HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

D.B.:Hon'ble Shri P.K. Jaiswal
Hon'ble Shri Vivek Rusia, JJ.

W.P. No.7999/2018
(Ramswaroop Shivhare V/s. Dy. Commissioner of Income Tax Central, Bhopal)

W.P. No.7936/2018
(Smt. Kalpana Shivare V/s. Dy. Commissioner of Income Tax Central Bhopal)

W.P. No.7990/2018
(Harmindar Bhatia V/s. Dy. Commissioner of Income Tax Central)

W.P. No.7993/2018
(Akash Shivhare V/s. Dy. Commissioner of Income Tax Central Bhopal)

W.P. No.7995/2018
(Mukesh Shivhare V/s. Dy. Commissioner of Income Tax Central)

W.P. No.7997/2018
(Ashish Shivhare V/s. Ministry of Finance Deptt. of Revenue)

W.P. No.8361/2018
(M/s. Indus Globel Education & Welfere Society Thr. Harminder Singh Bhatia V/s. Dy. Commissioner of Income Tax Central, Bhopal)

W.P. No.9086/2018
(Ramesh Rai V/s. Income Tax, Deptt.)

W.P. No.15076/2018
(Vineet Shivhare V/s. Ministry of Finance (Deptt. of Revenue)

W.P. No.15097/2018
(Smt. Laxmi Narayan Shivhare V/s. Ministry of Finance, Deptt. of Revenue)

W.P. No.15101/2018
(Hari Bhau Shivhare V/s. Ministry of Finance, Deptt. of Revenue)

W.P. No.15106/2018
(Prem Narayan Shivhare V/s. Dy. Commissioner of Income Tax Central, Bhopal)

W.P. No.12965/2018
(Sunit Mandhok V/s. Dy. Commissioner of Income Tax Central, Bhopal)

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Shri Sumit Neema, Senior Advocate with Shri Gagan Tiwari, Advocate for the petitioner.

Ms. Veena Mandlik, Advocate for respondent.

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ORDER

(Passed on 6th day of September, 2018)

Per P.K. Jaiswal, J:-

In these batch of writ petitions under Article 226 of the Constitution of India, the petitioner therein are praying for quashment of order dated 22.12.2017, passed by the respondent

No.1, read with referral letters dated 17.11.2017, passed by the respondent No.1, show cause notice dated 30.11.2017 and the approval dated 22.12.2017 given by the respondent No.2 (Principal Commissioner of Income Tax Central Circle, Bhopal, Ministry of Finance, Deptt. of Revenue, wherein the proceedings for special audit under Section 142(2A) of the Income Tax, 1961 (hereinafter referred as 'the Act') have been ordered for and initiated against the petitioner for the Assessment Year 2010-11 to 2016-17. For the sake of convenience the facts are borrowed from W.P. No.7999/2018.

2. This order shall disposed of all the above thirteen writ petitions, as common questions of law arise there from, on somewhat similar facts for consideration of this court.

3. The petitioner is a member of various association of persons and is deriving profit / loss from these association of persons. The search and seizure operation under Section 132 of the Act was conducted in different premises of the Shivhare group on 07.01.2016, including the business premises of the petitioner and residential premises of its Directors. The case was subsequently centralized under Section 127 of the Act with the office of Respondent No.1 at Bhopal. In pursuance of the search under Section 132 scrutiny assessment proceedings under Section 153A of the Act have been initiated. Notice under Section 153A to file returns was issued on 27.10.2016. Returns were filed on 19.05.2017, for the above assessment years and reply was filed on 28.06.2017. Thereafter notice / questionnaire was issued on 22.05.2017. Through the said reply, the petitioner requested the respondent No.1 to provide the copies of various Panchnama and statement drawn and copies of loose papers, etc, found and seized during the course of the search initiated by the respondents – Deptt. on 07.01.2016. Six more notices, all dated 10.07.2017, were issued by the respondent No.1 to the petitioner directing it to appear before it and furnish certain documents. The petitioner vide letter dated 18.07.2017, requested the respondent No.1 to supply copies of Panchnama and statements. On 21.08.2017, another show cause notice was issued by the respondent No.1, directing the petitioner to furnish more documents and explanation relating to certain transactions as mentioned in the notice. The Assessing Officer after considering the nature and complexity of the accounts, voluminous of accounts, doubts about correctness of accounts, multiplicity of transaction of accounts, voluminous seized material, total non-cooperation on part of the petitioner and material available on record, formed the opinion, which was reduced in writing vide letter dated 20.11.2017 and 23.11.2017. Vide letter dated 20.11.2017, the Assessing Officer made a request to the Principal Commissioner of Income Tax Central, Bhopal, to consider the facts of the case and thereafter accord the approval for special audit, if deem fit.

4. The respondent No.2 (Principal Commissioner of Income Tax Central Circle, Bhopal, was requested to consider the case of the petitioner for special audit for seeking its approval for initiation of special audited proceedings under Section 142(2A) by an accountant, as defined in the explanation below Section 288(2) against the petitioner.

5. As per the procedure laid down by law, the Principal Commissioner of Income Tax (Central) Bhopal, has granted reasonable opportunity of being heard to the petitioner. The petitioner was granted the opportunity twice by the Principal Commissioner of Income Tax (Central), Bhopal, vide notice dated 30.11.2017 and letter dated 11.12.2017. The petitioner replied to it vide its reply dated 11.12.2017 and prayed for time to file detail submissions. The proviso to Section 142(2A) mandates that the opportunity has to be given to the assessee. The respondent No.2 (Principal Commissioner of Income Tax Central Circle, Bhopal, granted two opportunities to the petitioner before making reference to the special auditor.

6. The Principal Commissioner of Income Tax vide letter dated 22.12.2017 communicated to Assessing Officer that due opportunity was granted to the petitioner on the issue and the approval for special audit is accorded after careful consideration of the facts. The Assessing Officer after receiving the approval gave direction to the petitioner to get his Accounts audited from the special auditor nominated by the Principal Commissioner of Income Tax Central, Bhopal in this behalf.

7. The petitioner is challenging the ordered action of the respondents No.1 and 2 and order for special audit passed by the respondent No.1 on 22.12.2017 on the ground that the Assessing Officer has failed to give any opportunity, much less of reasonable opportunity of hearing, to the assessee at pre-decisional stage. As no opportunity of hearing was accorded to the petitioner by the Assessing Officer as required under Section 142(2A) of the Act, the impugned action is contrary to the law laid down by the Apex Court in the case of ***Rajesh Kumar*** *V/s.* ***Deputy Commissioner of Income-tax***, *(2006) 157 Taxman 168 (SC)* and the judgment of the three judges Bench of the Hon'ble Supreme Court in the case of ***Sahara India (Firm)*** *V/s.* ***Commissioner of Income-tax, Central-I***, *2008 (169) Taxman 328 (SC)* and submitted that the principles laid down by the Hon'ble Supreme Court are that the principle of '*Audi alteram partem*' cannot be ignored even at the stage of pre-decisional hearing as no opportunity of hearing was given to the assessee by the Assessing Officer and, therefore, the impugned letters / orders / communications are liable to be quashed.

8. Per contra, Ms. Veena Mandlik, learned counsel for the respondent – Revenue has submitted that opportunity was duly provided by the Principal Commissioner of Income-tax and thus, the sufficient compliance of the provisions have been made. She further submitted that the proviso to Section 142(2A) mandates that the opportunity has to be given to the assesseee, but the said proviso does not necessarily mandates that the opportunity has to be given to the assessee by the assessing officer only. The plain reading of proviso makes it clear that a reasonable opportunity of being heard has to be given and the opportunity was given twice by the Principal Commissioner Tax (Central) Bhopal and prayed for dismissal of the writ petitions.

9. The issue arising in this present bunch of writ petitions is in relation to the provision of Section 142(2A) of the Act. Section 142(2A) reads thus :-

> "142(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialized nature of business activity 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 Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, direct the assessee to get the accounts audited by an account, as defined in the Explanation below sub-section (2) of Section 288, nominated by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require :
> **Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.**

10. The Apex Court in the case of ***Sahara India (Firm)*** *V/s.* ***CIT, Central – I*** (supra) in para 6 of its judgment has observed thus :-

"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."

11. According to the learned Senior counsel for the petitioner, before any direction can be issued under Section 142(2A) of the Act for special audit of the accounts of the assesseee, there has to be a pre-decisional hearing and an opportunity has to be granted to the assessee for the purpose.

12. In ***Rajesh Kumar*** V/s. ***Dy. Commissioner of Income-tax*** (supra), while observing that the principles of natural justice must be held to be implicitly in Section 142(2A) of the Act, the Hon'ble Supreme Court has held as under :-

"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 natural 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."

13. The Apex Court in the case of ***Sahara India (Firm)*** *V/s.* ***CIT, Central – I*** (supra) in para 23 and 24 of its judgment has observed thus :-

"23. We are also unable to persuade ourselves to agree with

> the proposition canvassed by learned counsel for the revenue that since a post-decisional hearing in terms of sub-section (3) of Section 142 is contemplated, the requirement of natural justice is fully met. Apart from the fact that ordinarily a post-decisional hearing is no substitute for pre-decisional hearing, even from the language of the said provision it is plain that the opportunity of being heard is only in respect of the material gathered on the basis of the audit report submitted under sub-section (2A) and not on the validity of the original order directing the special audit. It is well settled that the principle audi alteram partem can be excluded only when a statute contemplates a post decisional hearing amounting to a full review of the original order on merit, which, as explained above, is not the case here.
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> 24. The upshot of the entire discussion is that the exercise of power under Section 142 (2A) of the Act leads to serious civil consequences and, therefore, even in the absence of express provision for affording an opportunity of pre-decisional hearing to an assessee and in the absence of any express provision in Section 142 (2A) barring the giving of reasonable opportunity to an assessee, the requirement of observance of principles of natural justice is to be read into the said provision. Accordingly, we reiterate the view expressed in Rajesh Kumar's case (supra).

14. As per Section 142(2A) of the Act the only requirement is that if in the opinion of the Assessing Officer the case is required to be audited by Special Auditor than the Assessing Officer must convey the opinion to the Principle Commissioner of Income Tax and after the approval is granted by the Principle Commissioner of Income Tax then Assessing Officer may issue the direction for Special Audit. The direction for Special Audit is subjected to approval of Principle Commissioner of Income-tax hence it is the Principle Commissioner of Income-tax who has to apply the mind before granting the approval for Special Audit on the proposal of Assessing Officer, therefore, the authority taking the substantive decision for Special Audit is Principle Commissioner of Income-tax. Hence, the Principle Commissioner of Income-tax is required to grant an opportunity to assessee or on the basis of opportunity granted by the assessing officer and based on the material available on record, the Principle Commissioner of Income-tax has to approve the proposal of the Assessing Officer if the Principle Commissioner deems it fit.

15. The requirement of pre-decisional heairng was met as Principle Commissioner of Income-tax (Central), Bhopal, before deciding the issue of approval for Special Audit gave the opportunity to the petitioner.

16. The petitioner has not made any objection regarding procedure followed by the Assessing Officer or by the Principal Commissioner of Income Tax (Central), Bhopal, in the entire process of Special Audit till the completion of Special Audit and only after the fact that the accounts have been verified by the Special Auditor, the present writ petitions have been filed on 04.04.2018. On 13.08.2018, it was pointed out that no assessment order was passed and the period for assessment is going to expire today, ie., 13.08.2018, we issued notice to the Revenue and directed that the assessment proceedings may go on, but no final order shall be passed without the leave of this Court.

17. On the next date of hearing, learned counsel for the Revenue has submitted that the assessment order has been passed on 13.08.2018 and the petitioner is having statutory remedy of appeal before the Commissioner of Income-tax and submitted that the writ petitions are rendered infructuous.

18. Considering the law laid down by the Apex Court in the case of ***Sahara India (Firm)*** *V/s.* ***Commissioner of Income-tax, Central – I*** (supra), so also the fact that Principal Commissioner of Income-tax granted two opportunities to the petitioner vide show cause notice dated 30.11.2017 and letter dated 11.12.2017, we are of the view that sufficient compliance of the proviso to Section 142(2A) has been made. We are also unable to persuade ourselves to agree with the proposition canvassed by the learned Senior counsel for the assessee.

19. In the result, the writ petitions filed by the petitioner have no merit and are, accordingly, **dismissed**.

20. A copy of this order be kept in W.P. No.7936/2018, W.P. No.7990/2018, W.P. No.7993/2018, W.P. No.7995/2018,W.P.No.7997/2018,W.P.No.8361/2018,W.P.No.9086/2018,W.P.No.15076/2018,W.P.No.15097/2018, W.P.No.15101/2018, W.P.No.15106/2018 and W.P. No.12965/2018.

No costs.

(P.K. JAISWAL)
JUDGE

(VIVEK RUISA)
JUDGE

SS/-

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HIGH COURT OF MADHYA PRADESH : INDORE BENCH
D.B.:Hon'ble Shri P.K. Jaiswal
Hon'ble Shri Vivek Rusia, JJ.

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ORDER FOR CONSIDERATION

(P.K. JAISWAL)
JUDGE
/09/2018

HON'BLE SHRI VIVEK RUSIA, J.

(VIVEK RUSIA)
JUDGE
/09/2018

Post for _ <u>06/09/2018</u>

(P.K. JAISWAL)
<u>JUDGE</u>
/09/2018

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W.P. No.12965/2018

Indore, Dated :-04.09.2018

Shri Sumit Neema, Senior Advocate with Shri Gagan Tiwari, Advocate for the petitioner.

Ms. Veena Mandlik, Advocate for respondent.

Heard.

Reserved for orders.

(P.K. JAISWAL) **(VIVEK RUSIA)**
JUDGE **JUDGE**

06.9.2018

Order passed separately signed and dated.

(P.K. JAISWAL) **(VIVEK RUSIA)**
JUDGE **JUDGE**

SS/-