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

Date of decision: 28th August, 2019

+ W.P.(C) 9358/2019

RELIGARE FINVEST LIMITED

..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate
with Mr. Rohit Jain, Ms. Kavita Jha
and Mr. Vaibhav Kulkarni, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR..... Respondent

Through: Mr. Raghvendra Singh, Senior
Standing Counsel with Mr. Vipul
Agrawal, Junior Standing Counsel.

+ W.P.(C) 9359/2019

RELIGARE ENTERPRISES LIMITED

..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate,
Mr. Rohit Jain, Ms. Kavita Jha and
Mr. Vaibhav Kulkarni, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR..... Respondents

Through: Mr. Raghvendra Singh, Senior
Standing Counsel with Mr. Vipul
Agrawal, Junior Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J. (Oral) :

**C.M. No 38598/2019 in W.P.(C) 9358/2019 &
C.M. No 38600/2019 in W.P.(C) 9359/2019**

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

**W.P.(C) 9358/2019 & CM APPL. 38597/2019 &
W.P.(C) 9359/2019 & CM APPL. 38599/2019**

3. Both the present petitions under Article 226 of the Constitution of India challenge the respective orders, both dated 06.08.2019, passed by Deputy Commissioner of Income Tax, Circle 21 (1), C.R. Building, I.P. Estate, New Delhi directing the Petitioners to have their books of account for the assessment year 2016-17 audited by the Special Auditor under Section 142 (2A) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').

Brief Facts

4. The facts and grounds urged in both the petition are more or less similar and furthermore since identical arguments have been advanced, the same are being decided by a common judgment. However, facts narrated in WP (C) No. 9359/2019 are being noted and discussed for the purpose of deciding the petitions.

5. The Petitioner contends that it is engaged in the business of lending,

investment, financial advisory services and distribution of third-party financial products and has been consistently following the same method of accounting for the purpose of maintaining its books of account and filing its tax return. For assessment year 2016-17, the year under consideration, the Petitioner originally e-filed its return of income declaring total income of Rs. 44,64,06,770/-. The return of income was revised declaring same total income. The case of the Petitioner was selected for scrutiny through CASS and notice was issued under section 143(2) of the Act. During assessment proceedings, Respondent No.1 called for various information, details and data, which were duly furnished by the Petitioner from time to time. The Petitioner filed, before the Revenue, a copy of the order dated 14.03.2019 passed by Securities & Exchange Board of India ('SEBI'). In the said letter, the Petitioner explained that SEBI, vide order dated 14.03.2019, directed the Petitioner and M/s. Religare Finvest Ltd. ('RFL'), subsidiary of the Petitioner, to initiate steps to recall all the loans diverted to the companies associated with the former promoters.

6. Petitioner further represented that the new professional management of the Petitioner is taking all steps to recall the loan and that the transactions referred in the SEBI order, in any case, had no effect on the taxable income of the Petitioner.

7. A show-cause notice dated 30.05.2019 was issued by Respondent No.1 requiring the Petitioner to furnish certain details/information by 06.06.2019. In the said notice, Respondent No.1 referred to forensic audit report furnished by SEBI and its order dated 14.03.2019 alleging diversion/

siphoning of funds of the Petitioner to the companies related to its erstwhile promoters. The Petitioner was directed to give an explanation and to show-cause why books of account may not be rejected.

8. In the meanwhile, despite Petitioner furnishing the details as directed, a notice dated 13.06.2019 was issued by Respondent No. 1 requiring it to show-cause as to why books of accounts of the Petitioner may not be referred for special audit under section 142 (2A) of the Act, considering the complexity and volume of the accounts and the specialized nature of the business activity of the Petitioner. In the said show-cause notice Respondent No. 1 primarily referred to and reproduced the contents of the notice dated 30.05.2019, and stated that, “*Due to complexity of transactions and voluminous books of account and details, specialized nature of business activity*”, the accounts of the Petitioner are proposed to be referred for special audit under section 142(2A) of the Act. Petitioner was directed to furnish its response within 4 days, i.e. by 17.06.2019.

9. In response to the aforesaid notice, the Petitioner gave an elaborate reply dated 17.06.2019, rebutting the allegations and inter alia contending that reference for special audit was unwarranted. Petitioner referred to several decisions dealing with the subject, and in particular the judgment of the Supreme Court in ***Sahara India (Firm) v. CIT***(2008) 14 SCC 151 and also the decision of this Court in ***Sahara India Financial Corporation Ltd. v. CIT*** (2017) 399 ITR 81 (DEL). It was urged that considering that there was no change in the nature of business of the Petitioner, its

business could not be categorized as “*specialized nature of business activities*”. Petitioner had undertaken transactions by way of giving loans and advances in the normal course of business of financing and each and every transaction is fully and appropriately recorded in the books of accounts and this is apparent on the face of the financial statement. Petitioner controverted that it has several subsidiaries, and explained that all the transactions entered into by the Petitioner with its sole subsidiary viz Religare Housing Development Finance Corporation are duly disclosed in the related party transaction schedule of audited financial statement. Regarding SEBI order dated 14.03.2019, it was argued that vide an earlier letter dated 06.05.2019 filed before principal CIT, Petitioner had elaborately explained the background of the aforesaid order, and that there was no revenue loss to the Income Tax Department. Thus, essentially the contention of the Petitioner was that there was no complexity in the books of account which would warrant the Respondent No. 1 to direct special audit.

10. Respondent No. 1 considered the reply furnished by the Petitioner and after seeking approval of the Principal Commissioner of Income Tax, passed the order dated 06.08.2019 and directed M/s Das Gupta and Associates, Chartered Accountants to audit the accounts of the Petitioner as per the terms of reference within a period of ninety days.

WP (C) NO. 9358/2019

11. In the present case, the Petitioner, Religare Finvest Limited (RFL) is a subsidiary of the Petitioner in WP(C) No. 9359/2019. As the challenge is to a similar order dated 06.08.2019 passed by the Deputy Commissioner of

Income Tax, after seeking approval of Principal Commissioner of Income Tax, directing M/s Das Gupta and Associates, Chartered Accountants to audit the accounts of the Petitioner. The grounds challenging the impugned order are identical to those which have been raised in W.P.(C) 9359/2019 and therefore our findings and reasons are applicable to both the parties.

12. However, it may be noted that the return of income e-filed by the Petitioner in W.P. (C) No. 9358/2019, Religare Finvest Limited (RFL), declared a total income of Rs.506,61,50,010/- . The return of income was revised declaring total income of Rs. 504,21,26,280/-.

Contentions of the Petitioner

13. The Petitioner has impugned the aforesaid order, alleging that there is a gross violation of the principles of natural justice and the order has been passed without affording the Petitioner any opportunity of being heard. Mr. Ajay Vohra, learned Senior counsel for the Petitioners argued that the order under Section 141 (2A) leads to serious civil consequences and such an order cannot be passed as a matter of routine, but only if the circumstances so warrant. Petitioner was not afforded with a reasonable opportunity of being heard prior to directing special audit and, thus, the order is vitiated on account of violation of principles of natural justice. The order suffers from the vice of lack of fulfilment of jurisdictional conditions for directing special audit. He further submitted that Section 142 (2A) was amended pursuant to Finance Act, 2013 with effect from 01.06.2013. Prior to the amendment, special audit under the aforesaid provision could have been directed only in cases where the accounts of the assessee were “complex” in nature, and

having regard to the interests of Revenue. After the amendment of the said provision, the scope, of the provision has been expanded. However, the exercise of the power under the amended provision has to be guarded and exercised with circumspection. The expanded, enlarged provisions of Section 142 (2A) would still require, as a condition precedent, the Assessing Officer to demonstrate the complexity of the accounts of the assessee, which an ordinary prudent person, reasonably informed about accounts and law, is not in a position to comprehend. The provision of Section 142 (2A) cannot be construed to mean that in every case where there is a large volume of accounts and multiplicity of transactions, the Assessing Officer can direct the conduct of a special audit under the aforesaid provision. Such an interpretation would be highly irrational and illogical in as much as, in case of every assessee having substantial turnover and reported taxable income, it would become possible to order conduct of a special audit in routine merely on the ground that the volume of accounts and multiplicity of transactions is large. The nature of business of the Petitioner which involves dealing with lakhs of people, would necessarily result into a high turnover, which is more than Rs. 2000 crores. This does not mean that in case of an assessee having turnover in excess of Rs. 2000 crores, special audit has to be directed as a matter of rule or mechanically. He relied upon the decision of the Supreme Court in the case of *Sahara India (Firm)* (supra) to contend that the impugned order is wholly without jurisdiction, illegal and bad in law. Mr. Vohra rebutted all the comments/findings of Respondent No. 1 in the impugned order, and stressed that Respondent No. 1 has not made any attempt to understand the accounts of the Petitioner, and has proceeded with a premeditated mind to make a reference for special audit. Lastly, he argued

that the order of reference is not appropriate and has been passed on surmises and conjectures and by virtue of the said order, the AO bypassed the burden of undertaking the assessment to the special auditor who has been given the responsibility to verify the books of accounts of the Petitioner, to complete the assessment.

14. Learned counsel for the Revenue on the other hand, relied upon the judgment of this Court in *AT &T Communication Services India (P.) Ltd. Commissioner of Income Tax and Anr.* [2014] 362 ITR 1997 (DELHI) to contend that under Article 226, the Court ordinarily does not interfere with the order passed by the Assessing Officer under section 142(2A) of the Act. He urged that the order suffers from no infirmity and the AO has duly applied his mind and has after due consideration of the facts, in his discretion held that he requires the assistance of the special auditor.

Analysis and Findings

15. We have given our thoughtful consideration to the contentions raised by the parties. Section 142 (2A) of the Act provides that the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee, volume of the accounts, doubts about the correctness of the accounts, multiplicity of the transactions in the accounts or specialized nature of the business activity of the assessee and the interests of the revenue, may at any stage of the proceedings before him, direct the assessee to get the accounts audited by special auditor after obtaining previous approval of the Chief Commissioner or Principal Commissioner. The plain language of the provision indicates that in order to make reference for special audit under

Section 142 (2A) of the Act, certain essential jurisdictional conditions are required to be satisfied and in absence thereof, the direction for special audit may not be warranted. This provision was amended by the Finance Act, 2013 whereby the words “*volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialized nature of business activities of the Assessee*” have been inserted after the expression “the nature and complexity of the accounts”, w.e.f. 1.6.2013. Prior to the amendment, special audit under Section 142(2A) of the Act could have been directed only in case the accounts of the Assessee were “complex” in nature and having regard to the interests of the revenue. The reason behind the amendment can be inferred from the Memorandum Explaining provisions in the Finance Bill, 2013, which reads as follows:

“Direction for special audit under sub-section (2A) of section 142
The existing provisions contained in sub-section (2A) of section 142 of the Income-tax Act, inter alia, provide that if at any stage of the proceeding, 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 approval of the Chief Commissioner or Commissioner, direct the assessee to get his accounts audited by an accountant and to furnish a report of such audit.

The expression “nature and complexity of the accounts” has been interpreted in a very restrictive manner by various courts.

It is, therefore, proposed to amend the aforesaid subsection so as to provide that if at any stage of the proceedings before him, the Assessing Officer, having regard 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 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 of the Commissioner, direct the assessee to get his accounts audited by an accountant and to furnish a report of such audit.”

16. Mr. Vohra has argued that notwithstanding the amendment, the said provision must be read in proper context and perspective. He argued that the said expression would apply in situations where the volume of the accounts or the multiplicity of transactions in the accounts are disproportionate to the size, volume and the reportable taxable income of the assessee.

17. There cannot be any dispute regarding the proposition advanced by Mr. Vohra that Section 142 (2A) of the Act cannot be resorted to by the Assessing Officer on his mere *ipse dixit*. The expanded/enlarged provisions of Section 142 (2A) of the Act would still require the fulfilment of the conditions precedent for the Assessing Officer to exercise his jurisdiction for ordering a special audit. While upholding the constitutional validity of the amendment made by the Finance Act, 2013, this Court in ***Sahara India Finance Corporation Ltd. v. CIT*** (supra), has held that even after the amendment, it is imperative for the Assessing Officer to make a genuine attempt to understand the accounts before making a reference under the said section. The relevant passage of the said decision is para 36, wherein the principles emerging from the decision of the Supreme Court in the case of ***Sahara India (Firm) v. CIT*** (supra) have been discussed. Further the applicability of the ratio of the Supreme Court decisions, even to the amended Section 142 (2A) of the Act is evident from the following paras:

“28. The *rationale* for the amendment, therefore, is that the erstwhile expression “*nature and complexity of the accounts*” had been interpreted in a restrictive manner by courts. The petitioner submits that such an amendment runs afoul of the guarantee under Article 14 of the Constitution. Before dealing with the constitutionality of the aforesaid amendment, it would be fitting to recollect the basic principles that must be kept in mind by the Courts while dealing with the challenge to the constitutionality of a legislative enactment. These principles were succinctly stated by the Supreme Court in *Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar*, AIR 1958 SC 538:

“14. The principle enunciated above has been consistently adopted and applied in subsequent cases. The decisions of this Court further establish-

(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest;

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing

conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

15. The above principles will have to be constantly borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the laws.”

29. The above principles have been consistently followed by the courts in India and the law in relation to challenge on the constitutionality of an enactment on the touchstone of Article 14 was reiterated by the Supreme Court in *Subramaniam Swamy v. CBI*, (2014) 8 SCC 682 in the following terms:

“Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (i) discrimination, based on an impermissible or invalid classification, and (ii) excessive delegation of powers; conferment of uncanalised and unguided powers

on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders-if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is.”

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34. The task that this Court is, therefore, faced with is to determine whether the grounds added by amendment to Section 142(2A) of the Act, are of such nature that they violate Article 14 of the Constitution. In this regard, the mere possibility that the AO may abuse the discretion that the provision vests in him would be insufficient to declare the provision as unconstitutional. The Supreme Court in *Sahara India (Firm), Lucknow v. Commissioner of Income Tax*, [2008] 300 ITR 403 (SC), had the occasion to interpret Section 142(2A) of the Act, as it stood prior to the amendments in question. The Court was faced with the question as to whether Section 142(2A) required giving the assessee a pre-decisional hearing before proceeding to order a special audit under the provision. The Court noted:

“A bare perusal of the provisions of Sub-section (2A) of the Act would show that the opinion of the Assessing Officer that it is necessary to get the accounts of assessee audited by an Accountant has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessee; and (ii) the interests of the revenue. The word “and” signifies conjunction and not disjunction. In other words, the twin conditions of “nature and complexity of the accounts” and “the interests of the revenue” are the prerequisites for exercise of power under Section 142(2A) of the Act.

Undoubtedly, the object behind enacting the said provision is to assist the Assessing Officer in framing a correct and proper assessment based on the accounts maintained by the assessee and when he finds the accounts of the assessee to be complex, in order to protect the interests of the revenue, recourse to the said provision can be had. The word “complexity” used in Section 142(2A) is not defined or explained in the Act. As observed in Swadeshi Cotton Mills Co. Ltd. v. C.I.T., [1988] 171 ITR 634 (All) it is a nebulous word. Its dictionary meaning is: “The state or quality of being intricate or complex or that is difficult to understand. However, all that is difficult to understand should not be regarded as complex. What is complex to one may be simple to another. It depends upon one’s level of understanding or comprehension. Sometimes, what appears to be complex on the face of it, may not be really so if one tries to understand it carefully.” Thus, 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; appreciate the entries made therein and in the event of any doubt, 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 objective criteria and not on the basis of subjective satisfaction. There is no gainsaying that recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor. Similarly, the requirement of previous approval of the Chief Commissioner or the Commissioner in terms of the said provision being an inbuilt protection against any arbitrary or unjust exercise of power by the Assessing Officer, casts a very heavy duty on the said high ranking authority to see to it that the requirement of the previous approval, envisaged in the Section is not turned into an

empty ritual. Needless to emphasise that before granting approval, the Chief Commissioner or the Commissioner, as the case may be, must have before him the material on the basis whereof an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect the application of mind to the facts of the case.”

35. On the question of whether Section 142(2A) involves giving a predecisional hearing to the assessee, the Court held:

“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.”

36. Thus, what emerges from the *Sahara* (supra) decision of the Supreme Court in relation to Section 142(2A), can be summarized as under:

- (i) The Assessing Officer must make a genuine and honest attempt to understand the accounts maintained by the assessee.
- (ii) The opinion required to be formed by the Assessing Officer under Section 142(2A) must be based on objective criteria and not merely subjective satisfaction. The powers under the provision cannot be used by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts to the special auditor.
- (iii) The requirement of previous approval of the Chief Commissioner or Commissioner, casts a heavy duty on these authorities to ensure that this requirement is not reduced to an empty formality. Before granting the approval, the Commissioner or the Chief Commissioner, must have before him the materials on the basis of which the opinion has been formed by the Assessing Officer. The approval granted by the Commissioner or the Chief Commissioner must reflect application of mind to the

facts of the case. This requirement was elaborated by the Calcutta High Court in *West Bengal State Co-operative Bank Ltd. v. Joint Commissioner of Income Tax*, [2004] 267 ITR 345 (Cal), where it noted that-

“The Commissioner of Income Tax should not give any approval mechanically and if he finds that there is no examination of the books of account by the Assessing Officer before sending the proposal, he will not certainly give any approval. Under this section, the Commissioner of Income Tax does not exercise the jurisdiction of the appellate authority rather the approving authority. Approval means and connotes supporting and accepting of an act and conduct done by another person. Therefore, it would be his duty to examine on receipt of his proposal, whether the Assessing Officer has correctly done it or not, if he finds that this requirement has not been fulfilled then he must not approve of the same.”

(iv) In accordance with the principles of natural justice, the assessee must be given the opportunity of a pre-decisional hearing before action is taken under Section 142(2A).

37. While this decision of the Supreme Court was prior to the amendments inserted by the Finance Act, 2013, this Court sees no reason as to why these holdings of the Supreme Court in *Sahara* (supra) would not be applicable to the amended Section 142(2A). The fact that the AO's determination under this provision must be based on objective material and not subjective satisfaction, that he must make an honest attempt at understanding the accounts of the assessee, that the grant of approval by the higher authority must not be mechanical, that principles of natural justice must be followed by giving the assessee a pre-decisional hearing, would all be equally applicable even under the amended Section 142(2A). It would still be impermissible for the AO to shift the responsibility of auditing the accounts mechanically to the special auditor. In these circumstances, we fail to understand the petitioner's contention as to how the amendments would in effect nullify these procedural safeguards that the Supreme Court has read into Section

142(2A).”

(Emphasis supplied)

18. While there can be no quarrel with the proportion that the Assessing Officer while exercising jurisdiction under Section 142 of the Act should ensure compliance with the aforesaid view of this Court in ***Sahara India Finance Corporation Ltd.*** (supra), we are, however, not convinced with the submission of Mr. Vohra that notwithstanding the amendment, the scope of the said provision should be limited and restricted to only those categories of cases, where the volume of account, or the multiplicity of transactions are disproportionate to the size and volume of business and the reported taxable income of the assessee. Since the legislative intent while amending Section 142 was to expand and enlarge the scope of the jurisdiction of the Competent Authority to order special audit, by laying down the guideline for exercise of the said jurisdiction, it cannot be interpreted to give it a restrictive meaning. If the legislature has added new words in the grounds for ordering a special audit under section 142(2A), it would be contrary to all rules of construction to ignore the impact of the newly added words and to so construe the definition as if the newly added words were either not there or were intended to be otiose and redundant. Such an interpretation would neutralize the effect of the amendment and run counter to the legislative intent. From a bare reading of the amended provision, we are unable to discern a restrictive scope, as sought to be interpreted by Mr. Vohra. The AO can resort to the aforesaid provision under any of the circumstances, mentioned in the section. If the subjective satisfaction of the Assessing Officer is based on objective assessment, for any of the reasons specified in the amended provision, the court would not ordinarily interfere

with the exercise of the discretionary power vested with the AO under the said provision. Of course, the expanded provisions are not without fetters and safeguards. The power under Section 142 (2A) of the Act cannot be exercised lightly, and the Assessing Officer must exercise his discretion in a reasonable manner by taking into account all relevant and germane aspects. The exercise of the power would be subject to the guiding principles laid down by the Supreme Court in ***Sahara India (Firm)*** (supra), as notice by this Court in ***Sahara India Finance Corporation Ltd.***(supra).

19. Now let's examine the reasons assigned by Respondent No. 1 in the impugned order dated 06.018.2019 directing special audit. While testing the reasoning on the touchstone of the principles enunciated by the Supreme Court in ***Sahara India (Firm)*** (supra), we would like to underscore that while exercising jurisdiction under Article 226 of the Constitution of India, the Court does not sit in appeal over the order passed by the Assessing Officer. The subjective satisfaction is a subject matter which falls exclusively within the domain of the Assessing Officer. In Article 226, we would not like to tread or invade into the jurisdiction of the AO. As long as the exercise of the jurisdiction is based on cogent reasons, Court would certainly have the jurisdiction to examine whether the discretion to refer the account for special audit was exercised objectively, or not. However whether the material produced before the AO was sufficient for him to conclude "complexity " would essentially remain a matter falling in his discretion. In fact, the view expressed by this Court, in ***AT &T Communication Services India (P.) Ltd.*** (supra), lays down the scope of interference of the Court in such matters in the following words:

“16. The question whether the accounts and the related documents and records available with the A.O. present complexity is essentially to be decided by the A.O. and in this area the power of the court to intrude should necessarily be used sparingly. It is the A.O. who has to complete the assessment. It is he who has to understand and appreciate the accounts. If he finds that the accounts are complex, the court normally will not interfere under Article 226. The power of the court to control the discretion of the A.O. in this field is limited only to examine whether his discretion to refer the accounts for special audit was exercised objectively, as far as the accounts, records, documents and other material present before the A.O. would permit. There must be valid material before the A.O. from which he apprehends that there is complexity. As to what material would make the accounts complex is essentially for the A.O. to determine and unless his decision can be attacked on the ground of perversity or absolute arbitrariness or mala fide, it should not be interfered with. In the present case we are satisfied that the accounts including the documents, records and other material before the A.O. did make the issues for his decision complex requiring a special audit. We are accordingly not inclined to accept the contention of the assessee to the contrary.”

(Emphasis supplied)

20. Though the above decision was rendered in the context of the unamended provisions, views expressed concerning the scope of jurisdiction of the Court under Article 226 are still relevant and would be applicable. In view of the limited and guarded scope of judicial review, we now proceed to evaluate the impugned order. The Assessing Officer has taken a view that there is complexity in the accounts of the assessee. He is also of the view that the interests of the revenue are adversely affected. The relevant portion of the impugned order reads as under:

“15. Anomalies and complexities noted in the books of

accounts of the assessee:

During the course of assessment proceedings various anomalies and complexities were noted in the books of accounts of the Assessee company. These were communicated to assessee company vide show cause notice dated 30.05.2019 and subsequently vide show cause notice issued under section 142(2A) of the Act. The reply of the assessee company filed on 06.06.2019, 12.06.2019, 17.06.2019 and 28.06.2019, in this regard, have been considered and the same has been disposed of issue wise as under:

a. The assessee company is a Non-banking Finance Company (NBFC) engaged in the business of financing. The assessee borrowed loans from Various Banks, Financial Institutions and others on which interest was paid. The said loans were given to various parties and interest received from them was declared as income. Total loans of Rs. 682 Crores borrowed by the assessee company and total amount of Rs. 232 Crores lent by the assessee were outstanding as on 31/03/2016. The assessee declared interest income of Rs. 125.40 Crores during the year and has claimed interest expense of Rs. 110 Crores. The assessee has also claimed professional / litigation expenses of Rs. 3,53,45,032/-.

(a.i) Further, an amount of Rs. 432.92 Crores was invested by the company in its subsidiaries / associated concerns / group companies and an amount of Rs. 218.84 Crores was given as loans and advances to them. An amount of Rs. 24,17,69,927/- has been shared as expenses with its associated concerns during the year without any stated reasons/ basis. Thus, the transactions with the associated concerns / related parties involved huge amounts.

(a.ii) Enquiries were conducted and action taken against the assessee company by various Government agencies like Enforcement Directorate (ED), Serious Fraud Investigation (SFIO), Delhi Police (EOW) etc. In the said enquiries, it comes out that the assessee has diverted the funds for the benefit of promoter and promoter group companies and was involved in siphoning of funds borrowed by it by way of advancing money or paying expenses paid to its associated concerns or making investment in them in the form of shares.

(a.iii) The assessee was specifically raised query regarding the fact of misappropriation and siphoning of funds vide notice dated 30/05/2019 vide point no. 13. In this connection, report of the forensic audit of the assessee company got conducted by the SEBI which bears testimony to the said diversion/siphoning of funds, was also confronted to the assessee company.

(a.iv) The assessee categorically denied that some of the transactions mentioned therein were related to the assessee or entered into by it and further stated that the observations made by SEBI and Forensic Auditor in respect of transaction were not applicable. However, no such evidence was placed on record to show that these transactions were not entered into by the assessee or the same were not related to the assessee. Thus, an in-depth verification of the books of account is required to ascertain and establish the fact about these transactions.

b. The assessee company has recorded huge losses on account of investment made in the subsidiary / associated companies/ partnership firms etc. Capital gain / loss of Rs. 371,47,42,141/- has been claimed on sale of such investments during the year. The assessee was raised specific query regarding the said claim vide point no. 1 of the notice dated 30/05/2019. In reply the assessee company placed voluminous information in the form of agreement; balance sheets etc. on record which needs in depth verification for allowability of the said claim. The said information runs into 9 bulky volumes of more than 1000 pages. Justification regarding the investment into the subsidiary / associated companies/ partnership firms and resultant gain/loss has also not been provided.

c. The assessee has made provision of Rs. 279.25 crores for diminution in value of investment made in subsidiary company during the year. Each year such provisions are made for diminution in the value of shares of subsidiary company which creates a suspicion as to how the value of investment in subsidiaries can diminish at such a level. Despite being confronted on this issue no satisfactory reply with the help of relevant supporting evidences could be furnished by the assessee. In fact the reply needs in depth

backward integration and verification of the reasons/business expediency/sources having revenue implication that ultimately lead to such diminution.

d. The assessee claimed legal and professional fees of Rs. 3,53,45,032/- in its profit and loss account. The assessee was asked to substantiate the same vide point no. 3 of notice dated 30/05/2019. The assessee submitted copies of the invoices / bills of the said expenses. On perusal of the bills, it was observed that the same pertained to the litigation expenses related to various cases against company, Managing director, key personnel etc. Since a number of criminal cases have been launched against the company and its key personnel, so each and every bill along with the litigation status of each case needed in depth verification to examine the allowability of such expenses have been factually incurred solely & exclusively for the purpose of business of the assessee. The assessee company though queried on the issue calling for specific details and supporting evidence, did not file the complete details as required. Thus, prima facie it can not be denied that the personal expenses of the directors have been claimed as legal expenses of the assessee company.

e. There is multiplicity of transactions of borrowing, lending and investing with same parties or same nature of transactions with various parties. As already stated, that the assessee has borrowed funds of Rs. 682 crores and lent funds of Rs. 232 crore during the year under consideration. The assessee has lent money to various parties from whom interest has been earned. The funds have been borrowed and lent on different terms and conditions. However, the assessee has only provided lists in support without going into the detail as to how the revenue has been recognised on all the transactions of such nature and also amongst the parties to whom the money has been lent or obtained including the associated and group concerns.

f. Further, this is an NBFC company which is governed by RBI and is engaged in specialized nature of business activity and not a regular business involving manufacturing or trading. Various rules and regulations are applicable on such entities. This NBFC has undertaken transactions with its associated companies as a chain or series of transactions. The money has been rotated

through various companies through layering. Further, there are allegations of misappropriation of funds. Thus, the accounts are not only voluminous but are complex and need in depth verification for ascertaining the actual nature of transactions.

(f.i) The assessee was asked to produce books of account. However, the assessee stated in para 11.1 of its submissions as under:

“With reference to the same, it is submitted that the assessee has already submitted ledger accounts, party-wise details and relevant information with respect to the points raised vide the subject mentioned SCN. The relevant extracts of the documents relating to the anomalies as mentioned in the SEBI report have been enclosed as per the reply in the preceding paras. However, of your goodself required any other information in respect of books of accounts, then please let us know specific requirement, the assessee shall submit the same.....”

(f.ii) This shows that the assessee is reluctant to produce the books of account, as it will reveal the true nature of the transactions undertaken by the assessee. It must be appreciated that ledgers of particular expenses helps to understand the nature of the said expense but the books of account need to be verified in detail to understand the overall scenario of the business of the assessee and transactions undertaken by it. Non-production of the books of account further strengthens the view about the correctness of the same.

g. As of now, enquiries were conducted and action was taken against the assessee company by various Government agencies like Enforcement Directorate (ED), Special Fraud Investigation (SFIO), Delhi Police (EOW) etc. In the said enquiries, it comes out that the assessee has diverted the funds for the benefit of promoter and promoter group companies and was involved in siphoning of funds borrowed by it, by way of advancing money or paying expenses paid to its associated concerns or making investment in them in the form of shares. In fact the Promoter director vide his complaint to Delhi Police(EOW) has himself alleged that accused(s) as mentioned in the complaint have carried out and orchestrated serious financial fraud in two companies namely Religare Enterprise Limited and

ReligareFinvest Limited in addition to RHC Holdings (P) Ltd and such fraud has been undertaken by the accused(s) in a pre-planned manner through various dubious transaction(s). This fact has also been amply illustrated, as already mentioned, in the Forensic audit report of the SEBI dated 12.12.2018 shared with the department and also confronted to the assessee company by the Assessing officer.

(g.i) The assessee has no satisfactory answer to the said report and issues related to it. It is pertinent to mention that this is when the assessee company itself in a series of complaints/petitions before various regulatory authorities including EOW wing of Delhi Police have since been alleging that diversion of funds has been made and thus been claiming its retrieval through suitable Statutory order from the competent authorities. Thus, the fact of diversion/ siphoning of funds remaining un-refuted, stands as established and revenue implication involved in it can only be investigated through a special audit by a technical expert like a special auditor.

h. Further it is held by judicial authorities all over the country that assessing officer is duty bound to determine the correct income/loss of each assessment year of an assessee. The purpose of direction for special audit is to ensure that a correct assessment order is passed so that revenue is not deprived of its dues. The direction to the Assessee for compulsory audit of accounts u/s 142(2A) of the Income Tax Act does not affect the Assessee's right especially in view of the fact that cost of audit is not payable by the Assessee but by the department and therefore, assessee's interest are not affected in any way except to the extent of correct determination of taxable income.

i. In view of the above discussed facts the statutory provisions with regard to ordering of special audit is satisfied in this case in view of the basic two ingredients i) Nature and complexity of accounts, its voluminous, doubts about the correctness of accounts, multiplicity of transactions, specialized nature of business activity of the assessee, and ii) Interest of the revenue for forming an opinion for the purpose of special audit u/s 142(2A) is satisfied in this case.

j. Therefore, I am of the considered opinion in view of foregoing

discussion and complexity involved in information submitted and in the interest of revenue, that this is a fit case for invoking provisions of section 142(2A) of the Income Tax Act, 1961 so as to determine correct and true income of the Assessee company for the A.Y. 2013-14.”

(Emphasis supplied)

21. The Assessing Officer deduced that the queries raised by the questionnaire dated 30.05.2019 remain conclusively unanswered. The Assessing Officer has held that the Petitioner company was unable to cull out the requisite details from the books of accounts to be furnished during the course of assessment proceedings, and held that the accounts were not only voluminous but were also complex for him to handle deftly. He therefore, felt a need to have the assistance of an expert. Further, the fact of diversion/siphoning of funds has also come out in the forensic audit report of SEBI dated 12.12.2018 and, therefore, in order to protect the interest of the Revenue, in-depth verification is required. It is also not in dispute that the direction to the assessee for compulsory audit of accounts under Section 142 (2A) of the Income Tax Act does not have any financial impact on the assessee, as the cost of audit is not payable by the assessee, but the department. The special audit would only assist the department to correctly determine the taxable income. Thus, having regard to the nature and complexity of the accounts being voluminous and the doubts about the correctness which are evident from the material before the Assessing Officer, we cannot say the findings of the Assessing Officer are without application of mind.

22. There is no quarrel regarding the proposition advanced by Mr. Vohra

that the Assessing Officer has a duty to apply his mind and not to resort to the provisions of special audit, as a matter of routine. The discretion that the Assessing Officer exercised for ordering special audit, cannot be said to be arbitrary or mala fide or a routine or casual exercise. In these circumstances, on the basis of the reasons recorded in the impugned order, it cannot be said that there was no genuine attempt on the part of the Assessing Officer to understand the nature of his business, its method of accounting, or to understand the nuances of the books of accounts or documents. The impugned order clearly reflects the reasons for ordering a special audit. The Assessing Officer initially issued a notice under Section 142(1) on 03.08.2018 along with detailed questionnaire including the reason for selection of case for scrutiny under Section 143 (3). Thereafter, a fresh notice under Section 142 (1) was issued on 30.10.2018 along with pending and fresh queries. Since there was continued non compliance, a show cause notice in respect of specific queries raised therein was issued on 30.05.2019. Another notice dated 03.06.2019 in the form of corrigendum to show cause notice was issued, calling upon the Petitioner to produce the books of accounts. The questionnaire raised by the Assessing Officer was not specifically answered, and if the same had been satisfactorily answered, he would have found the same to be useful for verification of various claims made by the assessing companies in its return of income for the assessment year under consideration [AY 2016-17]. The Petitioner also placed reliance on the judgment of the Kerala High Court in ***Muthoottu Mini Kuries v Deputy Commissioner of Income Tax*** 250 ITR 455 (Kerala) to contend that the direction to the assessee to get accounts audited without hearing the assessee would be unjustified. However, the ratio of the said judgment is not

applicable to the facts of the present case. Each case turns on its own facts and the present case is distinguishable from the said judgment keeping in view the facts and circumstances in both the cases. For the foregoing reasons it is, thus, evident that the Petitioner was given sufficient opportunity of being heard. Thus, the contention of violation of principles of natural justice is also without merit.

23. Sections 142 (2A) (2D), 142 (3) and 142 (4) are the relevant provisions dealing with the considerations that are to be weighed while directing special audit. The Supreme Court has also laid down the guiding principles relating to conduct of special audit. In essence, the Supreme Court has underlined that the opinion required to be formed must be based on objective criteria, and not subjective satisfaction. On a reading of the impugned order, it is demonstrated that the Assessing Officer has examined the objections raised by the Petitioner and has exercised his jurisdiction objectively on due consideration of the records, documents and other material before him for ordering a special audit. There is no perversity or arbitrariness in the order of the Assessing Officer. On careful perusal of the afore-noted reasons spelt out in the impugned order, we are of the considered opinion that the Assessing Officer has carefully scrutinized the objections raised by the Petitioner and has fairly and objectively arrived at the conclusion that special audit is required.

24. Before parting, we would also like to deal with the objections raised qua the terms of reference. We are unable to agree with Mr. Vohra that the Assessing Officer has directed the special audit to undertake the entire work

of assessment. We do not find any reason to hold that the Assessing Officer has shifted the responsibility of scrutinizing the accounts and passed the buck to the special auditor, as has been contended by the Petitioner. The special auditor who has been appointed, has been asked to give comments on several issues. Of course, while carrying out the audit, the special auditor would have to verify the books of accounts of the Petitioner so that the report furnished by him, is of assistance to the Assessing Officer to determine the taxable income. We have perused the terms of reference and do not find the same to be inappropriate, especially having regard to the fact that despite the honest attempt made by the Assessing Officer in understanding the accounts of the assessee, it has not yielded the desired results, thereby warranting the appointment of the special auditor. At this stage, we cannot hold that there is no co-relation between the aspects which require scrutiny and the terms of reference for the special auditor under the law. Petitioner can raise such objections at the appropriate stage.

25. In view of the afore-going observations, the Court is of the opinion that there is no infirmity in the order directing the special audit. The writ petitions have no merit, and consequently the same are dismissed. The assessee(s) in both the petitions are directed to cooperate with the special auditor. There shall be no order as to costs.

SANJEEV NARULA, J

VIPIN SANGHI, J

AUGUST 28, 2019/nk