
(2017) 02 GUJ CK 0189

GUJARAT HIGH COURT

Case No: 1266 of 2017

ULHAS SECURITIES
PVT LTD

APPELLANT

Vs

DEPUTY
COMMISSIONER OF
INCOME TAX

RESPONDENT

Date of Decision: Feb. 13, 2017

Acts Referred:

- Constitution of India, Article 226 - Power of High Courts to Issue certain writs
- Income Tax Act, 1961, Section 142(1), Section 142(1), Section 142(1), Section 142(1), Section 132, Section 132, Section 132, Section 132, Section 142, Section 142, Section 142, Section 142, Section 142(2A), Section 142(2A), Section 142(2A), Section 142(2A), Section 153C, Section 153C, Section 153C, Section 153C, Section 142(3), Section 142(3), Section 142(3), Section 142(3), Section 142(2D), Section 142(2D), Section 142(2D), Section 142(2D)
- Inquiry before assessment - Search and seizure - Inquiry before assessment - Inquiry before assessment - Assessment of income of any other person.- - Inquiry before assessment - Inquiry before assessment

Hon'ble Judges: M R Shah, B N Karia

Bench: Division Bench

Advocate: S N Divatia, Mainsh Bhatt, Mauna M Bhatt

Final Decision: Dismissed

Judgement

1. By way of this petition under Article 226 of the Constitution of India, the petitioner/assessee has prayed for an appropriate writ, direction and order to quash and set aside the impugned order dated 15.12.2016 passed under Section 142(2A) of the Income Tax Act directing to appoint Special Auditor for AY 2009-10 to 2015-16.

2. The facts leading to the present Special Civil Application in nutshell are as under:

2.1. That the assessment proceedings under Section 153C of the Income Tax Act for AY 2009-10 to 2014-15 is pending before the Assessing Officer. That the assessee is carrying on the business of trading in shares and securities as well as financing. That approximately 40,000/papers in 45 gunny bags in the case of Asaram Bapu and Narayansai Group were seized by the Police Authority. That the Income Tax Authority requisition in the said document under Section 132 of the Act in the case of Asaram Bapu and Narayansai Group on 09.03.2015 from Police Authorities, Surat. That on the basis of the same, the petitioner was served with the notice under Section 153 C of the Act for block period i.e AY 2009-10 to 2013-14 and the petitioner assessee was required to furnish return of income under Section 153 C of the Act for the aforesaid year. That the petitioner assessee was served with the questionnaire by way of notice under Section 142(1) dated 18.07.2016 on the basis of the requisition material, statements and loose papers etc. The petitioner assessee was also asked to furnish various details such as ledger accounts, bank statements, confirmatory letters from unsecured depositors etc. During the course of block assessment for the aforesaid period, AO was of the opinion that looking to the complexity and multiplicity nature of material and the account of the assessee for the aforesaid period are required to be audited by the Special Auditor. Therefore, the AO served with the show cause notice dated 11.11.2016 upon the petitioner assessee and was given the opportunity of being heard as required in proviso to Section 142(2A) of the Income Tax Act and the assessee was called upon to show cause as to why the account for AY 2009-10 to 2015-16 may not be audited by the Special Auditor under Section 142(2A) of the Act. That the hearing for the aforesaid purpose was fixed on 22.11.2016. It appears that having been served with the aforesaid notice received on 17.11.2016, the petitioner assessee vide communication dated 21.11.2016 requested for 15 days time to submit the reply. Vide communication dated 22.11.2016, AO granted time upto 1.12.2016 and the hearing was fixed on 1.12.2016. That thereafter, vide communication dated 30.11.2016 the assessee submit its reply and submit that as the books of accounts are duly audited, there seems no need for another audit by special audit. It was submitted that even the regular assessment to have been carried out on the basis of such annual account and therefore, also there is no need for special audit. It was further submitted that the various queries raised in the communication dated 14.10.2016 have been replied for almost five years out of 7 years and same can very well be verified during the assessment proceedings and the AO is having much more authority and powers as compared to special auditor and therefore, there is no need for special audit in connection with the issue raised in communication dated 14.10.2016. It appears that thereafter the said objection came to be disposed of by the AO vide order / communication dated 5.12.2016. That thereafter, AO sought approval of the Principal CIT (Central Circle), Ahmedabad who accorded approval vide his letter dated 14.12.2016. That thereafter, AO has passed impugned order dated 15.12.2016 appointing Special Auditor for AY 2009-10 to 2015-16.

2.3. Feeling aggrieved and dissatisfied with the impugned order passed by the AO passed under Section 142(2A) of the Act appointing Special Auditor for the AY 2009-10 to 2015-16, the assessee has preferred present Special Civil Application under Article 226 of the Constitution of India.

3. Shri S.N. Divatia, learned advocate has appeared on behalf of the petitioner assessee and Shri Manish Bhatt, learned counsel has appeared on behalf of Revenue who is on caveat.

3.1. The impugned order is challenged by the petitioner on the following grounds.

(1). Insufficient opportunity.

(2). All the conditions for appointment of Special Auditor under Section 142(2A) are not satisfied.

(3). The Special Auditor is directed only with a view to extend the period of limitation to frame block assessment.

3.2. Shri Divatia, learned advocate for the petitioner assessee has vehemently submitted that in the facts and circumstances of the case, the impugned order of appointing Special Auditor is bad in law, contrary to the provision of Section 142(2A) of the Act and in breach of principles of natural justice as sufficient opportunity has not been given to the petitioner assessee.

3.3. It is vehemently submitted by Shri Divatia, learned advocate for the petitioner assessee that notice dated 11.11.2016 was served upon the petitioner assessee on 17.11.2016, thereafter petitioner assessee asked for 15 days time to respond to the same as a five years material was required to be considered. However, the AO granted only 10 days time and therefore, the petitioner assessee could file their reply dated 31.11.2016 and the detailed reply could not be filed by the assessee. It is submitted that thereafter the impugned order has been passed on 15.12.2016. It is submitted that therefore, it can be said that no sufficient opportunity has been given to the petitioner assessee. It is submitted that therefore, the impugned order can be said to be in breach of principles of natural justice.

3.4. It is further submitted by Shri Divatia, learned advocate for the petitioner that the entire exercise of giving direction for Special Audit is aimed at seeking extension of time for finalizing the assessment proceeding as the period for framing the block assessment was likely to come to end.

3.5. It is further submitted by Shri Divatia, learned advocate for the petitioner that even otherwise all the conditions for special audit under Section 142(2A) of the Act are not satisfied in the present case.

3.6. It is further submitted by Shri Divatia, learned advocate for the petitioner that the respondent has directed the Special Auditor as per para 6 of the impugned order to verify various claims, purchase of assets, eligibility for exemptions etc. which are taken care of in the tax audit and do not require special audit. It is submitted that special audit cannot be directed for preparing new books of accounts as per the directions of AO.

3.7. It is further submitted by Shri Divatia, learned advocate for the petitioner that during the block assessment and the AO has served the questionnaire upon assessee for which, the AO has passed the order of special audit, which have been answered by the assessee. It is submitted that therefore, the purpose for special audit will be taken care by the AO during the block assessment.

3.8. It is further submitted by Shri Divatia, learned advocate for the petitioner that as such the petitioner/assessee has nothing to do with 40,000/pages of documents requisitioned and / or has nothing to do with the Sant Shri Asharamji Ashram and Shadahaks whose name figured in the requisitioned document. It is submitted that therefore, in absence of proving relevance of such material, respondent has materially erred in directing the special audit. It is submitted that the respondent has not reached to the satisfaction in objective manner of directing the special audit.

3.9. It is further submitted by Shri Divatia, learned advocate for the petitioner that even in the impugned order it is not stated by the AO that in the interest of Revenue and / or to protect the interest of the Revenue again are required to be audited through special auditor. It is submitted that in absence of such case / claim, the impugned order under Section 142(2A) of the Act is not sustainable as the conditions for special audit under Section 142(2A) of the Act are not satisfied.

Making above submission, it is requested to allow / admit the present Special Civil Application and grant the relief as prayed for.

4. Present petition is vehemently opposed by Shri Manish Bhatt, learned counsel for the Revenue.

4.1. It is vehemently submitted by Shri Bhatt, learned counsel for the Revenue that in the facts and circumstances of the case and looking to the complexity and multiplicity of transaction visavis the requisitioned material i.e. 40,000/papers found from 42 gunny bags, in which, there is ample material with the AO connecting the petitioner assessee that the requisitioned material and the persons / Sadhak whose names figured in the requisitioned material, the AO is justified in passing the order under Section 142(2A) of the Act for special audit for AY 2009-10 to 2015-16.

4.2. It is submitted that Section 142 (2A) of the Act has been amended and all the conditions mentioned in the amended Section 142(2A) of the Act have been satisfied while passing the impugned order under Section 142(2A) of the Act.

4.3. It is submitted that the impugned order has been passed after giving an opportunity to the petitionerassessee as per proviso to Section 142(2A) of the Act and after considering the reply submitted by the petitionerassessee dated 30.11.2016 thereafter the impugned order has been passed after getting approval from the higher authority. It is submitted that therefore, the impugned order cannot be said to be breach of principles of natural justice as alleged. It is submitted that even in the memo of petition no such ground is taken that no sufficient opportunity has been given to the petitioner.

4.4. It is submitted by Shri Bhatt, learned counsel for the Revenue that object and purpose of special audit is to facilitate the AO in arriving at right conclusion and to arrive at correct taxable income. It is submitted that even after the report is submitted by the special auditor considering Section 142 of the Act, thereafter the assessee shall be given the opportunity to make submission on the report of the special auditor and he shall be furnished copy of the report of the special auditor. It is submitted that therefore, as such no prejudice shall be caused to the assessee if the account for the period between the 2009-10 to 2014-15 are audited by the special auditor. It is further submitted that merely because the AO can consider and / or verify the audited account and / or account of the assessee are audited again is no ground not to appoint special auditor under Section 142(2A) of the Act. It is submitted that if the AO is of the opinion that books of account are complex in nature and there is multiplicity of transactions, AO is justified in passing the order under Section 142(2A) of the Act.

4.5. It is submitted that in the present case there are ample evidence in the requisitioned material (42000 objection recovered from the 45 gunny bags) connecting the

petitionerassessee with the Shadahaks and rotation of fund and in flowing of funds through Shadahaks (brought in as unsecured loan by the petitionerassessee) also established the multiplicity of transaction and it also established the multiplicity of transaction and therefore, in order to arrive at correct taxable income and the extent of real fund flow and to identify the real persons whose funds are being rotated, the AO is justified in passing the order of special auditor under Section 142(2A) of the Act.

Making above submissions and relying upon the decision of the Delhi High Court in the case of DLF Ltd and Another vs. Additional Commissioner of Income Tax And Another reported (366) ITR 390 (Delhi) and Section 142(2A) of the Act, it is requested to dismiss the present petition.

5. In reply, Shri Divatia, learned advocate for the petitionerassessee has submitted that the decision of the Delhi High Court in the case of DLF Ltd and Another (supra) shall not be applicable to the facts of the case on hand.

6. Heard the learned advocates for the respective parties at length.

6.1. At the outset, it is required to be noted that the impugned order has been passed by the AO of special audit in exercise of powers under Section 142(2A) of the Act. Therefore, while considering the legality and validity of the impugned order passed under Section 142(2A) of the Act, Section 142 of the Act is required to be referred to and consider, which read as under:

"142. Inquiry before assessment.(1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under section 115WD or section 139 or in whose case the time allowed under subsection (1) of section 139] for furnishing the return has expired a notice requiring him, on a date to be therein specified,

(i) where such person has not made a return within the time allowed under subsection (1) of section 139 or before the end of the relevant assessment year], to furnish a return of his income or the income of any other person in respect of which he is assessable under this Act, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, or :

Provided that where any notice has been served under this subsection for the purposes of this clause after the end of the relevant assessment year commencing on or after the 1st day of April, 1990 to a person who has not made a return within the time allowed under subsection (1) of section 139 or before the end of the relevant assessment year, any such notice issued to him shall be deemed to have been served in accordance with the provisions of this subsection,

(ii) to produce, or cause to be produced, such accounts or documents as the Assessing Officer may require, or

(iii) to furnish in writing and verified in the prescribed manner information in such form and on such points or matters (including a statement of all assets and liabilities of the assessee, whether included in the accounts or not) as the Assessing Officer may require :

Provided that-

(a) the previous approval of the Joint Commissioner shall be obtained before requiring the assessee to furnish a statement of all assets and liabilities not included in the accounts ;

(b) the Assessing Officer shall not require the production of any accounts relating to a period more than three years prior to the previous year.

(2) For the purpose of obtaining full information in respect of the income or loss of any person, the Assessing Officer may make such inquiry as he considers necessary.

(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below subsection (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.

(2B) The provisions of subsection (2A) shall have effect notwithstanding that the accounts of the assessee have been audited under any other law for the time being in force or otherwise.

(2C) Every report under subsection (2A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer :

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 subsection (2A) is received by the assessee.

(2D) The expenses of, and incidental to, any audit under subsection (2A) (including the remuneration of the accountant) shall be determined by the Chief Commissioner or Commissioner (which determination shall be final) and paid by the assessee and in default of such payment, shall be recoverable from the assessee in the manner provided in Chapter XVIII for the recovery of arrears of tax :

Provided that where any direction for audit under subsection (2A) is issued by the Assessing Officer on or after the 1st day of June, 2007, the expenses of, and incidental to, such audit (including the remuneration of the Accountant) shall be determined by the Chief Commissioner or Commissioner in accordance with such guidelines as may be prescribed and the expenses so determined shall be paid by the Central Government.

(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under subsection (2) or any audit under subsection (2A) and proposed to be utilised for the purposes of the assessment.

(4) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year."

6.2. At this stage, it is required to be noted that Section 142 (2A) of the Act has been amended w.e.f. 1.6.2013 and it provides that if at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant. It also further provides that 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. As per Section 142(2A) of the Act every information under subsection (2A) shall be furnished by the assessee to the Assessing Officer. As per subsection 142(2D) the expenses of any audit under subsection (2A) including the remuneration of the accountant shall be paid by the Central Government (after 1.6.2007). As per subsection (3) of Section 142, the assessee shall be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under subsection (2) or any audit under subsection (2A) and proposed to be utilised for the purposes of the assessment. Thus, from the aforesaid provision, it appears that object and purpose of special audit is as such to facilitate the AO to arrive at correct taxable income and for which the AO is authorized to direct the assessee to get books of account audited by the accountant authorized by the AO, in case , AO is of the opinion that books of accounts are complex in nature and there are multiplicity of transactions, for which, accounts are required to be audited through special auditor. As observed herein above and even as per subsection (3) of Section 142 ample opportunity shall be available to the assessee to make submission/ comments on the report of the special auditor and therefore, there shall not be any prejudice caused to the assessee if the accounts are ordered to be audited through special auditor under Section 142(2A) of the Act. With this, challenge to the impugned order is required to be considered.

7. Identical question came to be considered by the Delhi High Court in the case of DLF Limited and Another (supra). In the said decision, the Delhi High Court has considered the scope, ambit and powers of the AO while passing order under Section 142(2A) of the Income Tax Act. In the said decision, it is observed that Section 142(2A) of the Act is enabling provision to help and assist the Assessing Officer to complete the scrutiny assessment with the assistance of an accountant.

In para 10, 11, 26 and 27, the Delhi High Court has observed as under:

10. Aforesaid rulings when appraised and reflected, state that while examining the question of complexity in accounts, we have to apply the test of "reasonable man by " replacing the word and qualities of a reasonable man, with the word and qualities of a reasonably competent Assessing Officer. The question of complexity of accounts has to be judged applying the yardstick or test; whether the accounts would be WPC 2363/2013 Page 8 of 21 complex and difficult to understand to a normal assessing officer who has basic understanding of accounts etc., without the aid, assistance and help of a special auditor. Thus due regard has to be given to nature and character of transactions, method of accounting, whether actuarial were adopted for making entries, basis and effect thereof, etc., though mere volume of entries might not be a justification by themselves as volume and complexity are somewhat different. Accounts should be intricate and difficult to understand. Every scrutiny assessment entails investigation and verification of the books of accounts, genuineness of the transactions or entries reflected in the books, computation of income etc. It is an exercise which demands expertise and a degree of skill to understand the accounts and decipher whether true and full income has been disclosed; whether there has been jugglery in the accounts or camouflage has been adopted. No undesirable assumptions should be made and a return filed is presumed to be correct, but a deep and in depth scrutiny depending upon the facts may be warranted. Section 142(2A) is an enabling provision to help and assist the Assessing Officer to complete scrutiny assessment with the help of assistance of an accountant.

11. There has been substantial expansion of scope and ambit of Special Audit under Section 142(2A) of the Act with effect from 1st June, 2013. The amended section has been widened to include volume of accounts, doubts about correctness of accounts, multiplicity of transactions in the accounts or specialised nature of business activity of an assessee. These amendments by Finance Act, 2013 with effect from 1st June, 2013, substitute the words "nature and complexity of accounts of the assessee". We are not concerned with the said amendment in the present case as the impugned order in question directing special audit was passed on 25th March, 2013, before the amendments became WPC 2363/2013 Page 9 of 21 effective. We are, therefore, primarily concerned with whether or not keeping in view the nature and complexity of accounts and the interest of Revenue direction for special audit is justified for the reasons set out in the order dated 25th March, 2013. (We have not examined the constitutional validity of the amended provisions and we express no opinion on the said aspect).

26. Powers under Section 142(2A) have to be exercised in terms of the legislative provisions. The object and purpose behind the legislation is to facilitate investigation and proper determination of the tax liability. The importance and relevancy of the legislation cannot be underestimated and it is a power available with the Assessing Officer to aid and assist him. Accounts should be accurate and provide real time record of the financial transactions of the assessee. Preparation of accounts is the work of the accountant on the payrolls or employed by the assessee. In order to ensure reliability and accuracy, enterprises resort to internal audit and an external audit which can be a statutory audit. Internal audits are normally conducted in house generally by acquainted or qualified accountants. Statutory audit is compulsory under WPC 2363/2013 Page 19 of 21 the Companies Act, 1956 or when stipulated by the Act and accounts have to be audited by a qualified Chartered Accountant. Chartered Accountants are not ordinary accountants but specialists who have successfully undergone academic study and have extensive practical experience and trained for the said work. Curriculum requires articleship under a mentor who is himself a Chartered Accountant with some years of experience. As opposed to an ordinary accountant, a Chartered Accountant with his experience and academic background is in a better position to investigate, examine and scrutinize entries and records of financial transactions. Calibre and competence of Chartered Accountants is of a high degree and should not and cannot be equated with the capability of an ordinary accountant or a normal person having knowledge or acquainted with accounts. Off late there has been demand for increased public scrutiny of accounts, inspite of statutory audit. Enron and other cases abroad and Satyam 's case in India have highlighted the need and necessity to have controls and system of checks, perhaps even beyond scope of traditional audit. Financial statements and accounts are being increasingly exiguously examined to rule out possibility of wrong doings, cover up or evasion of taxes. Financial statements and accounts are coming under increasing scrutiny and investigation. A Chartered Accountant is a financial investigator and prober, is required to be curious, tenacious and well conversant to identify and unearth frauds, misreporting and wrong claims in the accounts.

27. The aforesaid observations should not be construed as a general expression or opinion, that every account or statement of income must be viewed with suspicion, distrust and scepticism. The past instances are mere warnings, for closer and more indepth scrutiny. It is also a fact that WPC 2363/2013 Page 20 of 21 the business transactions have become more complicated and accounting entries more complex than ever before. This may be one of the causes why possibly the frauds could not be detected in some cases. Indeed such cases have made the audit work more comprehensive, intrusive and investigative. Ethical managements may at times regard such enquiries as an unwarranted intrusion or

a hounding approach. Section 142(2A) does not permit fishing or roving inquiry approach or a witch hunt but is a regulated provision which accepts the need and necessity of the Assessing Officer to take help of an expert accountant i.e. a Chartered Accountant, a person who is academically qualified and has practical experience to understand accounts and unearth tax evasion or furnishing of inaccurate particulars etc. The provision balances the right of the Revenue with the inconvenience which the assessee may face. Assessing Officers are not Chartered Accountants and when required and permissible, therefore, can take help and assistance from the qualified specialists to complete the assessment and determine the taxable income of an assessee.

8. In the present case, the AO has thought it fit to get account audited by the special auditor has requisitioned materials are to the extent of 40000 papers found from the 14 gunny bags, which were acquisition from Asharam Bapu and others. It appears that many of the persons with whom the petitioner assessee has transaction/ relation/ dealing are common and therefore, it cannot be said that the persons/ Shadahaks named in the requisition material are alien to the petitioner assessee. Under the circumstances, when large number of papers are required to be considered / verified visavis assessee and other persons whose names figured in the requisitioned papers and when considering Section 142(2A) of the Act, the AO has thought it fit to exercise of powers under Section 142(2A) of the Act, it cannot be said that the AO has committed any error and / or illegality. It is required to be noted that impugned order has been passed after given an opportunity to the petitioner assessee and having satisfied with respect to the complexity and multiplicity of transactions.

9. Now, so far as the contention on behalf of the petitioner assessee that one of the requirement for exercising the powers under Section 142(2A) of the Act that the AO must be satisfied in interest of revenue, the account is required to be audited by the Special Auditor is concerned, it is required to be noted that considering the amended provision of Section 142(2A) of the Act which has come into force w.e.f. 1.6.2013, the special Auditor can be appointed if at any stage of the proceedings before him, the AO having regard to the nature and complexity of the account of the assessee and the interest of the revenue, is of the opinion that it is necessary so to do, he may direct the account to be verified by the Special Auditor. Therefore, having regard to the nature and complexity of the account, if the AO is satisfied and / or is of the opinion that accounts are required to be verified by the Special Auditor, he may pass such order. Therefore, on the aforesaid ground that the AO has not stated that the accounts are required to be audited by Special Auditor in the interest of Revenue, the impugned order is not required to be quashed and set aside, more particularly, when it is stated in the order that looking to the complexity and the multiplicity of transactions, account are required to be verified by the Special Auditor.

Considering the object and purpose of Section 142(2A) of the Act, it appears that the accounts are required to be audited by the Special Auditor under Section 142(2A) of the Act with a view to facilitate the AO in passing the impugned order.

10. In view of the above and for the reasons stated above, we see no reason to interfere with the impugned order passed by the AO. Under the circumstances, present petition deserves to be dismissed and is accordingly dismissed.