

(1999) 239 ITR 921 : (1999) 106 TAXMAN 373

Calcutta High Court

Case No: G.A. No"s. 2095 and 2218 of 1999 and A.P.O.T. No"s. 401 and 425 of 1999

Joint Commissioner of
Income Tax

APPELLANT

Vs

I.T.C. Ltd. and Another

 I.T.C. Ltd. and
Another Vs Joint
Commissioner of
Income Tax

RESPONDENT

Date of Decision: July 5, 1999

Acts Referred:

- Income Tax Act, 1961 - Section 142(2A)

Citation: (1999) 239 ITR 921 : (1999) 106 TAXMAN 373

Hon'ble Judges: Y.R. Meena, J; Ranjan Kumar Mazumdar, J

Bench: Division Bench

Advocate: Roy Choudhury and Pal, for the Appellant;

Judgement

Y.R. Meena, J.

These are two connected appeals, one made by the Revenue and the other made by the assessee. The Revenue has challenged the impugned order on the ground that the learned single Judge has granted leave in terms of prayer (1) of the writ petition, that is, the stay of operation of the order appointing special auditor. The assessee has challenged the impugned order dated May 4, 1999, on the ground that before issuing of notice u/s 142(1) of the Income Tax Act, 1961, the Income Tax Officer has not applied his mind, and that it is not possible to comply with the direction referred to in the said notice.

2. As both the appeals are connected, whether the accounts of the assessee be audited by the special auditor appointed u/s 142(2A) of the Act or whether the Assessing Officer should look into the accounts himself, in case the special auditor is not permitted to audit the account and the Assessing Officer is also not in a position to look into the accounts of

all the branches when the assessee is not in a position to produce all the books of account maintained by all the 43 branches of the assessee, then whether it can be said that the impugned order u/s 142(2A) of the Act is without application of mind. Sub-section (2A) of Section 142 reads as under :

"(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the Revenue is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the, assessee to get the accounts audited by an accountant, as defined in the Explanation below Sub-section (2) of Section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require."

There is no dispute that the Assessing Officer with the approval of the Commissioner or Chief Commissioner can direct the assessee that his accounts be audited by the special auditor appointed by the Assessing Officer with the approval of the Commissioner or Chief Commissioner.

3. Learned counsel for the assessee submits that before appointment of a special auditor there must be an opinion of the Assessing Officer that the nature and complexity of the accounts is such and/or also in the interests of the Revenue, it is necessary that accounts of the assessee be audited with the special auditor appointed, with the approval of the Commissioner or Chief Commissioner under Sub-section (2A) of Section 142 of the Act. He placed reliance on the decision of this court in the case of [PEERLESS GENERAL FINANCE AND INVESTMENT CO. LTD. AND ANOTHER Vs. DEPUTY COMMISSIONER OF Income Tax AND OTHERS.](#), and on the decision of the Allahabad High Court in the case of [Swadeshi Cotton Mills Company Ltd. Vs. Commissioner of Income Tax and Another](#), . He further submits that after proposal by the Assessing Officer, the notice was issued by the Commissioner, after hearing the assessee he simply recommended the case, supporting the view of the Assessing Officer, to the Chief Commissioner and the Chief Commissioner has not given an opportunity to the assessee, though hearing was given by the Commissioner. Therefore, the Chief Commissioner should not have given approval for appointment of special auditor under Sub-section (2A) of Section 142 of the Act.

4. He further submits that it is not possible to and nobody can comply with the requirement of the Assessing Officer in a notice u/s 142(1) of the Act for completion of the assessment. He also drew our attention to page 202 of the notice issued by the Chief Commissioner and to page 204 of the written submissions filed by the assessee on March 12, 1990, before the Chief Commissioner. He also placed reliance on the decision of the Andhra Pradesh High Court in the case of [A.S. Sarma and Others Vs. Union of India](#), wherein the view has been taken that the provisions of Section 44AB are not

superfluous even after insertion of Sub-section (2A) in Section 142. Section 44AB deals with the cases having turnover of more than 40 lakhs of rupees in business and having professional receipt more than 10 lakhs of rupees in case of profession, while Section 142(2A) deals with the cases having less turnover than referred in Section 44AB.

Therefore, he submits that when the turnover is more than 40 lakhs of rupees, no special auditor can be appointed under Sub-section (2A) of Section 142 of the Act as the accounts have already been audited u/s 44AB of the Act.

5. Learned counsel for the assessee submits in case the assessee fails to produce the documents, assessment can be completed u/s 144 and there is no need to appoint the special auditor. Even in the assessment year 1993-94 the special auditor was appointed and in the report he found that income disclosed by the assessee was more than what had been found by the special auditor. Though the Assessing Officer did not accept that report and huge additions were made and those additions were deleted subsequently, therefore, he submits no purpose will be served by the appointment of the special auditor u/s 142(2A) and the assessee will be unnecessarily burdened with the fees of the special auditor that will run into lakhs of rupees.

6. On the other hand, learned counsel for the Revenue submits that considering the nature and complexity of the accounts and as the assessee is not prepared to produce all the books of account and the material on which the books of account are prepared, the appointment of the special auditor is justified. He submitted that as the company has 43 branches all over the country and the accounts prepared by those branches are recast in the head office, therefore, it is necessary to ascertain the true and correct profits of the assessee by looking into the accounts based on the income and expenditure of those branches. When the assessee himself stated that it is not possible to comply with the requirement referred to u/s 142(1) of the Act, the Assessing Officer has no option but to appoint the special auditor. Not only that, in the preceding year also the special auditor was appointed. Initially, stay was granted but that has been vacated subsequently by the Division Bench.

7. When the learned trial judge has stayed the operation of the order appointing the special-auditor u/s 142(2A), the Assessing Officer has issued fresh notice u/s 142(1) in compliance with the direction of this court that had been challenged before the trial court. The trial court though did not stay the operation of that notice/letter dated April 20, 1999, but gave direction that both the parties should work out amongst themselves what documents should be produced and assessment proceeding would continue.

8. In what cases the special auditor can be appointed u/s 142(2A), the Allahabad High Court has referred to the circular issued by the Central Board of Direct Taxes which reads as under (page 638) :

"The Board have laid down the following guidelines for selection of cases for audit u/s 142(2A) of the Income Tax Act, 1961,

2. As regards companies, only those cases are to be referred for special audit where ;

(i) there are reports of misfeasance, gross neglect or breach of duty on the part of the principal officer or director in relation to the affairs of the company, or

(ii) the company's affairs have been the subject of a search or seizure under the Income Tax Act or been the subject of a probe under the Foreign Exchange Regulations Act, or

(iii) the company has foreign collaboration arrangements, or

(iv) where the company's principal is a foreign company and deduction of head office expenses, etc., have been claimed, or

(v) where the company has import/export business with a yearly turnover of more than a crore of rupees, or

(vi) where there are allegations of substantial tax evasion, or (vii) where the Income Tax Officer has any other information necessitating special audit."

In that case, the action of the Assessing Officer for appointment of the special auditor u/s 142(2A) has been upheld, but it was observed that after seeing the accounts the Assistant Commissioner had formed his opinion that the appointment of the special auditor was a necessity.

9. In the case of [PEERLESS GENERAL FINANCE AND INVESTMENT CO. LTD. AND ANOTHER Vs. DEPUTY COMMISSIONER OF Income Tax AND OTHERS.,](#) the appointment of the special auditor was challenged by the assessee and this court after considering the facts of that case found that the appointment of the special auditor as has been proposed by the Assessing Officer on the ground that there was litigation between the assessee and the Reserve Bank of India and also between the assessee and the Department. The learned trial judge, in this case, found that the litigations had nothing to do with the assessment of income of the assessee and, therefore, that cannot be the basis for appointment of the special auditor. Therefore, that order of appointment of the special auditor u/s 142(2A) was set aside and quashed.

10. There is no doubt that before appointment of the special auditor there should be a ground that in the interests of the Revenue and considering the "nature and complexity" of the accounts maintained by the assessee, the appointment of the special auditor u/s 142(2A) is necessary. Thus that depends upon the facts of each case. The law laid down is not in dispute. But the pertinent question is whether, in the facts and circumstances of a particular case, the appointment of the special auditor is justified or not.

11. Therefore, it is necessary to consider some of the relevant facts to see whether the appointment of the special auditor is justified. The Assessing Officer has submitted his proposal to the Commissioner, vide, letter dated February 9, 1999, being annexure-B,

wherein he has pointed out that there are some defects. The accounting systems have been violated. There was a countrywide raid conducted in 1996 by the Enforcement Directorate on different offices, factories and residences of former and present directors of the assessee and irregular transactions worth 50 crores of rupees were taken note of on the basis of such search and some of the documents and transactions also covered the part of previous year relevant to the assessment year under consideration.

12. The accounts pertaining to export-import transactions of the leaf tobacco division at Guntur was also audited by one S. B. Bilimoria and Co., for the period from 1992 to 1996. In the report of S. B. Bilimoria and Co., it was found that V.A.T. had affected the third party purchase of leaf tobacco, despite direct dealing with I.T.C. Ltd. There was search and seizure in February, 1987, by the Central Excise at the business premises and the Department of I.T.C. Ltd., and ultimately a duty or penalty amounting to Rs. 800 crores, was imposed and as per the Tribunal's direction the assessee had made payment of Rs. 170 crores and claimed deduction. Whether such deduction can be allowed and, if so, on what basis, for that the relevant materials are to be examined by the Assessing Officer, if it is not possible by him, the appointment of the special auditor is the only course available to the Assessing Officer to find out whether such deduction can be allowed on the basis of materials available with the assessee. In the previous year relevant to the assessment year, the assessee has added Rs. 81.42 crores to the plant and machinery, Rs. 2.95 crores to the motor vehicles Rs. 14.86 crores to the land and Rs. 6.69 crores to the buildings. These claims should be verified, to see whether these claims/expenditure was for the purpose of business and can be allowed under the Act, if so to what extent. The assessee-company has purchased leaf tobacco worth Rs. 66.33 crores, from All India Tobacco Co. Ltd., paper board worth Rs. 30.20 crores from Bhadrachalam Paper Board Ltd., and made payment of Rs. 11.45 crores on account of contractual obligation. Whether the expenditures are genuine or whether the expenditures are hit by any of the provisions of the Act that can be said only when there is verification from the material on which the accounts of the assessee and its branches are prepared. The assessee-company has also received share premium of Rs. 65.55 crores. Details thereof have not been furnished.

13. The assessee has claimed deduction of Rs. 22.27 crores while computing the taxable income, but no proper accounts and details thereof have been furnished.

14. The assessee has further debited Rs. 2,579.63 crores against the excise duty, but no details or break up of the same have been furnished. The assessee-company has claimed deduction of Rs. 21,65,67,763 u/s 43B which represents duties and taxes, but not debited in the profit and loss account. Even the documentary evidence in support of that payment has not been furnished. Similarly, the assessee has claimed Rs. 7.68 crores on scientific research. But, no details were filed. There was an addition of Rs. 40.34 crores on capital work-in-progress, but no details were filed.

15. The assessee-company has also advanced loans of Rs. 25 crores to its subsidiaries and loan of Rs. 62.68 crores to others. Some of the advances made in cash and some of the advances were made in kind. The assessee has also shown deposits from normal trade debtors to the tune of Rs. 178.16 crores during the year and with a fresh increase in deposits by Rs. 74.46 crores. No details have been filed. The contribution to provident fund and other funds have been claimed at Rs. 18.08 crores, but no details were filed. It is not possible to ascertain the exact expenditure incurred by the assessee. Rs. 34.89 crores have been claimed on account of consumption of stores and the spare parts at Rs. 47.28 crores, freight and handling charges at Rs. 67.53 crores, but no details were filed. It is not possible to ascertain whether these expenditures are for the purpose of business. Under the head advertisement/sales promotion the assessee has claimed Rs. 181.10 crores. Market research expenses have been claimed at Rs. 5.33 crores. Travelling and conveyance expenses have been claimed at Rs. 35.70 crores. In the absence of details it is not possible to find out whether it is for the purpose of business and can be allowed under the provisions of the Act of 1961.

16. The assessee-company has also effected export sales and under that suffered loss to the tune of Rs. 14,88,18,972.

17. The details have not been furnished on the basis of which the accounts are prepared and also the record of the assessee is valueless that cannot be produced. Thus it is not possible to ascertain the true profits by the Assessing Officer. Therefore, there was a proposal for the appointment of the special auditor u/s 142(2A) of the Act. Considering the letter of the Assessing Officer, the Commissioner of Income Tax has issued the notice to the assessee, as to why the special auditor should not be appointed. After hearing the assessee and considering his written submissions, the Commissioner of Income Tax endorsed the view taken by the Assessing Officer for appointment of the special auditor, under Sub-section (2A) of Section 142 of the Act and recommended the matter for appointment of a special auditor to the Chief Commissioner. The Chief Commissioner has also issued the notice to the assessee on March 5, 1999. Annexure "L" asking the assessee to either appear in person or through authorised representative on March 12, 1999, and submit his objections, if any, against appointment of the special auditor for the assessment year 1996-97. On March 12, 1999, written submissions were filed questioning the authority of the Chief Commissioner giving approval. In addition to the objections raised in the written submissions the summary of submissions made to the Commissioner, was also annexed.

18. Dr. Pal, learned senior counsel appearing for the assessee, has submitted that the Commissioner of Income Tax instead of giving approval to the proposal of the Assessing Officer after hearing, he sent that proposal to the Chief Commissioner for approval u/s 142(2A) of the Act. The Chief Commissioner has not given him hearing and approved the proposal of the Assessing Officer for appointment of the special auditor that should not be done. Mr. Roy Choudhury, learned counsel for the Revenue, submits that by a notice of the Chief Commissioner the assessee was directed to appear before him on March 12,

1999, at 11.30 a.m. either personally or through his counsel for the purpose of submitting whether he has any objection with regard to the appointment of the special auditor for the assessment year 1996-97. A person authorised by the assessee-company appeared before the Chief Commissioner on March 12, 1999, and gave a written submission of the assessee to the Chief Commissioner. Thus, it cannot be said that no opportunity was given by the Chief Commissioner before approving the appointment of the special auditor as proposed by the Assessing Officer.

19. In this connection, Mr. Roy Choudhury drew our attention to annexure "N" which is at page 204 of the petition being a letter of the company addressed to the Chief Commissioner dated March 11, 1999. It may be mentioned here that even Dr. Pal, learned counsel appearing for the assessee, has not controverted this letter.

20. On a perusal of the letter of the Chief Commissioner dated March 5, 1999, addressed to the principal officer of I.T.C. Limited and the written submissions dated March 11, 1999, submitted to the Chief Commissioner on March 12, 1999, it cannot be said that the opportunity has not been given by the Chief Commissioner to the assessee regarding the objection of the assessee, if any, against the appointment of the special auditor u/s 142(2A) of the Act.

21. We agree with Dr. Pal that before giving approval, opportunity should be given to the assessee whether he has any objection and if there be any, that should be considered. In this case, opportunity was given by a letter of the Chief Commissioner dated March 5, 1999, and in response to that on March 12, 1999, the assessee submitted its written submission annexing the written submission made before the Chief Commissioner. It does not make any difference, the objection of the assessee can be by way of oral submission or it can put those submissions in writing. It is the choice of the assessee either to make oral submission on the appointed date or give his submissions in writing to the Chief Commissioner.

22. When he has given his submissions and objection in writing to the Chief Commissioner on the appointed day and those submissions were considered, which is reflected from paragraph 2 of the order of the Chief Commissioner wherein it is stated that in response to the notice the assessee-company filed its written submission on March 12, 1999, along with the annexures which have been produced, it cannot be said that that has not been considered. The written submissions not only were filed in response to the notice of the Chief Commissioner but those were considered also. Therefore, it cannot be said that the Chief Commissioner has not given any opportunity to the assessee to make submissions against the order of approval for appointment of the special auditor. There is, therefore, no case is made out that the principles of natural justice were violated. Therefore, it cannot be said that opportunity has not been given before approval of the appointment of the special auditor by the Chief Commissioner.

23. Dr. Pal learned counsel for the appellant, further submits that on March 12, 1999, the Chief Commissioner was not available for hearing, As stated above, when the written submissions were given no further hearing was required and no specific requirement was there in the notice for personal hearing. Even otherwise this allegation of learned counsel for the assessee the fact either will be accepted or denied in the counter filed by the Revenue. That was not before the learned single judge. Therefore, we have no comments on the allegation whether the Chief Commissioner has ever promised for personal hearing or the assessee insisted for personal hearing or whether personal hearing was necessary when the assessee has given submissions in writing on March 12, 1999. That will be considered by the learned trial judge when he will dispose of the petition.

24. Dr. Pal, learned counsel for the appellant, next argued that in view of the decision of the Andhra Pradesh High Court in [A.S. Sarma and Others Vs. Union of India](#), a special auditor can be appointed u/s 142(2A) if the turnover in the case of business is less than Rs. 40 lakhs and the professional receipts are less than Rs. 10 lakhs. Therefore when the turnover of the assessee is more in view of the decision of the Andhra Pradesh High Court, no special auditor can be appointed u/s 142(2A) of the Act. In the Andhra Pradesh High Court, the issue raised was whether after the insertion of Section 142(2A) the provision of Section 44AB become superfluous. The Andhra Pradesh High Court though did not accept the claim of the assessee that after Sub-section (2A) of Section 142, the provision of Section 44AB became superfluous but, however, said that both the sections are applicable in different circumstances. The provisions of Section 44AB are applicable in cases where the turnover in business is more than Rs. 40 lakhs and the gross professional receipt is more than Rs. 10 lakhs and the provisions of Section 142(2A) are applicable in cases of business where the turnover is less than Rs. 40 lakhs and in case of profession the gross receipt is less than Rs. 10 lakhs.

25. With respect we are not in agreement with the view taken by the Andhra Pradesh High Court. In case if it would have been the intention of the Legislature that could be specified in Sub-section (2A) of Section 142 or they can add a proviso in Section 44AB to this effect, but neither there is any such proviso nor is there such intention reflected from Sub-section (2A) of Section 142 of the Act.

26. In fact this is meant for the purpose in cases where the "nature and complexity" of the accounts is such that it is not possible to the Assessing Officer to justify the correct assessment of the income and not possible to him to examine the correctness of the accounts. In that case, the Legislature has conferred power on the Assessing Officer for appointment of the special auditor with the approval of the Commissioner or Chief Commissioner. The interest of the assessee has been protected that no assessee should unnecessarily be harassed by the Assessing Officer, that is why the duty has been cast on the senior officers of the Department, i.e., the Commissioner or Chief Commissioner, that without approval of either the Commissioner or Chief Commissioner, the Assessing Officer has no power to appoint the special auditor to look into the accounts of the

assessee. Therefore, in our view, the power conferred on the Assessing Officer, and the approval of the Commissioner and Chief Commissioner is not confined to any turnover, in business or profession. There is no limit or any bar on account of amount of receipts either in business or profession. This power has been conferred on the Assessing Officer to do justice with the assessee and also to protect the interests of the Revenue.

27. Learned counsel for the appellant, Dr. Pal, further submits that though the hearing was given by the Commissioner, but a proposal for the appointment of the special auditor u/s 142(2A) has been given by the Chief Commissioner. We perused the relevant materials on record. There is no dispute on the facts that the Assessing Officer has proposed for appointment of auditor under Sub-section (2A) of Section 142 and submitted the matter to the Commissioner. The Commissioner has given hearing and recommended the case for appointment of auditor under Sub-section (2A) of Section 142 to the Chief Commissioner. The Chief Commissioner has also issued a notice to the assessee, if he has any objection in respect of appointment of auditor under Sub-section (2A) of Section 142, he can make his submissions on March 12, 1999. The grievance of Dr. Pal is that no hearing was given to the assessee by the Chief Commissioner. The case of the Department is that the assessee had made the written submissions on March 12, 1999, and those were considered by the Chief Commissioner, before giving approval for appointment of the special auditor. There is no dispute also on the fact that the Commissioner and the Chief Commissioner both have concurrent jurisdiction to give approval in case any proposal is made by the Assessing Officer. Here though the Commissioner has not given the approval but has endorsed the view taken by the Assessing Officer regarding appointment of an auditor u/s 142(2A) and finally approval has been given by the Chief Commissioner. When the Commissioner and Chief Commissioner both are competent and have concurrent jurisdiction to give approval for appointment of the auditor, and if finally approval is given by the Chief Commissioner, after giving reasonable opportunity to the assessee to raise his objections regarding appointment of the special auditor u/s 142(2A) when both the Commissioner and Chief Commissioner have the power to give approval, it can be given by either and that is an internal matter of the Department who gives the approval. Either the approval is given by the Commissioner or Chief Commissioner how any right of the assessee is prejudiced, only on the ground that approval has not been given by the Commissioner and has been given by the Chief Commissioner. It is not the case of the appellant that the Commissioner was not in favour of the approval. When all the three authorities are in favour of the appointment of the auditor, we do not find any justification to quash the order on the ground that approval has been given by the Chief Commissioner.

28. Dr. Pal, learned counsel appearing for the assessee, further submits that in pursuance of the order of the learned single judge, the Assessing Officer has issued fresh notice/letter dated April 20, 1999, asking the assessee to produce the relevant papers and documents which are the basis for the accounts in all the 43 branches. Such as, profit and loss account, balance-sheet, trial balance, books of account and bank

statements of some dividends of the company referred to at page 2 of the notice and some transactions in the leaf tobacco division up to November 30, 1996. The material regarding the pre-deposit of Rs. 170 crores during the financial year relevant to the assessment year 1995-96--the details relating to loss of Rs. 14.88 crores--details regarding the excise duty amount of Rs. 2,579 crores--the details of purchases worth Rs. 66 crores from the two concerns of this assessee-company and similar type of relevant records referred to at page 4 from paragraph 11 onwards till paragraph 27.

29. Learned counsel appearing for the appellant submits that it is not possible to produce the records--because the record is voluminous and more than a truck-lorry load. It cannot be produced. Therefore, he objected to the requirement of the Assessing Officer u/s 142(1) notice in pursuance of the order of this court dated April 5, 1999. The perusal of the record shows that notice under Sections 142(1) and 142(2) has even been issued prior to the order of this court dated April 5, 1999, but as he felt impossible to scrutinise the entire record corresponding and reflected in the accounts, he proposed for the appointment of a special auditor u/s 142(2A). In the notice subsequently issued in pursuance of the order of this court dated April 5, 1999, that has been challenged in the writ petition before the learned trial judge on the ground that notice has been issued without application of mind and it is not possible for the assessee to produce all the relevant materials which is the basis for preparing all accounts in the head office as well as in all the 43 branches of the assessee in different parts of the country.

30. Thus it is clear that the Department as well as the assessee-appellant has the same view that it is not possible for the Assessing Officer to look into the accounts to verify whether the entries in the account were properly reflected on the basis of genuine transactions. At the same time, the statute has conferred unfettered power on the Assessing Officer to look into the account as to how the assessee has disclosed his income, whether the entries are genuine or not, whether the transactions are genuine or not, whether any particular expenditure can be allowed under the provisions of the Act or not, whether the deductions claimed fulfil the conditions under the various provisions of the Act. For all these, it is necessary for the Assessing Officer to look into the accounts as well as the material on the basis of which the accounts are prepared.

31. In the case of this assessee, in its 43 branches all over the country, what they have received in those branches and what are the expenses of those branches, if the Assessing Officer wants to look into that or wants to verify it, how can that power be curtailed ? That power of the Assessing Officer cannot be curtailed and nowhere any provision of this Act prohibits the Assessing Officer to verify the correctness of various entries in the accounts. Thus, the nature of this assessee's account that he maintained the accounts in all the 43 branches separately and recast that in the head office. Whether that has been properly recast or not ? Can the Assessing Officer be stopped to verify and examine those entries ? Our answer is obviously in the negative. He cannot be stopped, in case he found that there is a possibility of escapement of income and there is a possibility of bogus claims. The Assessing Officer has the power to verify the entries of

the accounts, which are based on the material with the assessee, having 43 branches all over the country. As the assessee-appellant as well as the Revenue--both are of the view that it is not possible and the interests of the Revenue may suffer in case the income is not properly assessed. It is pertinent to note that in December, 1996, there was a search in offices, business premises and factories throughout the country and illegal transactions worth more than Rs. 200 crores were found. In such case the scrutiny of accounts and relevant material is all the more necessary to satisfy whether the entries made in the accounts are genuine. If it is not possible to the Assessing Officer, in view of the nature and complexity of the accounts, the Assessing Officer can ask for the approval of appointment of the special auditor.

32. The appointment of a special auditor is not only in the interests of the Revenue. Sometimes it may be in the interest of the assessee. In 1993-94, in the case of this assessee, the special auditor was appointed and in his report, he found that the income disclosed by the assessee is more than the income, in fact taxable under the provisions of the Act.

33. The appointment of the auditor is not only in the interest of the assessee and when both counsel admit this fact that it is not possible to produce all the accounts with the relevant material and when it is not possible to the Assessing Officer to justify his job making the assessments without scrutiny of the accounts, the relevant material to verify the entries in the books of account. There is a justification for appointment of the special auditor.

34. It is also brought to our notice that in the proceeding, i.e., 1995-96, the auditor was appointed u/s 142(2A). Initially, stay was granted, but subsequently the stay was vacated and the special auditor has proceeded with the audit of accounts for the assessment year 1995-96. Though we agree with Dr. Pal that any interlocutory order cannot be treated as precedent but at the same time, that is a fact which cannot be overlooked.

35. Considering the facts and "nature and complexity" of the accounts in this case, in our view, the appointment of a special auditor is justified and the Revenue has a strong case in his favour for appointment of a special auditor u/s 142(2A). Accordingly, we set aside the impugned order dated April 5, 1999, and direct the Assessing Officer to proceed with the appointment of the special officer, if appointment is finally made, the special auditor can proceed to audit the accounts of the assessee.

36. In the appeal being G. A. No. 425 of 1999 as in the Appeal No. 401 of 1999, we have taken the view, the appointment of special auditor is justified. We direct the Assessing Officer not to insist that the assessee produce all the documents referred to in his notice u/s 142(1) in pursuance of the order of this court dated April 5, 1999, unless the particular evidence or document is necessary to be looked into for completion of the assessment order.

37. However, it is made clear that the assessment so made in pursuance of the report of the special auditor shall not be communicated to the assessee or the effect should not be given to that order till disposal of the petition in question pending before the learned single judge.

38. Consequently, we allow Appeal No. 401 of 1999 and dispose of Appeal No. 425 of 1999 as discussed above.

39. All the parties are to act on an operative part of this judgment on the usual undertaking.