

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.No.9127 of 2004

M/s.CRS Sons & Co. Limited
Chennai-17
Petitioner

Vs

The Income Tax Officer
Company Ward 1(1), Chennai
Respondent

Prayer:- This Writ Petition is filed to issue a Writ of Certiorarified Mandamus to call for the records of the Respondent in Company Ward 1(1) 2003-2004, pertaining to the Petitioner and to quash the impugned order dated 9.3.2004.

For Petitioner : Mr.Subbaraya Ayyar Padmanabhan

For Respondent : Mr.T.Pramodkumar Chopda
Senior Standing Counsel

ORDER

In this Writ Petition, the Petitioner seeks to quash the order dated 9.3.2004 of the Respondent, in and by which, a Special Auditor was appointed for auditing the books of accounts of the Petitioner for the assessment years 1996-97 to 2002-03.

2. The facts, which are necessary for disposal of this Writ Petition, are that the Petitioner is engaged in the textile business. The returns filed by the Petitioner were accepted, except for the assessment year 1997-98, for which regular assessment under Section 143(3) of the Income Tax Act, 1961 was made and a survey under Section 133A was also conducted on 18.11.2002. Pursuant to the same, the Assessing Officer issued notices dated 13.2.2003 and 29.11.2002 for the assessment years 1996-97 to 2001-2002 for reopening the assessment under Section 148 of the Act. The Petitioner sent a reply, stating that the original returns filed for the assessment years 1996-97, 1997-98 and 1998-99 may be considered as the returns filed in response to the said notices. For the assessment years 2000-01, 2001-02 and 2002-03, the Petitioner filed revised returns on

30.05.2003. Subsequently, the Assessing Officer issued the notices under Section 143(2) on 24.9.2003 and 20.11.2003. The Petitioner appeared in all hearings and also furnished all the details. Thereafter, the Assessing Officer issued the notice under Section 142(2A), dated 13.2.2004, proposing to appoint a Special Auditor for auditing the books of accounts of the Petitioner, alleging that the books of accounts were complex in nature and calling upon the Petitioner to put forth their objections on or before 18.2.2004 in this regard, to which the Petitioner also filed a reply. While so, the Respondent passed the impugned order dated 9.3.2004, appointing a Special Auditor for auditing of the accounts of the Petitioners, alleging that the accounts were complex in nature. Hence, this Writ Petition has been filed.

3. The learned counsel for the Petitioner contended that the nature of the accounts were very simple and there was no complexity in the same, as alleged by the Assessing Officer and that the impugned order has been passed under Section 142 (2A) of the Act, without affording sufficient and proper opportunity to the Petitioner and without assigning any valid reason and hence, prayed for quashing of the impugned order.

4. The learned standing counsel for the Respondent, by filing a counter affidavit, contended that during the assessment proceedings, the Assessing Officer came to the conclusion that there were complexities in the books of accounts, inasmuch as it was found that various entries in the day book as well as the ledger do not contain the narration so as to ascertain the nature of the entries as well as their corresponding accounting in the other books and these type of discrepancies were seen in a number of books for about six to seven assessment years and that if the assessment is completed without a special audit, it may go against the interests of the Revenue and that sufficient opportunity was given to the Petitioner and that it is not necessary for the Assessing Officer to give a show cause notice or give a hearing to the assessee before issuing the directions under Section 142(2A) and only the assessment order would create a liability and accordingly, by the impugned order, a Special Auditor was appointed and prayed for dismissal of this Writ Petition.

5. This court heard the learned counsel on either side and considered their submissions and also perused the materials placed on record and the relevant provisions of the Act.

6. The undisputed facts are that to the notices dated 13.2.2003 and 29.11.2002 for the assessment years 1996-97 to 2001-2002 for reopening the assessment under Section 148 of the Act, the Petitioner sent a reply, stating that the original returns filed for the assessment years 1996-97, 1997-98 and

1998-99 may be considered as the returns filed. For the assessment years 2000-01, 2001-02 and 2002-03, the Petitioner also filed revised returns on 30.05.2003. Thereafter, the Assessing Officer issued the notices under Section 143(2) dated 24.9.2003 and 20.11.2003 and the Petitioner appeared in all hearings and made their submissions. Then, the Assessing Officer issued a notice under Section 142(2A), dated 13.2.2004, proposing to appoint a Special Auditor for auditing the accounts of the Petitioner and calling upon the Petitioner to appear on 18.02.2004 at 2.30 p.m., to which the Petitioner also filed a reply. Thereafter only, the impugned order dated 9.3.2004 came to be passed, appointing a Special Auditor for auditing of the books of accounts of the Petitioner.

7. According to the Petitioner, there is no complexity in the books of accounts and the impugned order has been passed under Section 142(2A) of the Act, without affording sufficient and proper opportunity to the Petitioner and without assigning any valid reason and without mentioning the nature of the complexities in the books of account in detail.

8. On the other hand, it is the contention of the Respondents that it is always open to the assessing officer under Section 142(2A), to go for a special audit, by appointing a special auditor, when he is of the opinion that there are complexities in the books of accounts and if they related to various entries, which are not properly correlated and that if the assessment is completed without a special audit, it may go against the interests of Revenue and that sufficient opportunity was given to the Petitioner and that it is not necessary for the Assessing Officer to give a show cause notice or give a hearing to the assessee before issuing the directions under Section 142 (2A) and only the assessment order would create a liability.

9. Now, the question that arises for consideration is as to whether before passing an order under Section 142(2A), an opportunity of hearing or a show cause notice needs to be given to the assessee and whether there should be narration of the nature of the complexities in the books of accounts.

10. In the notice dated 13.02.2004, the assessing officer opined that having regard to the nature and the complexity of the books of accounts and the deficiencies in the books of accounts of the Petitioner and the interests of the revenue, it was proposed to get the accounts of the Company and its directors audited by a Special Auditor under Section 142(2A) of the Income Tax Act, 1961 and opining so, in order to give an opportunity to the Petitioner, in this regard, called upon the Petitioner to appear on 18.02.2004 at 2.30 p.m.

11. Even in the impugned order dated 9.3.2004

itself, the assessing officers justified the appointment of the Special Auditor, by briefly narrating the nature of complexities in the books of accounts of the Petitioner. Even the Director of the Company himself admitted to infirmities in the books, vouchers, etc. and to that effect, it is also stated in the impugned order as under:-

"6. In reply to Qn.No.12 in the sworn statement recorded at the time of survey, the Director of the Company himself admitted to infirmities in the books, vouchers, etc. and offered additional income on an estimated basis.

7. The director has further admitted that M/s.Sundaravalli collections is a part and parcel of the Company and undisclosed income of M/s.Sundaravalli Collections would be offered in the Company's hands. Therefore, in order to verify and deduce the correct income of the Company, one has to examine the books of accounts of the Company along with that of M/s.Sundaravalli Collections. Further, the exact details of the quantity and nature of the goods purchased are not available in the books of the Company, but the same is available only in the books of M/s.Sundaravalli Collections. So, for computation of income of M/s.CRS Sons and Company Limited, reference to the books of M/s.Sundaravalli Collections is also necessary. Reference to books of two entities to fix the income of one entity is by itself a complex process."

12. At this juncture, it is relevant to extract Section 142(2A) of the Income Tax Act, 1961 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 to do so, 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."

13. A bare perusal of Sub-section (2A) of Section 142 shows that all that is required therein is that the assessing officer should be of the opinion that in view of the nature and complexity of the accounts of the assessee and the interest of the Revenue, it is necessary to direct a special audit of the

assessee's accounts. There is also no express provision for narrating the nature of the complexities in the books of the accounts of an assessee in detail.

14. As per the Section 142(2A), though there is no express provision for affording an opportunity of hearing to an assessee, in the case on hand, before passing the impugned order under the said Section, a notice dated 13.02.2004, however, was issued, fixing the personal hearing on 18.02.2004 at 2.30 p.m. and the Petitioner also sent a reply dated 18.2.2004 to the same, but a copy of the said reply dated 18.2.2004 does not find a place in the typed set of papers filed by the Petitioner. Hence, the contention of the Petitioner, in this regard, is untenable.

15. For the prepositions that it is not necessary for an assessing officer to give a show-cause notice or give a hearing to the assessee before issuing the directions under Section 142(2A) and that it is suffice if he is of the opinion that there is complexity in the accounts of such an assessee, there are number of decisions of various Courts, upholding the said preposition.

16. In Atlas Copco (India) Ltd. vs V.S. Samuel, Assistant (2006 202 CTR Bom 361:2006 283 ITR 56 Bom), it has been held as under:-

"13. Mr. Ashok Kotangale, the learned counsel appearing for the Revenue, on the other hand, relied upon the Division Bench judgment of the Allahabad High Court in the case of Jhunjhunwala Vanaspati Ltd. v. Asstt. CIT and Another. The Division Bench of the Allahabad High Court in clear and unambiguous terms gave its opinion that it was not necessary for the AO to issue a show-cause notice or give a hearing to the assessee before issuing the direction of special audit under Section 142(2A). The Division Bench of the Allahabad High Court held that an order under Section 142(2A) giving direction of special audit does not entail any civil consequences nor affect the rights of the assessee. Such order does not create any liability against the assessee. The Allahabad High Court held thus :

"A bare perusal of Sub-section (2A) of Section 142 shows that all that is required therein is that the AO should be of the opinion that in view of the nature and complexity of the accounts of the assessee and the interest of the Revenue, it is necessary to direct special audit of the assessee's accounts."

In our opinion, it is not necessary for the AO to give a show-cause notice or give a hearing to the

assessee before issuing the directions under Section 142(2A). In our opinion, the direction under Sub-section (2A) of Section 142 is purely administrative in nature and not quasi judicial. Moreover, in our opinion, such a direction does not have civil consequences. It does not affect the assessee's rights or liability. Hence, the decision of the Supreme Court in State of Orissa v. Dr. Binapani Dei does not apply. No doubt an administrative order if it has civil consequences can only be passed after giving opportunity of hearing, but in our opinion a direction under Sub-section (2A) of Section 142 does not have civil consequences because it does not affect his rights and does not create any liability against the assessee. It is only the assessment order which will create a liability. The purpose of the direction under Sub-section (2A) of Section 142 is to ensure that a correct assessment order is passed so that the Revenue is not deprived of its dues. Hence, we do not agree with learned counsel for the Petitioner that an opportunity of hearing or show-cause notice has to be given to the assessee before passing the direction under Section 142(2A).

14. That the order passed under Section 142(2A) is purely administrative in nature and that such order is not quasi judicial admits of no ambiguity. The law-makers while enacting Section 142(2A) empowered the AO to direct the assessee to get the accounts audited by special auditor. The legislature, to ensure that such power is not abused, provided safeguards. For forming an opinion as to whether it is necessary to have the accounts of the assessee audited by a special auditor, the AO has to have regard to the nature of complexity of the accounts of the assessee and the interest of the Revenue. After forming such opinion, he has to seek the approval of the Chief CIT or the CIT, as the case may be, before any direction is issued to the assessee to have his accounts audited by a special auditor. This by itself is a vital safeguard in preventing abuse of power. In the very scheme of things, we are unable to read that the assessee needs to be heard before the directions are issued to the assessee for audit of its accounts by a special auditor. Such order, in our opinion, does not entail any civil consequences. No decision is given. Merely because the assessee is required to pay the auditor's fee, that does not mean that any liability is created against the assessee and that such order entails any civil consequences. The issuance of direction for special audit facilitates

the AO to have the complex accounts of the assessee examined by an independent auditor. That helps and assists him in assessing the income of the assessee. We find ourselves in agreement with the view of the Allahabad High Court in the case of Jhunjhunwala Vanaspati Ltd. (supra) and respectfully disagree with the view of the Calcutta High Court in the case of Peerless General Finance & Investment Co. Ltd. (supra) and West Bengal State Co-operative Bank Ltd. (supra) and the view of the Kerala High Court in the case of Muthoottu Mini Kuries (supra). In our opinion, the assessee is not required to be heard before passing an order under Section 142(2A) of the IT Act, 1961.

18. We have no hesitation in concluding that the order dated 11th November 2005 giving direction to the Petitioner for special audit under Section 142 (2A) for assessment year 2003-04 does not suffer from lack of jurisdiction or error of law."

17. It was not necessary for the assessing officer to issue a show-cause notice or give a hearing to the assessee before issuing the direction of special audit under Section 142 (2A) and an order under Section 142(2A) giving direction of special audit does not entail any civil consequences nor affect the rights of the assessee. Such order does not create any liability against the assessee, as has been held in yet another decision of the Division Bench of the Allahabad High Court reported in (2004-188-CTR-All-434:2004-266-ITR-657 All) (in the case of Jhunjhunwala Vanaspati Ltd. v. Asstt. CIT and Another).

18. Similarly, in yet another decision rendered in the case of Gurunanak Enterprises v. CIT (2003-259-ITR-637), the Delhi High Court observed as under:-

"It is not within the province of judicial review to minutely analyse the materials on which the opinion of the Assessing Officer is rested to find out whether the same is sufficient for the authority concerned to come to the conclusion that the accounts of the assessee need to be subjected to special audit. As noticed above, what is complex to one may be simple to another and, therefore, the issue has to be examined from the view point of the Assessing Officer concerned. The court is not expected to substitute its own understanding and comprehension of the accounts of an assessee.

We also do not find any substance in the submission of learned counsel for the Petitioners that merely because no special audit under the said provision had been directed in the past several years or that their accounts had already been subjected to statutory

audit under Section 44AB of the Act and the Petitioners' assessments were completed without noticing any complexity in the accounts, the Assessing Officer is denuded of his power to order special audit subsequently, even though the nature of business and the method of accounting adopted by the assessee had remained the same as in the past. If the facts and circumstances so warrant, a special audit under Section 142(2A) may be ordered in respect of any year."

19. In *Kumar Films Pvt. Ltd. v. CIT* (2002-258-ITR-257), the Patna High Court held that the High Court, in writ jurisdiction, cannot judge the satisfaction of the authority when it has ordered for appointment of an auditor after taking note of the nature of the controversy and accounts. In *Living Media Ltd. v. CIT* (2002-255-ITR-268), the Honourable Supreme Court affirmed the judgment of the Delhi High Court in this connection. In *U.P. State Handloom Corporation Ltd. v. CIT* (1988-171-ITR-640), the Allahabad High Court upheld the directions under Section 142(2A).

20. On the facts found prima facie, no fault can be found with the assessing officer having taken a decision to initiate a special audit under Section 142(2A), that too when various discrepancies were admittedly found in a number of books for about six to seven assessment years. Further, no case is made out for interfering with the impugned order referring to a special audit. The purpose of the direction under Sub-section (2A) of Section 142 is to ensure that a correct assessment order is passed so that the Revenue is not deprived of its dues. Therefore, it is always open to the assessing officer under Section 142(2A), to go for a special audit, by appointing a special auditor, when there are complexities in the books of accounts and if they are related to various entries, which are not properly correlated. Even in the impugned order dated 9.3.2004 itself, the assessing officer justified the appointment of the Special Auditor by briefly narrating the nature of complexities in the books of accounts of the Petitioner.

21. In view of the reasons, discussions and in the light of the decisions cited above, the irresistible conclusion that could be arrived at is that the impugned order, appointing a Special Auditor for auditing the books of accounts of the Petitioner on the ground that there were complexities in the accounts, made under Section 142(2A) does not suffer from lack of jurisdiction or error of law.

22. In the result, this Writ Petition is dismissed. No costs.

-s/d-
Assistant Registrar(CSIII)

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Sub-Assistant Registrar

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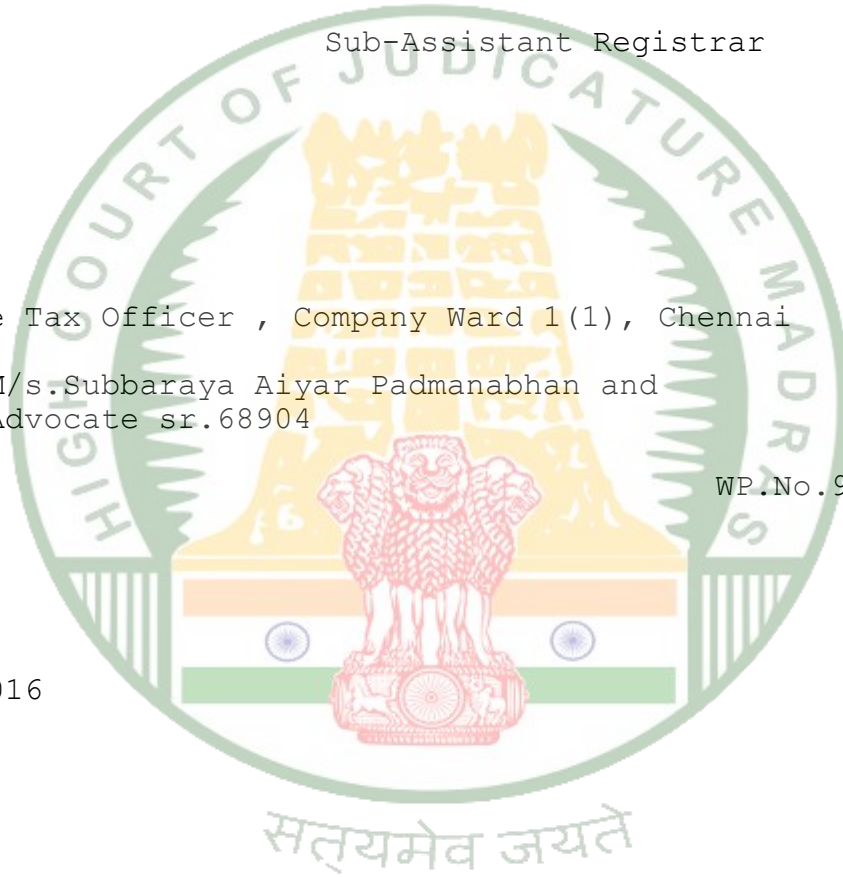
To:

The Income Tax Officer , Company Ward 1(1), Chennai

+1 cc to M/s.Subbaraya Aiyar Padmanabhan and
Ramamani Advocate sr.68904

WP.No.9127 of 2004

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