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

\+ **WRIT PETITION (CIVIL) NO. 2974/2013**

Reserved on : 6th November, 2017
Date of decision : 6th March, 2018

NOKIA INDIA PRIVATE LIMITED ..... Petitioner
Through Mr. Arvind Datar, Sr. Advocate with Mr. Vikas Srivastava, Mr. Jatinder Pal Singh, Mr. Sumit Mangal & Ms. Kanika Jain, Advocates.

Versus

ADDITIONAL COMMISSIONER OF INCOME TAX AND ANOTHER ..... Respondents

Through Mr. N.P. Sahani & Mr. Rahul Chaudhary, Sr. Standing Counsel.

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MS. JUSTICE PRATHIBA M. SINGH**

**SANJIV KHANNA, J.:**

Nokia India Private Limited has filed the afore-stated writ petition praying for multifarious reliefs, *albeit* during the course of arguments primarily one contention was raised and argued; assessment proceedings for the Assessment Year 2009-10 have abated as time barred.

2. The petitioner is a company incorporated under the Companies Act, 1956 and engaged in manufacture and sale of telecommunication handsets.

3. For the Assessment Year 2009-10, the petitioner filed its return on 30th September, 2009, declaring total income of Rs.826.92 crores. The

return was selected for scrutiny and notice dated 9th September, 2010 under Section 143(2) of the Income Tax Act,1961 ('Act', for short) was issued.

4. As per the petitioner, assessment proceedings had remained dormant for nearly twenty eight months till notice dated 17th January, 2013 was issued. Petitioner was required to produce books of accounts for the first time on 28th February, 2013, barely a month before the expiry of time limit for passing the assessment order on 31st March, 2013. Petitioner submits that books of accounts and vouchers were voluminous (described as truck loads), and accordingly, the Assessing Officer had asked the petitioner to furnish books of account in a manner they could be easily examined. On 8th March, 2013, books were submitted in Systems Applications and Products (SAP) format. Trial balance in soft and hard copies was also provided. Petitioner's request to specify ledger accounts required to be produced was rejected by the Assessing Officer with the direction to produce all accounts by 11th March, 2013. Petitioner on 11th March, 2013 had submitted a soft copy of the books of accounts in Excel sheet format, including trial balance and more than 600 pages of general ledger accounts etc. In the proceedings held on 14th March, 2013 numerous queries were raised and answered by the petitioner.

5. On 21st March, 2013, ten days before expiry of time for completing assessment, the Assessing Officer issued notice under Section 142(2A) of the Act to show cause as to why accounts for the Assessment Year 2009-10 should not be audited by a special auditor. Notice was served on the petitioner vide fax on Friday, 22nd March, 2013 at 12.41 p.m. and the petitioner was required to submit its reply/objections by 12.30 p.m. on 25th March, 2013. The petitioner protested, vide submissions on 25th March,

2013, asserting that there was neither a failure to submit details nor incorrect details were furnished. It was highlighted and stressed that adequate time and opportunity had not been given to respond to the show cause notice.

6. The petitioner asserts that at 6 p.m. on 26th March, 2013, opportunity notice was received by fax from the office of the Commissioner of Income Tax, Delhi-V, the second respondent, on the proposal given by the Assessing Officer for initiation of special audit. The petitioner was required to respond by 11.30 a.m. on 28th March, 2013. The petitioner has alleged that only five pages of the draft/proposed order of the Assessing Officer were served on 26th March, 2013. Draft order of twenty two pages was served on 28th March, 2013 at 10 a.m. By letter dated 28th March, 2013, the petitioner informed the second respondent that due to paucity of time it was not possible to submit detailed objections. Request for extension of time by 3 to 5 working days was made. The second respondent had thereupon granted time to the petitioner to submit their response by 11 a.m. on 30th March, 2013.

7. The petitioner, vide their letter dated 29th March, 2013, had reiterated that due to paucity of time it was not possible to file a detailed reply to the draft order. However, *preliminary* objections were raised against initiation of special audit proceedings.

8. As per the respondents, notices under Section 142(1)/143(2) were issued. Reference was made to the order sheets dated 21st December, 2012 and 4th January, 2013. Subsequently, after damaging and incriminating material establishing tax evasion had come to light in the survey operations, detailed questionnaire was issued on 17th January, 2013. Despite opportunities, part details and only a few ledger accounts were furnished and

full compliance was never made. Soft copy of the books of accounts furnished in SAP format could not be accessed by using an accounting software and had to be converted, and hence cannot be termed as production of books of accounts. Authorized representatives of the petitioner had expressed their inability to explain accounts in entirety and reconcile the details furnished with the accounts. Given the said facts, the Assessing Officer had drawn the proposal for special audit.

9. On the aspect of opportunity, the respondents assert that the petitioner was deliberately marking time, knowing that the last date for passing of the assessment order was 31st March, 2013. Commissioner of Income Tax, Delhi-V, though not mandated as per the provisions of the Act, had issued opportunity notice to the petitioner to attend and explain vide letter dated 26th March, 2013. An attempt to serve the opportunity letter on the authorized representative was made on 26th March, 2013 itself. However service was refused on the ground that this was against the policy of the Chartered Accountant firm. At 11.45 a.m. on 28th March, 2013, authorized representative had appeared and confirmed having received the entire/full copy of the draft order. Earlier on 26th March, 2013, a portion of the draft order was furnished. Opportunity was granted to the petitioner to present their case at 5 p.m. on 28th March, 2013 and again at 11 a.m. on 30th March, 2013 (30th March, 2013 and 31st March, 2013, though Saturday and Sunday, in terms of the directions issued by the Central Board of Direct Taxes, all income tax offices had remained open). On 30th March, 2013, Commissioner of Income Tax, Delhi-V made repeated attempts to contact two representatives of the Chartered Accountant firm appearing for the petitioner, but they did not pick up their phones. Ultimately, partner of the

firm was contacted and informed about the attempts made. Commissioner of Income Tax, Delhi-V had also contacted the Advocate representing the petitioner and informed that response was awaited. Thus, adequate and fair opportunity was given, but the petitioner had acted with malevolent intent.

10. The respondents state that Commissioner of Income Tax, Delhi-V after duly applying his mind on 30th March, 2013 had accorded approval to the draft order along with the Terms of Reference for special audit. Approval was dispatched to the office of the Assessing Officer after being recorded in the dispatch register at serial No. 3712 and received in the office of the Assessing Officer vide serial No.2681 in the receipt register. Copy of the dispatch register and receipt register has been enclosed with the counter affidavit. On the same day, i.e., 30th March, 2013, the Assessing Officer passed the order under section 142(2A) of the Act. M/s T.R. Chadha and Company was appointed as the Special Auditor to conduct audit.

11. As per the respondents, the order under Section 142(2A) dated 30th March, 2013 and the Terms of Reference were sent by speed post vide receipt Nos. ED867855480IN, ED867855493IN and ED867855578IN dated 31st March, 2013 between 1815 to 1819 hours to Price Water House Cooper, DLF, Gurgaon; Nokia India, Greater Kailash, Delhi and Nokia India, Gurgaon, respectively. The said order was transmitted twice by fax on 31st March, 2013. Thirdly, service was affected at the office of the petitioner company at industrial plot No. 243, Udyog Vihar, Phase-I, Dundahera, Gurgaon through Atul Kumar and Sandip Dhanuka, Tax Assistants, who submitted service report dated 31st March, 2013, affirming having been deputed to serve the order under Section 142(2A) of the Act for the Assessment Year 2009-10. As per the said report, two persons, who

were present at the reception of the said office, had initially refused to accept the letter, but after talking to the senior officers on phone, they had accepted the letter at 5.45 P.M.

12. The petitioners, however, vehemently deny having received the order under Section 142(2A) of the Act by any of the aforesaid modes on or before 31st March, 2013. It is stated that only 5 pages, i.e. covering letter of two pages and Terms of Reference of three pages, were sent by two fax messages on 30th March, 2013, and not the entire order of 22 pages under Section 142(2A) of the Act. Reliance is placed on two fax message confirmation reports submitted by the respondents, indicating that five pages were transmitted. Similarly, postal receipt Nos. ED867855480IN and ED867855493IN mention the weight of the envelopes as 20 grams and the fee charged as Rs.17/-, which was payable for packets up to 50 grams. Order under Section 142(2A) of 22 pages would have weighed much more and was not enclosed in the said envelopes. Moreover, as the envelopes were handed over to the postal authorities on 31st March, 2013, it should be reasonable to hold that service was affected on or after 1st April, 2013. The Tax Assistants, as per the petitioner, had served a two page letter dated 30th March, 2013 enclosing Terms of Reference at the Gurgaon office of the petitioner at 1738 hours on 31st March, 2013. Order under Section 142(2A) was not served. Terms of Reference and order under Section 142(2A) are distinct and separate and cannot be equated. As per the petitioner, they were served with the order under Section 142(2A) only on 3rd April, 2013.

13. Petitioner's legal assertion is that the order under Section 142(2A) should have been physically and actually served or delivered on or before 31st March, 2013. Reference was made to proviso to Section 142(2C)

asserting that as per the proviso, audit report of the special auditor has to be submitted within a maximum period of 180 days of the receipt by the assessee of the direction under Section 142(2A) of the Act. On conjoint reading of Sections 142(2A) and 142(2C), the date on which the Assessing Officer directs the assessee to get his accounts audited under Section 142(2A) of the Act used in Clause (iii) of the Explanation 1 of Section 153 have to be interpreted as the date on which the order under Section 142(2C) was received/served on the assessee. Reliance was placed on ***State of Punjab versus Shreyans Industries Ltd.***, (2016) 4 SCC 769; ***Kumar Jagdish Chandra Sinha versus Commissioner of Income Tax, West Bengal***, AIR 1996 SC 1895; ***State of Punjab versus Khemi Ram***, AIR 1970 SC 214; ***K. Joseph Jacob versus Agricultural Income Tax Officer,*** [1991] 190 ITR 464 (Ker); ***Qualimax Electronics versus Union of India,*** (2010) 27 STT 231 (Delhi High Court) and ***Government Wood Works versus State of Kerela*** (1988) 69 STC 62 (Kerela High Court). Service of directions under Section 142(2A) on the Chartered Accountant or Terms of Reference on the petitioner was immaterial and inconsequential as the order for special audit under Section 142(2A) has the effect of extending the period of limitation, and hence, the order itself should be communicated/delivered to the affected party on or before expiry of the normal limitation period. Delivery / service after the limitation period had expired cannot enlarge or extend the period of the assessment. On expiry of the statutory time limit, valuable right had accrued to the petitioner as an assessee and the right of the authorities to make and cause assessment got extinguished. Once the right was extinguished, it cannot get revived by a subsequent communication. Hence the assessment proceedings for the Assessment Year 2009-10 have abated.

Communication of the Terms of Reference cannot be construed as communication of the order under Section 142(2A). Reliance is placed on ***Rajinder Nath versus Commissioner of Income Tax, Delhi,*** AIR 1979 SC 1933 and ***Arun Kumar Aggarwal versus State of M.P.,*** AIR 2011 SC 3056.

14. The aforesaid contentions raised by the petitioner raise two distinct aspects and issues. First, what was the "effective" date of the order under Section 142(2A) directing special audit for exclusion under Clause (iii) of Explanation 1 of Section 153 of the Act. In other words, whether the Act requires and mandates that the order under Section 142(2A), even if passed earlier, must be served on the assessee on or before the last date for passing of the assessment order. Intertwined is the question of effect of service of Terms of Reference within the limitation. Second dispute is factual as it relates to the date when the order under section 142(2A) of the Act was actually served.

15. On the factual aspect and controversy, we would accept the contention of the petitioner that by the two fax messages transmitted on 31st March, 2013 and by speed post receipts ED867855480IN and ED867855493IN, the order under Section 142(2A) of 22 pages was not transmitted or enclosed. However, order under Section 142(2A) of the Act was enclosed in the post addressed to Nokia India, Gurgaon sent vide postal receipt ED86785578IN on 31st March, 2013 at 1819 hours, weighing 60 grams.

16. On the question of service affected by hand through Tax Assistants at the office of the petitioner at Dundahera, Gurgaon, there are conflicting and opposing assertions whether the order under Section 142(2A) of the Act was enclosed and served. We are inclined to accept, though with some

reservation, that the Tax Assistants had served the order under Section 142(2A) of the Act. We would record our reasons. Guards had signed the first page of the covering letter dated 30th March, 2013, the subject of which reads - "Forwarding of Terms of Reference to special audit under Section 142(2A) of the Income Tax Act, 1961 for AY 2009-10-Reg". Petitioner relies on the subject and submits that the order under Section 142(2A) of the Act was not enclosed as this was not mentioned in the subject. However, the first paragraph of the said letter records that the Assessing Officer was forwarding therewith the directions to special audit under Section 142(2A) for the assessment year 2009-10 as approved by the CIT, New Delhi-V. The directions were enclosed as Annexure to the letter. The subject or heading of the said letter dated 30th March, 2013 is not to be read in isolation and has to be read with the contents, which refer to the order passed under Section 142(2A) of the Act. The report submitted by the two Tax Assistants dated 31st March, 2013 records that they had visited the office of the petitioner at Dundahera in Gurgaon “to serve the order under Section 142(2A) of the IT Act, 1961 for AY 2009-10”. There is evidence in the form of postal receipts ED867855578IN addressed to the petitioner’s Gurgaon office posted on 31st March, 2013, weighing 60 grams. Thus, the Assessing Officer was aware and conscious that the order under Section 142(2A) of the Act had to be communicated and served on the petitioner. The petitioner also accepts that on 1st April, 2013, the Special Auditor had visited the premises of the petitioner and an employee of the petitioner had made a noting that the petitioner company was aware of the appointment of the Special Auditor and they would like to explore legal options and respond within seven days. Reference was to the service affected on 31st March, 2013. Petitioner in the

written replies dated 6th April, 2013 and 10th April, 2013, had not stated or claimed that the order under section 142(2A) of the Act was not communicated/served on them within the limitation period. No such assertion was made by the petitioner in Writ Petition (C) No. 2798/2013, which was withdrawn with liberty to file another Writ raising new contentions. Petitioner does claim that they did not earlier understand and appreciate the legal implications or effect of failure to serve the order under Section 142(2A) of the Act. This assertion may be plausible and in light of the contentions raised, we have examined the legal position whether the assessment proceedings had abated. In view of legal findings recorded below, our factual finding on the date of service would be somewhat insignificant and superfluous.

17. We would, however, completely reject the argument of the petitioner that the Assessing Officer had not received the approval from the office of the Commissioner of Income Tax, Delhi-V on 30th March, 2013. The contention of the petitioner with regard to interpolation and over-writing of the date in the receipt register is far-fetched and has to be rejected. The receipt register records receipt of several communications and letters received by the Assessing Officer. Petitioner unequivocally accepts service of Terms of Reference for special audit on 31st March, 2013 with the covering letter dated 30th March, 2013. Fax of five pages on two occasions consisting of the covering letter and Terms of Reference is also accepted.

18. Two more aspects are highlighted and can be dealt with immediately. Affidavit of Mr. Vikram Gera, Senior Vice-President, M/s T.R. Chadha and Company, though sworn and dated 5th May, 2013, was on the stamp paper purchased on 7th May, 2013 at 1.44 p.m. Secondly, the Assessing Officer

has interpolated the letter dated 2nd April, 2013 available in the assessment records and added words "I am also enclosing a copy of the draft order for special audit under Section 142(2A) of the Income Tax Act, 1961, as approved by the Commissioner of Income Tax, Delhi-V, again". These words were missing in the letter dated 2nd April, 2013 sent by fax by the Assessing Officer to the petitioner.

19. It is correct that the affidavit of Mr. Vikram Gera, Senior Vice-President of M/s T.R. Chadha and Company was dated and verified on 5th May, 2013, but it is printed on the stamp paper purchased on 7th May, 2013. Explanation of the respondents is that the affidavit was typed earlier and subsequently printed on the stamp paper. The stand of the respondents appears plausible and apparently was a mistake. The respondents should have been careful and corrected the date. This would not be a ground to reject the affidavit of Mr. Vikram Gera as false and untrue.

20. The second lapse made by the respondent is more serious. It relates to interpolation or rather additions made to the letter dated 2nd April, 2013. This letter, on official records and also enclosed as Annexure A-9 to the Writ petition, has the words "I am enclosing a copy of the draft order for special audit under Section 142(2A) of the Income Tax Act, 1961, as approved by the Commissioner of Income Tax, Delhi-5, again", which are missing in the copy filed by the petitioner as Annexure B-8 with the rejoinder affidavit. It is obvious that there are two separate letters of the Assessing Officer, both bearing the date 2nd April, 2013, but with material and significant addition of words in one which is the copy available on official records. This is objectionable. Any such fault by an assessee would have resulted in severe reprimand, if not penal action. As per the petitioner,

addition was made subsequently when issue of non service of order under Section 142(2A) was raised with plea of abatement. Noticeably, letter dated 2nd April, 2013 written by the Assessing Officer to the petitioner has not been placed on record by the respondents along with their affidavit.

21. What is equally disturbing and a matter of concern is that the direction for special audit, which has the effect of extension of time for completion of the assessment proceedings, was initiated about ten days before the last date for passing of the assessment order vide show cause notice dated 21st March, 2013. The order for special audit under Section 142(2A) was passed on 30th March, 2013, whereas the time for passing of the assessment order was to expire on 31st March, 2013. Directions for special audit when issued just before the limitation period, invariably supports and impels accusations and doubts whether the direction was a mere ruse for extension of time. In the facts of the present case, the petitioner asserts that the Commissioner had no option and was bound to accord approval for special audit, for the Assessing Officer could not have passed the assessment order on or before 31st March, 2013, given the issues involved and the details which had to be examined and adjudicated. Proposal for special audit was initiated right at the end, about 10 days before the limitation period for passing of the assessment order was to expire. This is an aspect for the respondents to introspect.

22. On the issue of reasonable or sufficient opportunity, the question cannot be answered by applying a strait-jacket test and would depend upon factual situation of each case. The yard-stick to judge any grievance whether reasonable opportunity was afforded or denied would be primarily a question of fact. If the view taken by the authority on opportunity is a

reasonable one, a Writ Court would decline striking down the order on the precept that greater latitude or more time would have been appropriate. The authority or tribunal conducting the proceedings been in *sessio* is the master, and has the authority to control the proceedings. They are entitled to fix dates, grant time and opportunity in the facts of a case and totality of the circumstances, while drawing inference from conduct of the party. Unless a wrong, denial of justice and prejudice caused is perceptible, Writ Court would not accept such pleas. [See, ***Jagjit Singh versus State of Haryana***, (2006) 11 SCC 1, Paras. 14 to 20].

23. Having examined the facts including the observation above, we are not inclined to accept the submission of lack and absence of fair, adequate and reasonable opportunity, though there was delay and the proposal for special audit was initiated about 10 days before the limitation period for passing of the order. The petitioner had the opportunity to reply and make oral submissions. Notwithstanding the time constraint, the petitioner could have responded and made written and oral submission, whether or not there were holidays or weekends. The petitioner was conscious and aware of the tight time schedule, and had made it difficult and did try to obstruct. To this extent the petitioner is also to be blamed. Having considered the contents of the order sheets, queries raised and issues relating to accounts, which have been fairly elaborately explained and elucidated in the order and counter affidavit, we are satisfied that a case for special audit was made out. To be fair to the respondents, we deem it appropriate to record that the petitioner did not in the oral arguments before us specifically question and challenge the order under Section 142(2A) on merits, though plea in this regard is somewhat raised in the written submissions.

24. We will now examine the legal position and answer whether the assessment proceedings would have abated if the order under Section 142(2A) was passed on 30th March, 2013 and was received or served on or after 1st April, 2013. To decide this controversy, we must reproduce Sections 142(2A), 142(2C) and clause (iii) of Explanation to Section 153 of the Act and they read:-

"Section 142(2A) of the Act

"142 (2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialized nature of business activity of the assessee, and the interest 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.

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Section 142(2C) of the Act

> "(2C) Every report under sub-section (2A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer:
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> *Provided that the* Assessing Officer may *suo motu,* or on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee."
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Clause (iii) to Explanation 1 to Section 153 of the Act

> "(iii) the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of Section 142 and –
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> (a) ending with the last date on which the assessee is required to furnish a report of such audit under that sub-section; or
> (b) Where such direction is challenged before a court, ending with the date on which the order setting aside such direction is received by the Commissioner, or"

25. As noticed above, in the present case limitation period for passing of the assessment order was to end on 31st March, 2013. Clause (iii) to Explanation 1 to Section 153 states that the period commencing from the date the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) of Section 142, ending with the last date on which the assessee is required to furnish a report of the special audit; or when such directions are successfully challenged in the Court the date on which the order setting aside such direction is received by the Commissioner, would be excluded. In other words, in case we uphold the order of special audit, the time period from the date when the order was passed on 30th March, 2013 till the special audit is completed and report is submitted, would be excluded. Sub-section (2C) to Section 142 states that report will be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer. The proviso states that the Assessing Officer on his own or on an application by the assessee, and for good and sufficient reason, can extend the period for special audit for further period or periods, but the aggregate of such periods cannot exceed 180 days from the date on which direction "under sub-section (2A) is received by the assessee".

26. The petitioner had emphasised on the aforesaid words "direction under sub-section (2A) is received by the assessee". It was accordingly submitted that receipt of the order under Section 142(2A) by the assessee was mandatory and a must for an effective and valid order under section 142(2A) of the Act. The date of passing of the order, therefore, was not of consequence but date of communication and service on the assessee as a

corollary was of consequence. We have already note the argument raised by the petitioner in some detail earlier. Elaborating, reference was made to Section 142(2A) of the Act asserting that the Section does not use the words "make" or "made" or even the word "issue". Thus, mere passing of an order under Section 142(2A) was irrelevant and the exclusion under clause (iii) to Explanation 1 of Section 153 would only be applicable if the order was served on the assessee within the period of limitation for passing of the assessment order.

27. For the reasons elucidated, we do not find any merit in the said contention raised and the interpretation placed by the petitioner. Section 142(2A) of the Act empowers the Assessing Officer to pass an order directing special audit. Clause (iii) to Explanation 1 to Section 153 refers to the period commencing from the date when the Assessing Officer directs the assessee to get his accounts audited under sub-section (2A) to Section 142 ending with the date on which the assessee is required to furnish report of such audit, and states that this period is to be excluded. The starting point is the date on which the Assessing Officer directs the assessee to get his accounts audited and not the date on which the said order is received by the assessee. The period of exclusion under clause (iii) to Explanation 1 of Section 153 ends on the last date on which the assessee is required to furnish his report of special audit. This is the end point and not the beginning.

28. Proviso to sub-section (2C) to Section 142 serves a different purpose and stipulates the outer time limit within which the special audit must be completed. It postulates and states that the Assessing Officer cannot grant extension for a period exceeding 180 days. This period would commence

not on the date when the order is passed, but from the date on which direction under sub-section (2A) to Section 142 is received by the assessee. The reason is obvious. There could be some time gap between the date of passing of the order for special audit and the date when the order is communicated to the assessee. Time period stipulated by the Assessing Officer for completion of special audit would commence only from the date when the assessee is communicated and receives the order and not the date of the order. Outer time limit of 180 days specified in the proviso has been fixed with reference to the date on which direction under sub-section (2A) to Section 142 is received by the assessee and not from the date of the passing of the order.

29. We would now refer to the case law dealing with the question of passing of the order and service of the order and whether non service or failure to serve the order under Section 142(2A) of the Act within the limitation period for passing of the order is fatal and would make the order passed null and void.

30. We begin by referring to the decision relied upon by the petitioner in ***Shreyansh Industries (supra)*** which dealt with interpretation of sub section 10 to section 11 of the Punjab General Sales Tax Act, 1948. Statutory period of completion of assessment of the dealers who had filed regular returns as prescribed was 3 years from the last date prescribed for furnishing the return. Referring to sub section 10 to section 11, Revenue had argued that the Commissioner could extend the time limit without any upper limit notwithstanding this period of 3 years subject to the condition of the reasons being recorded in writing. Stand being that time period was not prescribed

and fixed to exercise power under Section 11(10) of the said Act. In that context, it was held that subsection 10 to section 11 would apply when the assessment had not already become barred by time and not after the limitation period to pass an order had expired. After 3 years a valuable right had accrued to the assessee. Reliance placed by the Revenue on Section 148 of the Code of Civil Procedure for enlargement of time when original period had expired, and on Section 139(2) of the Act, it was held, was misconceived. This decision has no relevance in the facts of the present case, as the issue and question under consideration which is to be answered, is the legal effect of the order under section 142(2A), which would have the effect of extending time for completion of assessment, when passed within the limitation period and is served subsequently. The question is whether as per the provisions of the Act service of the order within the original limitation period was mandatory requirement under the Act. Legal effect of passing of the order and its service was not examined and answered in ***Shreyansh Industries*** (supra).

31. Second decision in ***Kumar Jagdish Chandra Sinha*** (supra) interprets Section 153 (1) of the Act. The petitioner relies upon paragraph 15 of the judgment which refers to the expression 'communication' and states that the same should be understood as explained in ***Khemi Ram*** (supra)**.**

32. ***Khemi Ram*** (supra) rather than supporting the petitioner, supports the case of the respondents that the expression "communication" need not be interpreted as actual receipt and can be meaningfully understood as dispatch, i.e., when the order is sent out and goes out of control of the authority. The

principle being that the authority should not have chance of changing its mind or modifying the order. It was lucidly explained and held:-

> "17. The question then is whether communicating the order means its actual receipt by the concerned government servant. The order of suspension in question was published in the Gazette though that was after the date when the respondent was to retire. But the point is whether it was communicated to him before that date. The ordinary meaning of the word "communicate" is to impart, confer or transmit information. (Cf. *Shorter Oxford English Dictionary*, Vol. 1, p. 352). As already stated, telegrams, dated July 31, and August 2, 1958, were despatched to the respondent at the address given by him where communications by Government should be despatched. Both the telegrams transmitted or imparted information to the respondent that he was suspended from service with effect from August 2, 1958. It may be that he actually received them in or about the middle of August 1958, after the date of his retirement. But how can it be said that the information about his having been suspended was not imparted or transmitted to him on July 31 and August 2, 1958 i.e. before August 4, 1958, when he would have retired? It will be seen that in all the decisions cited before us it was the communication of the impugned order which was held to be essential and not its actual receipt by the officer concerned and such communication was held to be necessary because till the order is issued and actually sent out to the person concerned the authority making such order would be in a position to change its mind and modify it if it thought fit. But once such an order is sent out, it goes out of the control of such an authority, and therefore, there would be no chance whatsoever of its changing its mind or modifying it. In our view, once an order is issued and it is sent out to the concerned government servant, it must be held to have been communicated to him, no matter when he actually

> received it. We find it difficult to persuade ourselves to accept the view that it is only from the date of the actual receipt by him that the order becomes effective. If that be the true meaning of communication, it would be possible for a government servant to effectively thwart an order by avoiding receipt of it by one method or the other till after the date of his retirement even though such an order is passed and despatched to him before such date. An officer against whom action is sought to be taken, thus, may go away from the address given by him for service of such orders or may deliberately give a wrong address and thus prevent or delay its receipt and be able to defeat its service on him. Such a meaning of the word "communication" ought not to be given unless the provision in question expressly so provides. Actual knowledge by him of an order where it is one of dismissal, may, perhaps, become necessary because of the consequences which the decision in *The State of Punjab* v. *Amar Singh* contemplates. But such consequences would not occur in the case of an officer who has proceeded on leave and against whom an order of suspension is passed because in his case there is no question of his doing any act or passing any order and such act or order being challenged as invalid."

In the aforesaid decision, the Supreme Court had examined the question whether an order of suspension passed against a Government servant takes effect when it was made or when it was actually served and received. The question had arisen in the context of Rule 3.26(d) of the Punjab Civil Services Rules, as they then were, which had mandated that the disciplinary enquiry would lapse on retirement of the State employee unless an order of suspension was passed and would have the effect of not permitting the concerned Government servant to retire. In the said case, order of suspension against Khemi Ram was dispatched on 31st July, 1958,

but was served after his retirement on 4th August, 1958. The single Judge and Division Bench of the Punjab and Haryana High Court had held that the Government employee had retired from service rendering the enquiry and the ultimate dismissal invalid for the order of suspension was served post 4th August, 1958. In this case, reference was made to decision of the Supreme Court in ***Bachhittar Singh versus The State of Punjab,*** [1962] 3 Supp. SCR 713 and ***State of Punjab versus Sodhi Sukhdev Singh,*** [1961] 2 SCR 371 to argue that an uncommunicated order on the file was inconsequential. Reference was also made to ***Sardar Pratap Singh versus State of Punjab***, (1966) ILLJ 458 SC wherein two Judges of the Supreme Court had held that an order of suspension would be effective, the moment it was issued. However, three other Judges in ***Sardar Pratap Singh*** (Supra) had not expressed any view on the said aspect. Thus, ***Khemi Ram*** (Supra) holds that communication would be effective when it was dispatched, no matter when it was actually received. Once an order was dispatched and goes out of the control of the authority, there was no chance whatsoever of the authority changing its mind or modifying the order. The judgment also observed that the communication could be actual or constructive. The said observations are relevant as the petitioner in the present case does accept having received 'Terms of Reference' on or before 31st March, 2013. In view of our findings recorded above, we would record that the order itself under Section 142(2A) was dispatched on 31st March, 2013.

33. The order under Section 142(2A) was communicated when it was sent out before 31st March, 2013, as elucidated in ***Khemi Ram*** (supra)

34. The aforesaid judgments of the Supreme Court were referred to and examined by a Division Bench of this Court in ***Qualimax Electronics Private Limited*** (supra) and it was held as under:-

> "32. Of course, the is the danger that to prevent an assessee from seeking a settlement of his case, the adjudicating authority may quickly pass the adjudication order the moment he gets an inkling that the assessee is about to approach the Settlement Commission. There is also the danger that the adjudicating authority may back date an order. Adjudicating authorities are not supposed to behave in this manner and are presumed to function within the boundaries of law but, these things can happen. Would not a literal construction of the provisions then come in aid of such errant officers and run counter to the legitimate hopes of assesses who want to come clean, pay their taxes and have their cases settled by the Settlement Commission? The answer to this would lie in construing the date of adjudication to be the date on which the adjudicating authority loses his *locus poenitentia,* or opportunity to tear off, destroy or alter the adjudication order. In other words, when the order goes out of his control. And, that happens when the order is signed and the one-way process of sending it to the assessee is put in motion either directly or indirectly through some other agency.
>
> 33. Thus, the date of receipt of the order-in-original is not a relevant circumstance. What is of prime importance is the date on which the order-in-original was despatched from the office of the adjudicating authority (in this case, the Commissioner of Central Excise & Customs, Ghaziabad). As we have seen, the order-in-original dated 24.12.2009 had left the office of the said Commissioner on 31.12.2009 and was beyond his reach and control. Consequently, the adjudication becomes effective and complete on that date, i.e, 31.12.2009 That being so, the necessary pre-condition of

> a case pending adjudication on the date of the settlement application is not satisfied. As such, the Settlement Commission had no jurisdiction to entertain the plea of settlement. Because, it is only a "case" as defined in section 31(c) which could be the subject matter of settlement. Section 31(c) defines "case" to mean any proceeding for the levy, assessment and collection of excise duty, "pending before an adjudicating authority on the date on which an application under sub-section (1) of section 32E is made". Once, the order leaves the hands of the adjudicating authority in the sense explained above, the 'case' can no longer be said to be pending before him. Conversely, the proceeding would be regarded as pending before an adjudicating authority till the order does not go out of his control. In the present case, this happened on 31.12.2009 Thus, on 08.01.2010, when the settlement applications were filed by the petitioners, the matter before the adjudicating authority had already been adjudicated."

In the said case, the petitioners therein had challenged the order passed by the Customs and Central Excise Settlement Commission holding that the settlement applications were not maintainable as the cases had been adjudicated prior to filing of the settlement applications. Order-in-original dated 24th December, 2009 passed by the adjudicating authority was received by the petitioners on 8th January, 2010. The applications for settlement were filed on 8th January, 2010. The ratio of this judgment in ***Qualimax Electronics Private Limited*** (supra) again does not support the case of the petitioner.

35. In ***Qualimax Electronics Private Limited*** (supra), reference was made to the judgment of the Supreme Court in ***Collector of Central Excise, Madras versus M.M. Rubber and Company, Tamil Nadu,*** 1992 Supp (1)

SCC 471, which decision had drawn distinction between commencement of limitation period for filing of an appeal against an order, and when an order comes into force or becomes operative. In the former case, period of limitation for filing of an appeal would normally commence when the order passed was received, published and notified. In the latter case, the order becomes operative and effective from the date it was signed and the authority ceases to have any *locus poenitentiae* to tear off, modify or alter the order.

36. ***M.M. Rubber and Company*** (supra) had clarified on two different principles of law relating to limitation. First principle relates to exercise of power or an act, affecting the rights of the parties within period of limitation prescribed. Order or decision of authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed. This happens when the order is made or passed; that is to say when the order is made public or notified in some form or is sent out by the authority so as to have left his hands. Thereafter, the Authority cannot tear or draft a different order. Date of communication of the order to the parties whose rights are affected is not the relevant date for purpose of deciding whether or not the order was passed within the prescribed time.

37. Second principle relates to computation of period of limitation for a party affected by the order or decision, who invokes remedy by way of appeal, revision etc. The rule is that period of limitation for invoking the remedy starts from the date the order is communicated to the party or the date when it is pronounced or published, whereby the party affected has a reasonable opportunity of knowing of the passing of the order or its content.

Communication in the second sense is different from communication in the first sense i.e. the first principle. Communication in the second sense must be satisfied before the decision is said to be conclusive or binding. This principle is not dependent upon provisions of a particular statute but under the general law.

38. Pertinently, in ***M.M. Rubber and Company*** (supra) it was observed that knowledge of the party affected by the decision may be either actual or constructive. Knowledge of the party effected by the decision either actual or constructive, is the essential element which must be satisfied. This is a salutary and just principle.

39. We often overlook the aforesaid distinction when we examine the question as to whether an order has been passed within the period of limitation and apply decision with first and second principle interchangeably, which is impermissible and wrong. It is in this context we would also like to refer to the decision of the Supreme Court in ***Commissioner of Income-tax Vs. Major Tikka Khushawant Singh,*** (1995) 212 ITR 650 (SC) which referred to the earlier decision in the case of ***R.K. Upadhyay Vs. Shanabhai P. Patel,*** (1987) 166 ITR 163 and rejected the plea of the assessee and upheld the contention of the revenue that the date of issue of notice would determine, if it was within the period of limitation and would give jurisdiction to the assessing officer to proceed and not the date on which notice was served. It was observed that issue of notice within the statutory period gives jurisdiction but re-assessment cannot be made till notice was served.

40. In ***Bacchittar Singh*** (supra) and other cases it has been held that decision was written out, signed and dated, it would be nothing but a decision which the officer intends to pass and not final. An order on the file till communicated, would not be an order passed or made. Communication of the order would be complete when made public or notified in some form or sent out by the authority so as to have left from his hands as explained in ***M.M. Rubber and Company*** (supra).

41. In ***K. Joseph Jacob versus Agricultural Income Tax Officer and Another,*** [1991] 190 ITR 464 (Ker) dealt with Section 35(2) of the Kerala Agricultural Income Tax Act, 1950, which had stipulated that no order of assessment, etc. shall be made after expiry of five years at the end of the year in which the agricultural income was first assessable. It was observed that communication was made on the date of communication and not on the date when the communication was received. Further, the order or assessment came into force, when it was communicated because the party must be put to notice of that order. First observation relates and states the first principle and the second observation states the second principle. We would have some reservations in accepting the ratio expressed by the single Judge in ***K. Joseph Jacob*** (supra) in the light of the decisions of the Supreme Court in ***Major Tikka Khuswant Singh and R.K. Upadhyay*** (supra).

42. ***Government Wood Works versus State of Kerala,*** [1988] 69 STC 62 (Kerala High Court) relates to Kerala General Sales Tax Act, 1963. In the said case, order under Section 35 of the aforesaid Act was made on 3rd September, 1984, but communicated on 28th September, 1984 with an order of remit to the assessing authority, i.e., after period of limitation of four

years, which were prescribed. It was observed that mere signing of the order on the file was not enough unless it was in some way pronounced or published or party affected has some means of knowing it. To make an order complete and effective, it should be issued so as to beyond the control of the authority from possible change or modification therein. This, it was observed, should be done within the prescribed period though actual service of the order may be beyond that period. In this case, the Authority/Revenue had failed to produce evidence and material that the order was sent out within the prescribed period. To this extent, therefore, decision of Kerala High Court in ***Government Wood Works*** (supra) would not support the petitioners for in the present case order under Section 142(2A) was communicated, i.e. it was "sent out" and dispatched within the prescribed period of limitation.

43. In the aforesaid situation and to meet the argument, that 'Terms of Reference' were communicated and received by the petitioner alongwith letter dated 30th March, 2013 on 31st March, 2013, reference was made to ***Rajinder Nath and Others*** (Supra). This decision draws a distinction between 'finding' and 'direction' in the context of Section 153(3)(ii) of the Act, which removes bar of limitation period for making of assessment under Section 143 or 144 or 147 of the Act. Bar of limitation is removed when there is a direction issued by the statutory authority in the nature of an order requiring positive compliance and not by on mere "finding". Petitioner relies on the said decision to urge and submit that 'Terms of Reference' must be distinguished and cannot be equated with service of the order under Section 142(2A) of the Act. ***Rajinder Nath and Others*** (supra) examines

and interprets a different provision. The said findings have no relevance when we examine the question as to the effective date when the order is passed. A communication takes place when the order is dispatched or "sent out" and is made known or public. Communication in this context can be actual or even constructive. Service of the letter dated 30th March, 2013 with the 'Terms of Reference' would be effective communication in the light of the aforesaid discussion even if it is presumed that the order under Section 142(2A) was not enclosed with the letter. Further, order under Section 142(2A) of the Act was certainly dispatched and sent by speed post vide postal receipt ED86785578IN on 31st March, 2013 at 1819 hours, i.e. within the prescribed period.

44. In view of the aforesaid discussion and after examining the entire issue from factual as well as legal position, we have come to the conclusion that the writ petition has no merit. Assessment proceedings have not abated Accordingly, the writ petition is dismissed, with no order as to costs.

**(SANJIV KHANNA)**
**JUDGE**

**(PRATHIBA M. SINGH)**
**JUDGE**

**MARCH 6th , 2018**
**VKR/ssn**