

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-8357-2014 (O&M)

Date of decision: 07.10.2014

**Isolux Corsan India Engineering &
Construction Private Limited**

..... Petitioner

VERSUS

**Deputy Commissioner of Income Tax,
Circle 1 (1), Gurgaon and others**

..... Respondents

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MR. JUSTICE AMIT RAWAL**

**Present: Mr.C.S.Aggarwal, Senior Advocate, with
Mr.Parkash Kumar, Advocate, and
Mr.Ashim Aggarwal, Advocate, for the petitioner.**

Mr.Tejinder K. Joshi, Advocate, for the respondents.

RAJIVE BHALLA, J. (ORAL)

CM-12302-2014

Allowed as prayed for. The rejoinder filed on behalf of
the petitioner is taken on record.

CWP-8357-2014

Prayer in this petition, is to quash order dated
30.03.2014 (Annexure P-1), passed by the Deputy Commissioner
of Income Tax, Circle-I(1), Gurgaon, under Section 142(2A) of the
Income Tax Act, 1961 (hereinafter referred to as the 'Act'),
directing the petitioner to get its accounts audited from M/s
S.S.Kothari Mehta & Company, New Delhi.

Counsel for the petitioner submits that apart from the

fact that the impugned order does not assign any reason for arriving at the conclusion and/or issuing directions, to get account books audited, order dated 30.03.2014 has been passed in gross and blatant violation of the first proviso to Section 142(2A) of the Act which mandates the grant of an opportunity of hearing to an assessee before an order is passed requiring an assessee to get its accounts audited from an auditor to be nominated by the assessing officer. Apart from the aforesaid submissions, counsel for the petitioner submits that vide order dated 24.03.2014 the petitioner/assessee was called upon to file a reply positively by 11 AM on 27.03.2014. The reply was filed before 11 AM on 27.03.2014 but an opportunity of hearing, as required by the first proviso to Section 142(2A) of the Act was not afforded to the petitioner much less, was the petitioner called upon to clarify averments in the reply. A perusal of the interim orders, appended with the reply proves that before the impugned order was passed an opportunity of hearing was not afforded to the petitioner. The impugned order is not only null and void for failure to afford an opportunity of hearing but for absence of a perceptible process of reasoning much less any reason assigned in support of the direction to the petitioner to get its accounts audited from an auditor nominated by the assessing officer.

Counsel for the respondents submits that the

examination of the petitioner's accounts, stretched over a period of six months, during which numerous queries were raised some of which were answered but as others remained unanswered and in fact added more confusion to the accounts, the assessing officer had no option but to adopt the procedure prescribed by Section 142(2A) of the Act and order the petitioner to get its accounts audited from the auditor nominated by the assessing officer. After the petitioner filed a reply, the reply was duly considered and permission was obtained from the Commissioner of Income Tax, Faridabad, before the impugned order was passed. This apart, a representative of the petitioner was present before the assessing officer on 27.03.2014 but did not add anything beyond the contents of the reply and, therefore, no further opportunity was required to be granted to the assessee. It is further submitted that an opportunity of hearing need not necessarily translate into an oral hearing and may take the shape of calling upon the parties to file reply. It is further submitted that the impugned order must be read in the context of interim orders passed during the period of six months, preceding the passing of the impugned order. A perusal of these orders reveals that during the process of scrutiny, a large number of questions were addressed to the petitioner some of which were answered and as others questions remained unanswered or raised further questions. The only option left with

the assessing officer was to adopt the procedure prescribed by Section 142(2A) of the Act.

We have heard counsel for the parties, perused the pleadings particularly the impugned order dated 30.03.2014. A relevant extract from the impugned order reads as follows: -

“Please refer to the above subject. Scrutiny proceedings u/s 143(3) are going on in your case for AY. 2011-12. I am of the opinion that having regard to the nature and complexity of your accounts and in the interests of revenue, your accounts deserve to be audited as provided in Section 142(2A) of the Income Tax Act, 1961.

You are hereby directed u/s 142(2A) of the Income Tax Act, 1961 to get your accounts audited by the following accountant: -

M/s S.S.Kothari Mehta & Company, 146-149, Tribhuvan Complex, Mathura Road, Ishwar Nagar, Bahapur, New Delhi-110065.

Report of such audit in the prescribed form [Form No.6B] duly signed and verified by the above mentioned accountant must be submitted to the undersigned within 90 days of receipt of this direction. This issues with prior approval of the Commissioner of Income Tax, Faridabad, (Ref, letter no.CIT/FBD/Tech./142(2A)/13-14/6571-72 dated 30.03.2014).” सत्यमेव जयते

The question that calls for an answer, is whether Section 142(2A) of the Act renders it imperative that before passing an order an assessing officer is required to afford a reasonable opportunity of being heard to an assessee? The question so posed, would necessarily require reproduction of Section 142(2A) of the Act, alongwith its first proviso which read as follows: -

“142 (1) xxx xxx xxx

142(2) xxx xxx xxx

(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 specialised 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 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 :

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.”

Section 142(2A) of the Act, confers power upon the assessing officer, where the nature and complexity of accounts etc. and the interest of the revenue so requires to record an opinion that it is necessary to call upon the assessee to get his accounts audited by an accountant nominated by the assessing officer. The first proviso to Section 142(2A) of the Act, however prohibits an assessing officer from directing such an audit unless the assessee has been afforded a “reasonable opportunity of being heard.” The expression “reasonable opportunity of being heard” inheres an obligation to afford a reasonable opportunity of being heard. The mere calling upon the assessee to file a reply would not fulfill the preemptory condition set out in the first proviso to Section 142(A) of the Act. The grant of a reasonable opportunity of being heard, is a statutory

pre-condition to the exercise of power under Section 142(2A) of the Act, and if an assessing officer fails to afford a reasonable opportunity of being heard, before passing an order under Section 142 (2A) of the Act, such an order would be null and void.

A perusal of interim orders, appended with the reply as Annexure R1, and the impugned order reveals that the assessing officer granted an opportunity to file a reply but after receiving the reply did not grant an opportunity of being heard. It would be appropriate to reproduce interim orders from 27.03.2014 upto 30.03.2014 which read as follows: -

“27.03.2014 CA Sh.Dharmendra Gupta, AR, attends. Submits reply to show cause for audit u/s 142(2A).

27.03.2014 After considering the assessee's reply to the show cause dated 24.3.2014 a detailed proposal is sent to CIT Faridabad for approval u/s 142(2A) for special audit in this case. Issues, underlying basis and assessee's reply is enclosed with the proposal.

30.03.2014 Assessee is issued direction u/s 142(2A) to get its accounts audited by an accountant. Prior approval has been obtained from CIT, Faridabad vide letter No.CIT/FBD/Tech/142(2A)/13-14/8571-72 dt 30.3.2014.”

A perusal of these orders as well as the impugned order leaves no ambiguity that an opportunity of being heard was not granted to the petitioner/assessee thereby prohibiting the assessing officer from exercising power under Section 142(2A) of the Act, to order audit of the petitioner's accounts by an auditor nominated by the assessing officer.

An argument advanced by counsel for the revenue that during the process of examination of accounts, spread over the period of six months during which various queries were raised with respect to the accounts, may be considered as an opportunity of hearing, disregards the fact that a hearing is to be afforded after the assessing officer forms a prima-facie opinion, based upon credible material that the accounts produced by the assessee require to be audited by an auditor nominated by the department. The assessing officer formed such an opinion and served a show cause notice upon the assessee but thereafter did not afford an opportunity of being heard. The absence of an opportunity of being heard, in our considered opinion, cannot be cured by reference to queries that preceded the show cause notice and, therefore, renders the impugned order, a nullity.

In view of what has been recorded hereinabove but without expressing any opinion as to the rights of the parties, the writ petition is allowed, order dated 30.03.2014, is set aside, leaving it to the department to proceed in accordance with law. The department would be at liberty to proceed afresh/further and if permissible in law, exclude the period spent during pendency of this writ petition.

[RAJIVE BHALLA]
JUDGE

07.10.2014
Shamsher S.Sabharwal

[AMIT RAWAL]
JUDGE