

आयकर अपीलीय अधिकरण
मुंबई पीठ "बी"
श्री विकास अवस्थी. न्यायिक सदस्य एवं
श्री एम बालगणेश, लेखाकार सदस्य केसमक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
आअसं. 2004/मुं/2017 (नि.व. 2010-11)
ITA NO.2004/MUM/2017(A.Y.2010-11)

Shri Bhupendra Surani
B-2005, Chandanbala CHS
R.R. Thakkar Marg, Walkeshwar
Mumbai 400006
PAN: BJAPS5716D

..... अपीलार्थी/Appellant

बनाम Vs.

Addl. CIT, Central Circle 15 & 16
Mumbai

..... प्रतिवादी/Respondent

अपीलार्थी द्वारा/ Appellant by : Shri Vijay Mehta, Advocate

प्रतिवादी द्वारा/Respondent by : Ms. Samruddhi Hande, Sr. AR

सुनवाई की तिथि/ Date of hearing : 30.09.2022

घोषणा की तिथि/ Date of pronouncement : 23.12.2022

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-51, Mumbai [hereinafter referred to as 'the CIT(A)'], dated 28.12.2016 for Assessment Year 2010-11.

2. The assessee has raised following grounds of appeal: -

"1. *The learned Commissioner of Income Tax (Appeals) has erred in law and in facts in passing the order u/s 250 of the Act.*

2. *On the facts and circumstances of the case and in law, the learned CIT(A) ought to have held that the assessment order passed by the Assessing Officer u/s. 143(3) r.w.s. 153C of the Act is time barred and in violation of provisions of section 153 of the Income Tax Act, 1961 (in short "the Act") and hence, bad in law.*
3. *On the facts and circumstances of the case and in law, the learned CIT(A) ought to have held that the appointment made by the Assessing Officer of the Special Auditor is not in accordance with the provisions of section 142(2A) of the Act.*
4. *The learned CIT(A) ought to have held that the assessment order passed by the Assessing Officer u/s. 143(3) r.w.s. 153C of the Act is void ab initio.*
5. *On the facts and circumstances of the case and in law, the learned CIT(A) erred in adding an amount of Rs,3,67,20,734/- u/s. 2(24)(iv) r.w.s. 56(1) of the Act on account of amount brought in by the appellant in NRE account from abroad.*
6. *The learned CIT(A) has erred in adding Rs.553.59 crores u/s. 2(24)(iv) r.w.s. 56(1) of the Act on account of loose paper found during the course of search.*
7. *The learned CIT(A) has failed to appreciate the facts of the case and made additions on the basis of presumptions, surmises and conjectures."*

3. Shri Vijay Mehta Appearing on behalf of the assessee submitted that the assessee is a non-resident individual and is engaged in the business of trading in diamonds. A search action u/s. 132 of the Income Tax Act, 1961 (in short "the Act") was carried out in the case of J B Diamond Group on 29.10.2010. Consequent to the search, notice u/s. 153C of the Act dated 17.11.2011 was served on the assessee. At the time of search a laptop of the assessee was seized. Printout of certain pages from the laptop of the assessee were taken and seized. The assessee is a resident of Hong Kong and is having NRO and NRE accounts with ING Vysya Bank, Opera House Branch Mumbai. The assessee is also having NRO accounts with HDFC Bank and ICICI Bank at Nariman Point

Branch, Mumbai. During Financial Year 2009-10 relevant to Assessment Year (AY) 2010-11 the assessee remitted Rs.3.63 crores and Rs.79.75 crores through proper banking channel, within the norms of RBI. During assessment proceedings u/s. 143(3) r.w.s. 153C of the Act, the Assessing Officer (AO) directed for Special Audit u/s. 143(2A) of the Act. The Assessing Officer issued notice dated 15.02.2013 (at page 19 of the paper book) and sought objections of the assessee against Special Audit. The assessee, vide letter dated 19.02.2013 (at pages 20 to 22 of the paper book), filed objection against the appointment of Special Auditor. Alongwith the objections the assessee pointed that the assessee is a non-resident. Mainly the source of income is on account of dividend received and foreign remittance in the accounts are from the assessee's account outside India. Copies of NRO accounts were also provided to the Assessing Officer. However, brushing aside the objections raised by the assessee, Special Auditor was appointed vide order dated 23.03.2013 (pages 18 to 20 of the Department's paper book). The learned AR submits that the Special Auditor has been appointed in violation of the provisions of the Act.

4. The assessee vide letter dated 29.01.2013 furnished the details of Capital Account and the Balance Sheet for the year under consideration. It was also clarified that during the period relevant to assessment year under appeal no investments in movable or immovable properties was made by the assessee. However, the Assessing Officer without examining the accounts of the assessee proposed the appointment of Special Auditor. The CIT(A), vide letter dated 11.03.2013, granted approval for Special Audit for AYs 2005-06 to 2011-12. The approval letter is at page 17 of the Department's paper book. A perusal of the said approval would show that the same has been granted in a mechanical manner without proper application of mind.

5. The learned AR submits that recourse to Special Audit u/s. 142(2A) of the Act could only be taken by the Assessing Officer after having regard to the nature of complexity of the accounts of the assessee and in the interests of Revenue. Thus, twin conditions for directing Special Audit have to be satisfied, i.e: (1) "nature of complexity of accounts", and (2) "interests of Revenue". The Assessing Officer in the present case without examining the accounts of the assessee jumped to the conclusion of complexity of accounts. The assessee had furnished books of account to the Assessing Officer for assessment years 2007-08 to 2011-12 on 04.10.2013. Whereas the order for Special Audit was passed on 22.03.2013 and Special Auditor furnished his report on 16.09.2013. This clearly shows that the Assessing Officer had no occasion to examine books of the assessee to come to the conclusion regarding nature of complexity of the accounts of the assessee. In so far as the report of the Special Auditor is concerned, without books of account it is not possible to conduct audit. Therefore, the Auditor's report is nothing but a farce. The said report is based merely on, bank statements and capital account details furnished by the assessee during the course of assessment proceedings. The assessee throughout has been objecting to the Special Audit. The learned AR in support of his submissions placed reliance on the following decisions: -

1. Sahara India (Firm) vs. CIT, 300 ITR 403 (SC)
2. West Bengal State Co-operative Bank Ltd. vs. JCIT, 267 ITR 345 (Cal)
3. Swadeshi Cotton Mills Co. Ltd. vs. CIT, 171 ITR 634 (All)
4. Alidhara Texpro Engineering P. Ltd. vs. DCIT, 332 ITR 115 (Guj)

6. The learned AR submits that no attempt was made by the Assessing Officer to understand the accounts of the assessee. The books of the assessee are not complex at all. The Assessing Officer merely on surmises and

conjectures invoked the provisions of Section 143(2A) of the Act. The Assessing Officer was probably carried away by the fact that the assessee had made huge investments in India after remittance from abroad. Investments in India from foreign remittance cannot be a ground for Special Audit.

7. The learned AR of the assessee raised another objection that the assessment order passed u/s. 143(3) r.w.s. 153C of the Act is time barred and hence, is without jurisdiction. The learned AR contended that the time limit for passing the assessment order u/s. 153C of the Act is one year from the end of the Financial Year in which the seized documents were handed over to the Assessing Officer. In the instant case, the documents were handed over to the Assessing Officer on 17.11.2011. Hence, the time limit for passing the assessment order was 31.03.2013, if the Special Audit was not directed by the Assessing Officer. However, the Assessing Officer passed the assessment order on 14.11.2013 which is clearly beyond the period of limitation provided under law.

8. Shri Rahul Raman representing the Department submitted that during search a laptop of the assessee was seized. From the laptop printout of two sheets were taken (same are on pages 3 & 4 of the Departments' paper book). The said sheets gave details of investments made by the assessee in India. A perusal of the sheets would show substantial amount of transactions/investments. The assessee has been declared bankrupt by the Hong Kong Court. The assessee has not filed return of income either in Hong Kong or in India. Thus, the source of investments is unclear. The assessee did not cooperate with the investigation and even during assessment proceedings. The assessee is a recalcitrant and did not furnish requisite financial documents

including the books of account before the Special Auditor. The Special Auditor in his report has categorically observed that no books of account were furnished and only some bank statements without any vouchers, invoices or any cogent evidences to support the entries were provided. The actual investments made in India by the assessee were referred to as projections. The learned DR pointed that the assessee is related to the Directors of J B Diamond Ltd. The assessee is using J B Diamonds as a conduit for transferring funds for the purpose of investments in India.

9. Rebutting the submissions made on behalf of Department the learned AR of the assessee reiterated that no “complexity” was pointed out by the AO before making reference to Special Audit. The assessee has made all investments in Hong Kong. The loose sheets which are used by the Department for making the additions are in fact projections of the investments in Hong Kong. Hence, these sheets are unrelated to any investments in India.

10. We have heard the submissions made by rival sides and have examined the orders of authorities below. The prime grievance of the assessee is against appointment of Special Auditor u/s. 142(2A) of the Act. It is an undisputed fact that the assessee had not furnished its books of accounts for the relevant period either before the Assessing Officer or the Special Auditor. A perusal of the assessment order reveals that the assessee has been non-cooperative throughout and has been continuously objecting to Special Audit. The AO merely on the basis of bank statements and extracts of capital accounts formed an opinion regarding the nature and complexity of the accounts.

11. The sine-qua-non for appointing Special Auditor is the opinion of the Assessing Officer having regard to the nature and complexity of the accounts and the interests of Revenue. Unless the Assessing Officer forms an opinion about the complexity of the accounts and interests of Revenue, the Assessing Officer cannot initiate the proposal for appointing Special Auditor. To form such an opinion the Assessing Officer has to examine the accounts of the assessee. Without having examined the books of account an opinion cannot be formed with reference to "the nature and complexity of accounts".

12. The Hon'ble Supreme Court of India in the case of Sahara India (supra) after examining the provisions of Section 142(2A) of the Act held as under: -

"6. A bare perusal of the provisions of sub-section (2A) of the Act would show that the opinion of the Assessing Officer that it is necessary to get the accounts of assessee audited by an Accountant has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessee; and (ii) the interests of the revenue. The word "and" signifies conjunction and not disjunction. In other words, the twin conditions of "nature and complexity of the accounts" and "the interests of the revenue" are the prerequisites for exercise of power under Section 142 (2A) of the Act. Undoubtedly, the object behind enacting the said provision is to assist the Assessing Officer in framing a correct and proper assessment based on the accounts maintained by the assessee and when he finds the accounts of the assessee to be complex, in order to protect the interests of the revenue, recourse to the said provision can be had. The word "complexity" used in Section 142 (2A) is not defined or explained in the Act. As observed in Swadeshi Cotton Mills Co. Ltd. Vs. C.I.T., it is a nebulous word. Its dictionary meaning is: "The state or quality of being intricate or complex or that is difficult to understand. However, all that is difficult to understand should not be regarded as complex. What is complex to one may be simple to another. It depends upon one's level of understanding or comprehension. Sometimes, what appears to be complex on the face of it, may not be really so if one tries to understand it carefully." Thus, before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the Assessing Officer to understand accounts maintained by the assessee; appreciate the entries made therein and in the event of any doubt, seek explanation from the assessee. But opinion required to be formed by the Assessing Officer for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction. There is no gainsaying that recourse to the said provision cannot be had by the Assessing

Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor. Similarly, the requirement of previous approval of the Chief Commissioner or the Commissioner in terms of the said provision being an inbuilt protection against any arbitrary or unjust exercise of power by the Assessing Officer, casts a very heavy duty on the said high ranking authority to see to it that the requirement of the previous approval, envisaged in the Section is not turned into an empty ritual. Needless to emphasise that before granting approval, the Chief Commissioner or the Commissioner, as the case may be, must have before him the material on the basis whereof an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect the application of mind to the facts of the case."

13. In the instant case, facts on records clearly indicate that the Assessing Officer without even examining the accounts of the assessee has formed an opinion regarding nature and complexity of the accounts of the assessee. This opinion has been formed by the Assessing Officer in a very casual manner. Without examining the books of account the Assessing Officer can have no understanding of the nature and complexity of the accounts of the assessee. We are unable to impress upon ourselves to subscribe to the view of Assessing Officer to hold nature of accounts of the assessee as complex, without even having a look at the books of assessee. The Hon'ble Apex Court in Sahara India (supra) has held that there has to be a genuine and honest attempt on the part of Assessing Officer to understand accounts of the assessee. The contention of the Revenue is that the assessee is non-co-operative and did not produce books. Under such circumstances, the Assessing Officer could have resorted to any other relevant provision available under the Act to complete the assessment but reference to Special Audit. The satisfaction of the Assessing Officer in the instant case is at the outset, shallow, flawed and unsustainable. The foundation of the entire case of Revenue in making addition of Rs.553.95 crores u/s. 2(24)(iv) r.w.s. 56(1) of the Act is the observation made in the Special Audit report. Indubitably, the Special Auditor also furnished his report without examining the books of assessee. In our considered view, since the initiating point for invoking provisions

of Section 142(2A) of the Act is defective, the subsequent proceedings arising therefrom are unsustainable.

14. Having held reference to Special Auditor as bad in law, the question arises; Whether the assessment u/s.143(3) r.w.s 153C of the Act is time barred?

The time limit for completing the assessment u/s.153C of the Act is one year from the end of the Financial Year in which seized documents were handed over to the Assessing Officer. In the instant case it is undisputed that seized documents were handed over to the Assessing Officer on 17/11/2011. Therefore, the assessment should have been completed on or before 31/03/2013, whereas, the assessment order was passed on 14/11/2013, hence, clearly beyond the period of limitation as specified u/s. 153B of the Act. The extended time for completing assessment would have been available to the Assessing Officer if reference to Special Auditor was held to be valid. As a sequitur to our findings on reference to Special Auditor, we hold the assessment order time barred, ergo, liable to be quashed. We hold and direct accordingly.

15. In the result, appeal by the assessee is allowed.

Order pronounced in the open court on Friday the 23rd day of December, 2022

Sd/-

(M. BALAGANESH)

लेखाकार सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated 23/12/2022

n.p./V.M

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

प्रतिलिपि अग्रेषितCopy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/The CIT(A)-51, Mumbai
4. आयकर आयुक्तPCIT- Central-2, Mumbai
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

//True Copy//

BY ORDER,

(Dy./Asstt.Registrar)/
ITAT, Mumbai