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

Date of Decision: 24.12.2019

\+ **W.P.(C) 13822/2019**

NBCC (INDIA) LTD. ..... Petitioner
Through: Mr.S.Krishnan, Advocate

Versus

ADDITIONAL COMMISSIONER OF INCOME TAX & ORS.
..... Respondents
Through: Mr. Lakshmi Gurung, Sr. Standing Counsel with Mr. Talha A Rahman, Jr. Standing Counsel, Mr. Siddharth Gupta, Advocate, Mr. Mohd. Shaz Khan, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J. (Oral)

1. The present writ petition under Article 226 of the Constitution of India is directed against the action of respondent No.1 directing special audit of the accounts of the petitioner in course of assessment proceedings for assessment year 2017-18.

Brief facts

2. The factual matrix giving rise to the present petition, in brief, is that the petitioner, an Indian Company, wherein the Government of India also has a stake, is engaged in the business of construction. The petitioner filed its original return of income-tax for the aforenoted assessment year on 30th

October, 2017. The return was revised on 28.03.2018 and 27.02.2019 to provide for subsequent TDS credits and to update details of post-retirement benefits to employees. Respondents issued notice under Section 143(2) of the Act and initiated scrutiny proceedings. The petitioner asserts that the said proceedings remained dormant for 344 days, until another notice under Section 142(1) dated 02.08.2019 was issued. This notice enclosed a questionnaire for framing petitioner's assessment and raising several queries. The petitioner filed a detailed reply and answered 12 of the 53 queries, raised in the aforesaid notice. On 23.08.2019, another reply was filed and evidence and explanation was given in respect of 10 other queries. Respondent No.1 issued another notice dated 26.08.2019 requiring the petitioner to expedite filing of details, pointing out that the proceedings were *time barring.* Petitioner states that in response thereto, it filed the reply dated 02.09.2019, giving explanation and evidence regarding 11 queries. With that, the first level response, and details in respect of almost all 53 queries raised by respondent No.1 stood answered. Since at petitioner's end, its personnel were engaged in compliances for the current year's filings, a letter dated 12.09.2019 was submitted seeking some time for submission of the residual particulars.

3. In the meantime, respondent No.1 had been enquiring from the petitioner of the reason for not filing advance tax. Frequent telephonic conversations were made and ultimately, an email dated 19.09.2019 was sent by respondent No.1 enquiring as to why advance tax deposited for

the first quarter of the current year i.e. financial year 2019-20 was only Rs.14 crores, while the corresponding amount for preceding year was Rs.19 crores. This query was replied vide email dated 27.06.2019 and letter dated 16.08.2019, pointing out that the advance tax deposited in the preceding year had led to refund claim of Rs.40 crores, which when provided for, showed little variation in earlier years' deposit. On 09.09.2019, Principal Commissioner of Income Tax wrote to the petitioner directing payment of *"correct amount"* of advance tax for the relevant quarter. The said amount was deposited vide *challan* dated 13th September, 2019 and on the very same evening, respondent No. 1 issued notice under Section 142(1), reproducing the initial questionnaire of 53 queries making incorrect reference to filings by the petitioner and asking to show cause as to why special audit under Section 142(2A) not be ordered in the petitioner's case. Petitioner filed response thereto dated 23.09.2019 making reference to details already filed and clarified. While petitioner's averments were not adverted to, it received notice under Section 143(2) on 27.09.2019, once again listing nine issues as a subject matter for scrutiny assessment. A notice under 142(1) was also issued by the new incumbent to the office of respondent No.1, raising four new queries. The time period specified for complying with the aforesaid notice was stipulated as 05.10.2019. However instead of waiting for the date fixed, respondent No.1 on 04.10.2019 issued another notice under Section 142(1), making allegations of non-compliance on the part of the petitioner. This was also responded to, vide letter dated 11.10.2019 and parallelly, response was sent to the notice under Section 142(1) dated

04.10.2019. Petitioner then filed evidence /correspondence in response to the initial questionnaire on 25.10.2019; 04.11.2019; 08.11.2019; 13.11.2019; 19.11.2019; 20.11.2019 and 28.11.2019. The respondent No.1 thereafter passed an order under Section 142(2A) of the Act, which is impugned in the present petition.

Contentions of the Petitioner

4. Mr. S.Krishnan, learned counsel for the petitioner has assailed the action of the respondent No.1 for ordering special audit on several grounds. His first submission is that respondent No.1 has not issued any notice under Section 142(2A) of the Act. The notices dated 13.09.2019 and 27.09.2019 were issued under Section 142(1) of the Act and cannot sustain the proceedings under section 142(2A) of the Act, since the two provisions operate in completely different spheres. Notice under Section 142(1) is issued directing the filing of particulars requisitioned by the Assessing Officer (hereinafter referred to as "AO") and proceedings under Section 142(2A) can be initiated by the Assessing Officer, who has taken such particulars on record and formed an opinion on the basis of such particulars, that reference to special audit is necessary. He then submitted that proviso to Section 142(2A) requires pre-decisional hearing based on the show cause notice. Since the AO was still requisitioning information and documents, he was in no position to confront the assessee with alleged complexity and volume of accounts. Thus, the opinion formed by the AO for ordering special audit without evaluation of the information is a misconceived action. He further submitted that the

order dated 03.12.2019 referring to the notice under Section 142(2A) is wholly misplaced and is an attempt to create a record of a non-existent notice. Mr. Krishnan has then sought to canvass that respondent No.1 has attempted to interpolate the online interface maintained by Principal Director General of Income Tax (System) by making backdated reference to document dated 13.09.2019 through an upload on 03.12.2019. He referred to the copies of the screenshots annexed with the petition, of the online interface taken for several dates prior to 03.12.2019 to demonstrate that no notice under Section 142(2A) dated 13.09.2019 had ever been uploaded. In a nutshell, Mr. Krishnan reinforced his arguments that there was no notice under Section 142(2A) issued by the respondent No.1 till date and the proceedings are liable to be quashed on this short ground alone. He also sought to argue that the action of the respondent No.1 is that of prejudice. He submitted that the first reference to Section 142(2A) by respondent No.1 was made on the very same evening when the petitioner deposited a sum of Rs.14 crores as advance tax. The reference to special audit is an act of vengeance for non-compliance to respondent's threatening direction to *"pay correct amount"* of advance tax. Next, Mr. Krishnan endeavoured to demonstrate that the reference order of respondent No.1 is an act of his own apathy in initiating assessment proceedings; five months before limitation was to intervene. Notices under Section 143(2) stood issued on 23.08.2018 and 19.09.2018, when no details were requisitioned. Respondent No.1 took 316 days to issue the format-based questionnaire initiating the proceedings in earnest. This inclination is conspicuous from the fact that notice under Section 142(1)

dated 27.09.2019 required compliance by 05.10.2019 and instead of waiting for the said period to expire, the respondent No.1 issued a notice on 04.10.2019 falsely alleging non-compliance. Lastly, on merits Mr. Krishnan submitted that the necessary explanation and particulars had been furnished to the respondent No.1. He did not apply his mind on the same and instead in a routine manner has formed an opinion which is contrary to the law laid down by the Supreme Court in ***Sahara India (Firm) vs. CIT, 2008 300 ITR 403 (SC)*** that commands the AO to form an opinion based on objective criteria and not on the basis of subjective satisfaction. The petitioner has been regularly assessed to income-tax by the office of the respondent No.1 for several years and is amongst the highest tax payers in its range. The petitioner undergoes scrutiny assessment every year, and till date no officer has found the details on record to be complex or voluminous and therefore, there is no prima facie case for reference to special audit. To demonstrate this, Mr. Krishnan also sought to take us through the queries raised by the AO, issue-wise, to explain that such queries had been either raised after the show cause notice dated 13.09.2019 or to say that the respondent No.1 has failed to exercise reasonable domain knowledge with correct intent. Closing his submissions, it was also argued that though the monetary cost of audit is statutorily to be borne by respondents, it would nevertheless cause severe prejudice to the petitioner as it would have a huge negative impact on the perception amongst institutions, investors, customers, stakeholders and general public.

5. We have given due consideration to the contentions urged by Mr. Krishnan. The object behind enacting the provision of Section 142(2A) of the Act is clear from a plain reading of its language and the said provision is to assist the AO in framing the correct and proper assessment based on the accounts maintained by the assessee, having regard to the nature and complexity of the accounts, its volume and the doubts about its correctness, multiplicity of the transactions or specialized nature of business activity of the assessee and the interest of the revenue. While testing the reasoning of the AO for making a reference to special audit, we have in our decision in ***Religare Finvest Limited vs. Deputy Commissioner of Income Tax and Anr., 2019 SCC OnLine Delhi 100*** emphasized that the exercise of the power is to be guided by the principles laid down by the Supreme Court and ***Sahara India (Firm***)(supra). At the same time we have observed that while exercising our jurisdiction under 226 of the Constitution of India, we are not to act as an Appellate Court. The subjective satisfaction of the AO falls exclusively within the scope of his jurisdiction and if the reasoning adopted by AO is rational and is borne from the record, we would refrain ourselves from interfering with such jurisdiction, as the courts normally do not interfere in a field which falls within exclusive domain of the AO. Therefore, in order to evaluate the reasoning, it would be apt to examine the reasons assigned by respondent No.1 in its order dated 03.12.2019 dealing with the objection to the show cause notice. The aforenoted order runs into 13 pages and therefore, only the relevant portion is being extracted herein below:

"3. Anomalies and complexity noted in the Books of accounts of the assessee:

I. Department's Query:-The assessee has disclosed advance of Rs 1299 crores received from its client and Rs. 36.36 crores as revenue in advance as against Rs. 1286.11 crores and Rs. 11.95Cr respectively in comparison to Previous A.Y. It needs to be examined whether these advances are in nature of accrued income. The details regarding these advances to ascertain the revenue nature as well as their genuineness etc. were specifically called for vide question 20 dt. 02.08.2019. The reply submitted by you doesnot suffice the reason for which the question were raised so this issue remained unexamined. Further in your reply dt. 02.09.2019 to the point no. 15 of the notice u/s 142(1) dt. 02.08.2019 has stated as follows-

"It is submitted that the amount of Interest passed on to clients is a subject matter of agreement with the client which varies from case to case. Further, the computation of interest is based on the advances which were lying as advances with NBCC during the relevant assessment year and interest is calculated for the period the amount was kept as advance in NBCC's books as per the terms of the respective agreement and the same cannot be correlated with the closing balance of advance from clients. There may be cases where the advance was received/settled at the yearend leading to increase/decrease in quantum of advances without a corresponding change in interest to clients. The Zone wise details of interest paid to clients is enclosed as Annexure "C'."

From the above reply of the assessee, it is evident that ***interest passed on to clients is complex in nature as well as is voluminous in terms of period of holding of advance, rate of interest and calculation of interest amount vis-à-vis terms & conditions of agreements with these clients.*** *These issues needs in depth further verifications. Non specific reply of the assessee raises doubt about the correctness of these transactions.*

II. Department's query:-
Assessee has claimed TDS of 73,69,98,262/- in respect of 501 parties in the return of income. As per the provision of the Section 199 of the Income-tax Act, 1961, read with the Rule 37BA of the Income-tax Rules, the assessee can take TDS credits only for the receipts disclosed as income in a particular assessment year. It is difficult for the A.O. to examine the correctness of the above claim and to examine whether the assessee has disclosed the above receipts as income in its accounts. Further, despite of opportunity given the assessee could not produce any details what so ever so as to ensure that the TDS has been claimed only in respect of income which is credited as receipt. In absence of the desired details it is difficult to ascertain whether the TDS claimed in the return as prepaid taxes entirely relates to income offered in the Profit and Loss Account of assessee.

In its reply assessee submitted "TDS deducted and certificates for deduction of TDS are received as per Rules prescribed in the Act. The company follows percentage completion method of accounting. Naturally TDS deductions on advances made to the company for construction would not match with the profit enuring out of works done utilizing such advances. This is of a regular feature with the company. The credit for TDS has always been given in the past in terms of form 26-AS, after appreciating lack of link of TDS with income earned."

In above submission assessee itself has agreed that ***TDS deductions on advances made to the company for construction would not match with the profit enuring out of works done utilizing these advances****. However, assessee has submitted that in past years also assessee has been applying the same method. If something has not come into the notice this cannot be taken as precedent because as per provision of Section 199 and Rule 37BA where it is mentioned that credit to only those TDS shall be given whose corresponding income is assessable in that AY.*
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Therefore, assessee's argument that as these TDS credit were given in last years therefore it should be allowed for this AY is not acceptable as assessment proceeding/ITR filing are governed by provisions laid down by the IT Act/Rules and clearly as per the above discussion the assessee is in violation of Rule 37BA. *This raises doubts over the correctness of TDS claimed by the assessee and it becomes necessary that the TDS credit claimed by the assessee for AY 2017-18 gets verified.*

III. Department's query:-As per the Part D1 of the Cost Audit Report which is the product services profitability statement for the year ended in 31.03.2017. The profit margin as against the sales turnover of Rs. 185.34 Crore in real estate business is Rs. 32.23crores in FY 2016-17. Whereas the profit margin as against sales turnover of Rs. 273.99 crores was Rs. 119.37 crores in Fy 2015-16. This clearly shows that the profit margin in real estate business was 43.57% to the sales in the FY 2015-16 which has come down to 17.40% in FY 2016-17 (AY 2017-18).

Since you did not produce any evidence regarding the expenses claimed in the P&LA /c in the real estate business. This aspect of the case remains unverified.• Similarly as per the same detail given in the Part D1 of the Cost Audit Report, profit margin of Rs. 31.51 Crore has been shown against the sale of Rs. 534.08 Crores in infrastructure head in FY 2016-17. Whereas the profit margin of Rs. 31.36 Crores is shown against the sale turnover of Rs. 307.66 Crores only in FY 2015-16. Here again the profit margin in infra business was 10.19% in FY 2015-16 whereas the same has come down to a meagre of 5.90% in FY 2016-17 (AY 2017-18). Since neither accounts of expenses claimed under this head nor the credible evidences is produced despite of opportunity given to you. The same remains unverified.

In response the assessee submitted as under:-

"Cost audit report only provides a cost analysis in term of norms different from those which are applicable for computation of commercial profits. The profit margin in real estate business has

to be based on the overall commercial achievement and not on objectives contained in the cost audit report. Understandably since the two have relationship or link such question were raised in the past time in assessment. This information was never called for and a reconciliation with financial books already placed in the cost audit report.

As to realizations from the structure business the complete details of input cost and out put receipts are available which are simply amenable to verification. No effort has been made so far by anyone at your end for examining this aspect of the matter in the year"

The reply of the assessee cannot be accepted as the assessee has not appreciated the reasoning behind asking such query. The AO has simply asked the assessee to reconcile the profit earned with respect to the sales turnover and corresponding expenses. ***As apparent from the Cost Audit report in the head of real estate the ratio of profit to the sales turnover has reduced from 43.57% in the last year to 17.40% in the present AY. Further in the infrastructure head there was a dip in ratio of Profit to the sales turnover from 10.19% to 5.90%. The assessee was asked to produce ledgers of several expenses vide notice u/s 142(1) dated 02.08.2019 but till date assessee has not produced any of these ledger accounts. The sudden dip in the profit to sales ratio for both the head discussed above raises doubts about correctness of accounts that's why assessee was asked to produce reconciliation of these profit shown alongwith ledger details of expenses but the assessee has failed to do so till date.*** *Therefore this fact still remains unverified.*

Further the assessee has submitted that the AO has failed to ask for complete details of input cost and output receipt. Here the assessee has failed to appreciate this fact that vide notice u/s 142(1)dated 02.08.2019 the assessee was asked in detail to submit the cost, revenue earned pertaining to its projects pertaining to all the three head under which assessee functions i.e. for Project Management Consultancy, Real Estate

Development and Engineering, procurement and construction. Thus assessee's contention is not acceptable as the AO has already asked for these details but due to non compliance on the part of the assessee this issue still remains unverified.

IV. Department's query:-"As per the note 19 of Balance Sheet as on 31.03.2017 the trade payables has been shown as Rs. 2534.54 Cr whereas the trade payables as on 31.03.2016 were 1784.87Cr. It means there is an increase of 42%of trade payables in this year. However on perusal of the works and consultancy expenses claimed in FY15-16 & FY 16-17were Rs. 5248.56 Cr. and Rs. 5703.54 Cr. Respectively means that there is a meager increase of 8.67% in the work and consultancy expense. Further, details were called vide above mentioned notices so as to ascertain the identity and genuiness of trade payables but the same were not furnished by the assessee to justify the increase in trade payable of 42% as against the increase in business expenses of just 8.67%."

Assessee's submission in this regard:- "on the aspect of the trade payable it needs to be noted that they do not lie in the field of revenue. They are items of current liabilities. Profit cannot be worked out on the basis of assumptions and presumptions based on trade payables over a period of years. No such principle is known to business or commerce or accounts.

As per note 19 to the Balance sheet it is observed in the note that in the profit and loss in the balance sheet the closing balance in the Bank account and work in progress account is stated this is amenable question and ready verification from the records."

The reply of the assessee cannot be accepted as the trade payable may also inflate the asset side of the balance sheet of the assessee by the same amount and to balance the asset and liability the assessee has to create inflated assets in its balance sheet. Further ***on perusal of the purchase from the P&L A/c it is observed that the land purchase & material consumed has fallen from last years Rs .231.62 Cr. to Rs. 10.01 Cr this year.***

However the trade payable has increased by Rs.750.61Cr. Show cause notice dated 13.09.2019 increase in the works and consultancy expenses claimed has only increased 8.67%. This seems to very peculiar case and verification of this issue is required. Keeping all these facts in mind the AO asked for the details so as to ascertain the identify and genuiness of trade payable along with the ledger account of trade payable. The assessee remained non compliant on this issue*. Therefore it can be concluded that the assessee has not filed satisfactory reply in response to the show cause notice issued to it under section 142(2A) of the Income Tax Act,1961.*

V. Department's query:-"As per the Note 27 of the P&L A/c for FY 2016-17 the closing balance in the inventory of land bank has been shown as Rs. 630.66 Cr. and the closing balance of Work in progress is shown of Rs. 936.11 Cr.. The details along with the evidences were called for examination of all the ongoing projects vis-à-vis investment made in the purchase of lands but the same could not be produced till date."

Assessee's submission in this regard:- "As to the details called for in respect of the contents of note 27 regarding inventory of land bank and closing balance of work-in-progress it is submitted that they are all as per record. This information was never sought in any of your questionnaire yet however the details have been placed on record along with those under SI. No. 28 of the questionnaire."

The reply of the assessee cannot be accepted. The AO vide questionnaire dated 02.08.2019 has asked the assessee to submit the details regarding the inventories of the assessee. ***Here assessee instead of giving detail of the inventories, it has provided the relevant note from Financials which is already available with the AO****. No other detail was ever submitted by the assessee. Therefore, this issue still remains unanswered.*

Further a reminder dated 04.10.2019 along with some further queries were issued to the assessee vide notice dt. 27.09.2019.

Pointwise discussion where the assessee's reply is not found satisfactory is as under

1. Department's query:- On perusal of your annual report in Note-29 to the Financial Statement under head Employee benefits expenses, the auditor has reported as below:-

"The above expenses includes provision of Rs. 2201.32 lakhs on estimated basis on account of wage revision due to employees w.e.f January 1,2017."

Clearly ***you have created a provision of Rs. 2201.32 lakhs in the current year and from perusal of computation of income submitted by you it is observed that you have not added back this provision to your income keeping in view the taxability of this provision you are requested to submit your reply.***

Assessee's submission dated 04.10.2019-

1. "As your kind self would be aware, pay revision in central Government is done after 10 years, and approved recommendations of the 7th pay commission were given effect from 01st January2016 for central Government employees. On similar lines, pay revision in CPSE's also took place based on DPE guidelines w.e.f 01.01.2017.

2. The revised salary payable to employees is due from 01.01.2017, pending calculation of revised salary on case to case basis. Accordingly, the liability in this regard was quantified based on DPE guidelines, and the amount of arrears were actually disbursed to the employees in the months of January 2018 and may 2018.

3. The relevant office order authorizing the payment of revised salary forms Annexure B to this letter, while the relevant report of 3rd PRC committee forms Annexure c hereto.

4. The said claim is allowance in terms of law settled supreme

court in the case of Bharat Earthmovers v. CIT [(2000 245 ITR 428 (SC)]

5. In the tax audit report also, liability on account of pay revision has not been consider by the independent auditor as a contingent liability. The said report already stands filed.

6. Thus, the liability had definitely arisen stood quantified with reasonable certainity, pertained to the relevant period, and stands properly discharged. All requirements for allowability stand met."

***On perusal of assessee's submission it comes out that for the present AY the assesee has made a provision of Rs. 2201.32 Lakhs, the same amount was claimed as an allwabale deduction by the assessee. Vide notice dt.04.10.2019 the assessee was asked about the allowability of this expense as per the IT Act, 1961. In regard to the reply submitted by the assesse, the assessee has stated that all the condition for claiming the provision was met. However, this was not the case here as for claiming any provision as decided by Hon'ble Supreme Court in the case of Rotork Controls India (P.) Ltd v. CIT [2009]180 taxmann 422/3141TR 62 there needs to be scientific method for ascertaining the amount of the provision. While in the case of the assessee the independent auditor himself has considered it as estimated amount which is evident from the note 29**. The relevant portion is reproduced once again as under:-*

"The above expenses includes provision of Rs. 2201.32 lakhs on estimated basis on account of wage revision due to employees w.e.f January 1, 2017."

Further, from reply submitted by the assessee it is not possible to ascertain what was the actual expense incurred by the assessee during the year (if any) or in subsequent year against this provision as no details have been submitted by the assessee. Further, with no specific reply received from the assessee it is

difficult for the AO to understand how the difference (between provision created with the actual expense occurred) was treated in the subsequent years. In whole, this provision created by the assessee needs further verification and quantification and as on date this fact remains unverified.

1. Department's Query (iii) notice dated 27.09.219-

On perusal of your annual report in Note-31 to the Financial Statement under head payment of Auditors the auditor has reported as below:-

"In the Previous Year, Payment to Auditors include RS.2.50Lakhs for Audit fees. 50 Lakhs for Tax Audit & RS.2.00Lakhs for corporate Governance related for AY.2014-15"

Clearly you have included expenses pertaining to AY.2014-15 of RS.5.00 Lakhs in the AY.2017-18. You are following mercantile method of accounting, accordingly to which you are required to claim any expenses on basis of its accrual during that year in which it accrues. Keeping in view the taxability of this provision you are requested to submit your reply.

In response the assessee vide its reply dated 04.10.2019 submitted.

Payment to Auditors (Refer point no.2(iii) of the annexure to the notice u/s 142(1) of the Act dated 27.09.2019):

Your kind self has referred to Note 31 of the Accounts (page 150of Annual Report), noticing therein, payment to auditors which related to AY.2014-15. We have been asked to explain why expenses pertaining to AY.2014-15 have been claimed in AY.2017-18. In this regard, the Assessee submits:

1. The relevant Note 31-A itself refers to FY.2014-15, and not AY.2014-15:
2. The expenses referred therein have been claimed and duly

allowed in AY.2016-17

3. NO EXPENDITURE ONTHIS COUNTHASBEEN CLAIMED IN THE PRESENTYEAR.

From the above, it is clear that there is difference in version of the assessee and its auditors evidently showing defects in correctness of its accounts. Therefore the same needs further verifications."

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7. It is also a matter of record that ***sufficient time and opportunity has already been granted to the assessee to furnish details and reconcile the same with its books.*** *However, the assessee failed to do so.*

8. Keeping in view the facts discussed here in above and this office earlier letter dated 13.09.2019 and also another letter dated 27.09.2019 to the assessee in this regard giving opportunity to show cause as to why a special auditor within the provision of Section 142(2A) of the IT Act, 1961 not be appointed in the case of the assessee and considering the detailed submission along with annexures and having gone through them carefully and reasons for not accepting assessee's arguments wherever deemed fit as detailed above, the undersigned is of the considered view that having regard to the nature and complexity of the accounts of the assessee, volume of the accounts and doubt about the correctness of the accounts and the interest of the revenue it is held necessary to get the accounts of the accounts of the assessee for AY 2017-18 audited by an accountant as defined in the Explanation below sub-section (2) of Section 288 r.w.s 142(2A) of the IT Act, 1961."

(Emphasis supplied)

6. On perusal of the aforesaid order, it can be easily discerned that in the

opinion of the AO, several queries and the corresponding replies of the assessee reveal the complexity in the accounts of the assessee. Say for illustration, the interest passed on to the clients, where the details furnished in terms of period of holding of advance, rate and calculation of interest amount vis-à-vis terms and conditions of the agreement with the clients, are complex and voluminous. The non-specific reply of the assessee raised doubts about the correctness of the transactions and lead the AO to seek further verification. Similarly, in respect of the TDS claim of the Assessee, query was raised regarding difficulty faced by the AO in examining whether the TDS receipts have been disclosed in the accounts of the assessee. It was pointed out in the reasons that "*TDS deductions on advances made to the company for construction would not match with the profit enuring out of works done utilizing these advances*", thus causing complexities and anomalies. On several other queries, the AO has observed that the petitioner has not submitted satisfactory reply to the queries and failed to produce its ledger, accounts and documents as called for. Referring to the Cost Audit report of the assessee, it has been pointed out in the reasons, that "*in the head of real estate the ratio of profit to the sales turnover has reduced from 43.57% in the last year to 17.40% in the present AY*" and "*in the infrastructure head there was a dip in ratio of Profit to the sales turnover from 10.19% to 5.90%*". Therefore, "*the sudden dip in the profit to sales ratio for both the heads discussed above raises doubts about correctness of accounts that's why assessee was asked to produce reconciliation of these profit shown along with ledger details of expenses but the assessee has failed to do so till date*".

Similarly, the reasons note that on perusal of the balance sheet, it is observed that "*the land purchase & material consumed has fallen from last year's Rs. 231.62 Cr. to Rs. 10.01 Cr. this year*", though, "*the trade payable has increased by Rs. 750.61 Cr*" while "*increase in the works and consultancy expenses claimed has only increased 8.67%*". Therefore, in the opinion of the AO, this issue needs to be verified. In absence of relevant documents/books of accounts, true picture of the income of assessee cannot be drawn. The assessee failed to furnish the necessary details and reconcile the books, and this prompted the AO to form a subjective satisfaction based on objective assumption on the basis of the responses furnished by the assessee. The answers to the questionnaire raised by the respondent No.1 was not found to be satisfactory and the impugned order for special audit was issued. The AO has clearly brought out the complexity in the accounts, in the reasons given for arriving at a satisfaction. Respondent No.1 has highlighted several aspects that indicated the complexity of accounts and the interest of revenue would be served if the special audit report is obtained and therefore, we are not persuaded to hold that the reasons are not sufficient or that there has been a denial of an opportunity of hearing to the petitioner. The conclusion that the account books and the material furnished was complex in nature for which a special audit is required, as observed above, is the subjective satisfaction arrived at by the AO. It cannot be said that there was any arbitrary exercise of the power, in directing special audit under Section 142(2A) of the Act which would call upon this court to exercise judicial review so as to strike down the order. We, therefore, do not find any

substance in the contentions of Mr. Krishnan that respondent No.1 has not examined the material and the response to the questionnaire furnished by the petitioner. We cannot hold that there is no application of mind on the part of the respondent No.1 for issuing the impugned directions. In our opinion, the satisfaction recorded by the AO is in consonance with the principles enunciated in Section 142(2A) of the Act. The doubts expressed by the AO are on the basis of the complexity of the accounts recorded upon objective considerations mentioned in the impugned order on each query. Though the petitioner has sought to explain all the queries so raised in the present petition, however, we feel that it is not in our jurisdiction to go into the accounts and the audit report and discuss the same. Respondent No.1 has applied his mind and the anomalies and discrepancies that have been pointed out in the impugned order, to our mind are sufficient to meet the test of judicial review while questioning the subjective satisfaction for appointment of special auditor. In our opinion, the aforesaid reasons are sufficient to sustain the action of the respondent to order a special audit in view of the limited and guarded scope of judicial review.

7. Having satisfied ourselves that the impugned order does not call for any interference on merits, we have also considered the other contentions raised by the learned counsel for the petitioner to scrutinize if there has been any jurisdictional error. The submission of Mr. Krishnan that there has been no notice issued by the respondents under Section 142(2A) of the Act, is bereft of merits. On a bare perusal of the notice dated

13.09.2019, it becomes evident that the same has been issued as per the said provisions. Though the covering letter has a subject line *"notice under sub section (1) of Section 142 of the Income Tax Act, 1961"*, however, the content and the import of the said notice is to afford an opportunity to the petitioner to show cause as to why the special audit should not be ordered. The proviso to Section 142(2A) stipulates that the AO shall not direct the assessee to get the accounts audited unless the assessee has been given a reasonable opportunity of being heard. The reasonable opportunity of being heard, envisaged in the proviso to sub-section 2A of Section 142 is based on the principle of natural justice. This includes a show cause notice, whereby the assessee is put to notice of the materials which are adverse. By this exercise, an opportunity is given to a party which is likely to be impacted by the order under Section 142(2A) to respond to the notice and address the adversities in material pointed out therein. In fact, even prior to the insertion of the proviso, the Supreme Court in its decision of ***Sahara India (Firm)*** (supra) had observed that even in the absence of an express provision for affording the necessary opportunity of pre-decisional hearing to an assessee, the requirement of observance of principles of natural justice is to be read into the said provision. In the instant case, this fundamental requirement is clearly met and the notice dated 13.12.2019 afforded an opportunity to the petitioner, as contemplated under the law. On perusal of Para 10 and 11 of the said notice, it becomes further evident that the same was a show cause issued to meet the statutory requirement of the provision by giving a reasonable opportunity of being heard to the assessee before passing the order to get

the accounts audited under Section 142(2A) of the Act. The said portion is extracted herein below:-

> *"10. In view of the facts and circumstances discussed above vis-a-vis issue involved in this case it can be seen that the details needs to be examined to ascertain the genuineness of the transaction are not only voluminous but complex in nature. Further, the multiplicity involved in the transactions and your failure in making compliance to the notices, issued earlier creates a doubt about the correctness of the accounts. Therefore, considering the interest of the revenue involved in this case as well as specified nature of certain transactions you are required to show cause as to why your case for AY 2017-18 shal1 not be audited from an Auditor as per the provision of Section 142(2A) of the Income Tax Act, 1961.*
> *11. You are requested to submit your reply online on efiling portal and furnish your explanation/objection on or before 23.09.2019. If you fail to furnish any explanation/objection by 23.09.2019 then no more opportunity will be given and the decision on conducting Special Audit u/s 142(2A) will be taken on the basis of the information available on record."*

8. Mr. Krishnan has argued that the reasonable opportunity should also include an opportunity of personal hearing that he says was denied to the Petitioner despite requests. However, we are not convinced with this submission. On this issue, we are inclined to agree with the views taken by the Gujarat High Court in ***Neesa Leisure Limited vs. DCIT*** [2013] 35 Taxman 331 (Guj)**,** where this precise question has been dealt with and answered in the following words:

> *"14. **An opportunity of being heard is one of the prime aspects of the principles of natural justice**. **A reasonable opportunity of being heard normally includes a show-cause notice; disclosure of material adverse to the noticee; an opportunity to the party likely to be adversely effected to make representation against***

such a notice and a reasoned order; howsoever brief, taking in account such representation, if so made. The requirement of personal hearing, however, is normally not seen as necessary concomitant to a reasonable opportunity of being heard. In other words, opportunity of hearing does not always include personal hearing.

15. In case of F.N Roy v. Collector of Customs AIR 1957 SC 648 contention was raised that the petitioner was not given a personal hearing in the appeal which he preferred before the Central Board of Revenue and in the petition for revision to the Government. Such proceedings arose out of an order of confiscation of goods of the petitioner by the Customs authorities. The contention regarding personal hearing was rejected in the following terms :

> *"11. It was then stated that the petitioner had not been given personal hearing of the appeal that he preferred to the Central Board of Revenue and the application in revision to the Government.* ***But there is no rule of natural justice that at every stage a person is entitled to a personal hearing.*** *Furthermore, the appeal was out of time. The memorandum of appeal to the Central Board of Revenue was posted on 4th May 1954. The time to file the appeal, however, expired on 1st May 1954, so that even if the date of the posting is taken as the date of the appeal the petitioner was out of time."*

xxxxxxx

21. In the present case, therefore, we need to examine the provisions of the Act and the nature of order passed by the authority. As already noted, Section 142 (2A) of the Act empowers the Assessing Officer; with the previous approval of the Chief Commissioner or the Commissioner, during the pendency of an assessment proceedings, to get the accounts of the assessee audited by the special auditor. It is, of course, true that any such order that the Assessing Officer may pass would result into adverse civil consequences. We may, however, recall

that post 2007, the requirement that the assessee must weigh the financial burden of special audit has been done away with. Once such special auditor submits his report, setting forth particulars; as may be prescribed, as also such as the Assessing Officer may require, further assessment would take place.

22. In the present case, the Assessing Officer had issued notices to the assessee under section 142 (1) of the Act. When there was no compliance, notice for appointment of special auditor came to be issued. Petitioner's objections were considered, approval from the Commissioner was sought. On the strength of such approval so granted by the Commissioner, the Assessing Officer on the basis of his opinion that the accounts of the assessee were complex and in the interest of the Revenue, it was so required, directed that the accounts be audited by the special auditor.

23. To our mind the proviso to Section 142 (2A) of the Act does not envisage any personal hearing before an order under sub--section (2A) can be passed. The said proviso only requires giving reasonable opportunity of being heard to the assessee. Such reasonable opportunity ordinarily would not include right of personal hearing. It may, in a given case, at the discretion of the Assessing Officer that the same may be granted. The same may even be either desirable or necessary in given set of circumstances where complex and technical questions of law and facts are involved. Such requirement, however, cannot be read into or fastened under the proviso to section 142 (2A) of the Act. In other words, in the context of the statutory provisions, such requirement cannot be seen as part of the scheme of the Act. In a given case, in special set of facts and circumstances it may be desirable or even necessary, but not in all cases.

24. In case of Rajesh Kumar (supra), the Supreme Court though read the requirement of hearing in Section 142 (2A) even prior to introduction of provision, nowhere provided that such hearing must be personal hearing. In fact, the observations made by the Supreme Court in paragraph 63 of the said judgment would indicate that such hearing would be of summary nature. It was

observed as under :—

> *"63. The hearing given, however, need not be elaborate. The notice issued may only contain briefly the issues which the Assessing Officer thinks to be necessary. The reasons assigned therefor need not be detailed ones. But, that would not mean that the principles of justice are not required to be complied with. Only because certain consequences would ensue if the principles of natural justice are required to be complied with, the same by itself would not mean that the Court would not insist on complying with the fundamental principles of law. If the principles of natural justice are to be excluded, Parliament could have said so expressly. The hearing given is only in terms of section 142 (3) which is limited only to the findings of the special auditor. The order of assessment would be based upon the findings of the special auditor subject of course to their acceptance by the Assessing Officer. Even at that stage the assessee cannot put forward a case that power under section 142 (2A) of the Act had wrongly been exercised and he has unnecessarily been saddled with a heavy expenditure. An appeal against the order of assessment, as noticed hereinbefore, would not serve any real purpose as the appellate authority would not go into such a question since the direction issued under section 142 (2A) of the Act is not an appealable order."*

It was this view, which the Supreme Court approved in Sahara India (Firm) (supra). In such decision also, the requirement of personal hearing was not read into the provision."

(Emphasis supplied)

9. On perusal of the record, we also find that apart from the aforesaid show cause notice, the AO has given several other opportunities to the petitioner by calling upon them to furnish their response along with documentary evidence. After issuing statutory notice dated 13.09.2019, another opportunity was given on 27.09.2019, when there was a change

of the incumbent in office of the respondent No.1. Also, notices under Section 142(1) along with questionnaire were issued to the assessee on 02.08.2019, followed by a reminder on 26.08.2019. Despite aforesaid opportunities, the assessee was unable to answer the queries raised by the respondent to the satisfaction of the AO. In the impugned order, the AO has threadbare considered each response to the queries raised and concluded that the accounts of the petitioner are voluminous and complex.

10. We also do not find any substance in the petitioner's submission that the action of respondent No.1 is mala fide or is an outcome of failure to pay the advance tax to the lacking of respondents' authority. Such submissions are based on conjectures and surmises and in absence of any cogent material to support this assumption, we refuse to entertain such a plea. Equally, we find no merit in the submissions of the petitioner that the respondent No.1 has interpolated the record. The essential mandate of Section 142(2A) requires an opportunity of hearing, which in the present case has been met for the reasons discussed in detail hereinbefore. Petitioner does not dispute that notice dated 13.09.2019 was served upon the petitioner. Resultantly, it had an opportunity to put forth its case and objections for ordering special audit. Once this requirement is fulfilled and the petitioner tendered its reply thereto, the prerequisite under the Act was met.

11. We find no reason to entertain the present petition. As a result, the

petition and the application are dismissed. No order as to costs.

SANJEEV NARULA, J.

VIPIN SANGHI, J.

DECEMBER 24, 2019
v