**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Date of decision : 02.09.2021

1. CWP-16184-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

2. CWP-16187-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

3. CWP-16189-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents

4. CWP-16191-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

5. CWP-16192-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

6. CWP-16193-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

7. CWP-16195-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

8. CWP-16197-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

9. CWP-16196-2021 (O&M)

Bajwa Developers Limited …. Petitioner

Vs.

Commissioner of Income Tax and Another ….Respondents.

CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MRS. JUSTICE ALKA SARIN

Present: Mr. Alok Mittal, Advocate, for the petitioner.

AJAY TEWARI, J. (ORAL)

1. Taken up through video conferencing.

2. This common order shall dispose off the above-mentioned nine writ petitions filed by the petitioner challenging the direction issued under Section 142 (2A) of the Income Tax Act, 1961 (hereinafter referred to as, 'the Act'), to submit its accounts to a Special Auditor for the years for which the assessment is pending.

3. The brief facts are that a search was conducted on the premises of the petitioner, wherein in an underground room two computers were found, which seemed to be in the nature of parallel account books. There

was huge mismatch in the figures which had been given in the balance sheet of the petitioner *vis-a-vis* the data (ERP data) which was stored in those computers. Several notices were issued under Section 142 (1), in addition to notices under Section 143(2) of the Act and it was mentioned that against all the notices that either there was no compliance or part replies had been received and further adjournments had been sought. The cavalier reply which was offered by the petitioner, when it was asked to explain the mismatch, was that this data was not correct and the actual data was reflected in the books of accounts. The revenue contacted the service provider, who stated that the ERP data, which was stored in those computers was correct as per information given by the officers of the petitioner-company. There was also a back up service provider, who was also contacted by the Revenue, who also confirmed that even the back-up data was as per the information and material provided by the officers of the petitioner-company. It was, *inter alia*, in these circumstances that a notice was given to the petitioner to show cause why a direction under Section 142(2A) of the Act be not given. The petitioner filed objections to the same. Those were considered and a detailed order was passed by the Assessing Officer running into 25 pages dealing with each one of the objections and ultimately rejecting the same and recommending the matter to the Principal Commissioner, who then approved the act.

4. Learned counsel has argued that there is a catena of judgments right from ***M/s Sahara India, Lucknow Vs. Commissioner of Income Tax Central-1 and Another, 2008(14) SCC 151*** by the Supreme Court and ***DLF Commercial Project Corporation and Others Vs. Assistant Commissioner of Income Tax and Others, 2013 (353) IRT 211***, by a Division Bench of a Delhi High Court, wherein it has been categorically laid down that it would

be necessary for the Assessing Officer to go through the accounts and in the present cases the accounts have not been gone into. Particular reference has been made to paragraph six of the judgment of ***M/s Sahara India, Lucknow (supra)***, which is quoted below:-

> *"6. 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. Vs. C.I.T. , 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."

5. At the very outset, it has to be noticed that the foundational question which had come before the Supreme Court in the ***M/s Sahara India, Lucknow (supra)*** was formulated by their Lordships in para 7 of the same judgment , which is quoted herein:-

"7. However, the question for adjudication is whether in view of the fact that the said provision does not postulate the requirement of a hearing before an order for special audit is passed, a pre-decisional hearing is required to be given to the assessee or not?"

6. Further even in ***DLF Commercial Project Corporation*** (Supra), the facts were that the Assessing Officer had called for reports of some accounts and on one date the Assessing Officer had given an opinion that

special audit was not required but on the very next date he passed the order and issued a direction under Section 142 (2A) of the Act.

7. Learned counsel for the petitioner has further relied upon a judgment of the Delhi High Court passed in ***Delhi Development Authority and Another Vs. Union of India and Another 2013 (350) ITR 432*** and particularly para 24 thereof, which is reproduced as under:-

> *"24. We have referred to the aforesaid note in detail for two reasons. Firstly, the note reveals that the Assessing Officer felt that the case required detailed scrutiny or monitoring, verification of entries, which were substantial in number. Detailed scrutiny of large number of entries by itself, on standalone basis, will not amount to complexity of accounts. The accounts do not become complex because merely there are large number of entries, e.g., a petrol pump may have substantial sales, to thousands of customers daily at prices fixed under law/Rules, but this by itself will not be the accounts complex. Similarly, an Assessing Officer is required to scrutinize the entries and verify them, but this does not require services of a special auditor or a Chartered Accountant to undertake the said exercise. Section 142(2A) is not a provision by which the Assessing Officer delegates his powers and functions, which he can perform to the special auditor. The said provision has been enacted to enable the Assessing Officer to take help of a specialist, who understands accounts and accounting practices to examine the accounts when they are complex and the Assessing Officer feels that he cannot understand them and comprehend them fully, till he has help and assistance of a special auditor. Interest of the Revenue being the other consideration. In the present case, the Revenue has not submitted that test check of entries was undertaken, but anomalies or mistakes were detected. For proceeding further, and to compute the taxable income, help and assistance of an accounting expert was required. Secondly, we notice that the*

Assessing Officer felt that special auditor is required for determining and deciding certain legal issues, i.e., nature and character of Nazul I and Nazul II land, payments received and the treatment of the said payments, receipts or expenditure in the books for the purposes of taxation. The special auditor cannot go into and examine the said legal issue or question regarding taxability. This has to be determined and decided by the Assessing Officer. This determination/decision requires passing of the assessment order. However, at this stage, the Assessing Officer should indicate his prima facie or tentative view on why the legal issue requires examination of accounts by the specialist. A Chartered Accountant, a specialist in accounts does not have a role to play and cannot be delegated and asked to decipher, decide or express his opinion on nature and character of Nazul I or Nazul II land receipts and payments. In a given case, the complexities of account and the legal issue may be intertwined or connected and, therefore, examination of accounts may indirectly or directly require his opinion on a legal matter/issue, but this is not true or so stated in the present case. The case and the stand of the assessee is that as per the statute, including the Rules, Nazul I and Nazul II land, payments received, expenditure incurred etc., belong to the Central Government and nothing whatsoever can be attributed to them. There is no examination, consideration of the legal aspect and formation of a tentative view. The decision on this legal issue cannot be transposed and passed to the Chartered Accountant as a special auditor as he is not a specialist and mandated by the Act to undertake the said exercise. The case of the assessee is that it is maintaining separate accounts for Nazul I and Nazul II lands and the General Development Account. The said accounts are audited by the Comptroller and Auditor General and have been accepted by the Central Government.

8. However, in paragraph 13 of the same judgment it has been noticed as follows:-

"13. The aforesaid observations are relevant as it is accepted by the Revenue that for the assessment year 2003-04 and 2004-05, the Assessing Officer did not call for, examine or consider the books of accounts or even sample accounts. Highlighted portion of the aforesaid observations is clearly to the contrary and requires examination of the books by the Assessing Officer. Failure to even call for books of accounts or relevant accounts and examination thereof is an indication of the casual and unacceptable approach and exercise of power. It was contended by Mr. A.S. Chandhok, Additional Solicitor General that in this case books of accounts were not required to be examined as the notes of accounts stated/recorded by the assessee's auditor itself justify and establish complexities in accounts and also disclose the need to have special audit in the interest of Revenue. <u>In the present case, we are not concerned with an assessee who does not maintain books of accounts as per law or has duplicate books of account. It is a case of a statutory authority which is maintaining books of accounts</u>.

Emphasis supplied

xxx xxxx xxx xxx xxx."

9. In the present cases, as pointed out, there is evidence of duplicate accounts. It is trite to state that a judgment is only an authority on the facts of that case. Further, no doubt a direction of special audit entails civil consequences, but ultimately it is not an order which can be said to be *ex facie* prejudicial to the assessee because it only enables the exact financial position to come on the record. In the present cases, it is noticed in the order that there are 11,000 ledgers, which have to be scrutinized. It has also been found that apart from the facile explanation that the ERP data was not correct, no further explanation was given by the petitioner about the mis-match.

10. The learned counsel for the petitioner further argued that the onus was on the Assessing Officer to go through the record and the accounts which he failed to discharge only because the department sat on the matter despite the fact that the limitation for assessment was expiring within a few days. However, the version of the Assessing Officer, as has come in the impugned order, is that it was actually the petitioner who was seeking adjournments to ensure that the limitation would expire by seeking adjournments time and again.

11. In the totality of circumstances, we have not been able to persuade ourselves that the direction for special audit in the facts and circumstances of the present case can be held to be illegal.

12. Petitions are dismissed accordingly.

13. Since, the main cases are decided, pending applications stand disposed of.

(AJAY TEWARI)
JUDGE

(ALKA SARIN)
JUDGE

September 02, 2021
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NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO