even the assessee was not given opportunity to object to the said action, which was statutorily required, as discussed above. The service of notice was defective and rather, no service in the eyes of law. The case being based on search conducted u/s 132, the assessment of block period of AYs 2001-02 to 2007-08 was conducted simultaneously by the AO. In the assessment proceedings for AYs 2001-02 to 2005-06, there is no allegation of non-compliance on the assessee and all notices were duly served. However, it was only qua the notices issued u/s 142(2A) for appointment of special auditor for AYs 2006-07 & 2007-08 that the service was shown to be effected by way of substituted mode of service i.e. by affixture. Hence there was violation of the principles of natural justice. Even the Commissioner, while granting approval did not look into any material at all and it was only the show cause notice that was produced before him. In view of this, it is apparent from the record that the Special Audit referred for these cases was merely to get extension of time to frame assessment, hence, the said assessment has to be held as barred by limitation.

18. The Co-ordinate Chandigarh Bench of the Tribunal in the case of Sunder Mal Sat Pal vs. DCIT ITA Nos. 154 to 157/Chd/2013 (Chd ITAT) 15.06.2018 (The judicial member herein being part of the said Bench) has, in some what similar circumstances, has held as under:

> *"20. ……Not only that, no comments on nature of complexity of accounts year wise has been attempted by the Assessing Officer……. …..The impugned order under section 142(2A) of the Act thus does not meet the requirement of law and based on the judgment of Hon'ble High*

Court of Delhi in the case of Delhi Development Authority and Another Vs. Union of India and Another (350 ITR 432) wherein it was held that an Assessing Officer is required to scrutinize the entries and verify them, but this does not require services of a special auditor or a Chartered Accountant to undertake the said exercise. Section 142(2A) is not a provision by which the Assessing Officer delegates his powers and functions, which he can perform to the special auditor, it can be said that the Assessing Officer is not right in getting the accounts audited. We also hereby place reliance in the case of Sahara India (Firm) Vs. Commissioner of Income Tax, Central-1 300 ITR 403 (SC) wherein it was observed that "Before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the Assessing Officer to understand accounts maintained by the assessee; to appreciate the entries made herein and in the even of any doubt, to seek explanation from the assessee. But opinion required to be formed by the Assessing Officer for exercise of power under the said provision must be based on an objective criteria and not on the basis of an objective satisfaction…..".

21. Similarly the ratio laid down in the case of Unitech Ltd. Vs. Addl. CIT (74 Taxman 121) the Hon'ble High Court of Delhi held that examining the impugned order in the present case, it is apparent that the order is non speaking order and gives no reasons for arriving at the conclusion that having regard to the nature and complexity of assessee's accounts and interest of the revenue, the AO was of the opinion that accounts are to be audited u/s 142(2A) of the Act. The order is silent as to on what basis and on what grounds, the accounts proposed to audit under section 142(2A) were considered complex and on what considerations it was arrived that

it is in the interest of revenue to direct audit of accounts. Mere reference to a prior approval of CIT does not satisfy the precondition of a "Speaking order" containing reasons for invoking the provision of section 142(2A) of the Act. There is no reference to detailed replies furnished by the assessee during the proceedings.

22. Having regard to the above it is held that the impugned order reasons are clearly invisible and conspicuous by their absence. In other words, order is bereft of any reason. It is stated here that reasons are heart and soul of an order, as they facilitate the process of judicial review and therefore in absence of any reason much less cogent, clear and succinct reasons order u/s 142(2A) of the Act is held to be bad in law and without proper jurisdiction. … ……

24. Since the extended period was taken under the guise of Special audit, which is held without proper jurisdiction, the time so taken cannot be counted and the period does not get extended. Since the order was passed on 28/07/2010, the same has to considered, as time barred. Therefore, we are of the opinion that the order passed by AO suffers from legal jurisdiction and is therefore, bad in law."

Almost similar view has been taken by the various benches of the Tribunal as referred to by the Ld. Counsel for the assessee, as noted above.

19. Hence, in view of the above discussion and considering the relevant aspects that the reference by the AO to special auditor being bereft of plausible reasons for holding about the complexity of accounts and forming such opinion even without examining such accounts and the principals of

natural justice being violated, the assessee being given no proper opportunity to object to such reference and even mechanical approval by the CIT, therefore, in the light of the legal proposition laid down by the Hon'ble Supreme Court in the case of Sahara India (Firm) Vs. CIT (supra), we hold that the order appointing Special Auditor u/s 142(2A) of the Act passed by the AO as bad in law. Since the extended period was taken by the AO under the guise of Special audit, hence the same cannot be counted for computing the period of limitation to pass the assessment order. As held by the Hon'ble Supreme Court in the case of 'Harsha Dhingra Vs. State of Haryana' (supra), the subordinate Forums including this Tribunal is bound to apply law declared by the Hon'ble Supreme Court and is duty bound to apply such dictum to case which would arise in future.

20. The original limitation to pass the assessment order expired on 31.12.2008 in these cases and the impugned assessment order passed thereafter on 21.08.2009 are therefore held to be barred by limitation, hence, the impugned assessment orders passed u/s 153A of the Act in respect of the quantum appeals in ITA No. 1325/Chd/2010, 1326/Chd/2010 and 1421/Chd/2010 are hereby quashed and the consequential additions made by virtue of such invalid assessment orders stand deleted.

21. So far as the ITA Nos. 274/Chd/2014 and 275/Chd/2014 filed by the assessees agitating therein the levy of penalty u/s 271(1)(c) of the Act are concerned, since we have quashed the quantum assessment orders on the basis of which the impugned penalty u/s 271(1)(c) was levied, therefore, the very basis of levy of penalty has ceased to exist and such a penalty levied has

no legs to stand. Therefore, the penalty levied u/s 271(1)(c) of the Act in these appeals is set aside.

22. In the result, the appeals of the assessee bearing ITA Nos.1325/Chd/2010, 1326/Chd/2010, 271/Chd/2014 and 275/Chd/2014 are hereby allowed, whereas, the appeal of the Revenue bearing ITA No.1421/Chd/2010 is hereby dismissed.

Chandigarh, the 30th December, 2022.

Sd/-	Sd/-
[Shri Vikram Singh Yadav]	**[Sanjay Garg]**
Accountant Member	**Judicial Member**

Dated: 30 .12.2022.
Rs. / rkk

Copy of the order forwarded to:
1. (i) Shri Rajiv Kumar
   (ii) Shri Sohan Lal Arora
2. ACIT, Central Circle, Chandigarh
3. CIT(A)-
4. CIT- ,
5. CIT(DR), ITAT, Chandigarh

//True copy//

By order

Assistant Registrar