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

**+** **W.P.(C) Nos. 356/2011, 19746/2005, 605/2008, 846/2009, 1386/2007, 426/2012 and 553/2010**

**Reserved on: 24th May, 2012**
**%** **Date of Decision: 10th September, 2012**

Delhi Development Authority & Anr. ....Petitioners
Through : Mr. Sandeep Sethi, Sr. Advocate with
Mr. Sindhu Sinha, Advocate.

Versus

UOI AND ANR ..... Respondent
Through : Mr. Mukesh Anand, Advocate for UOI.
Mr. A.S. Chandhiok, ASG with
Mr. Sanjeev Sabharwal, Sr. Standing Counsel for Revenue.
Mr. Sanjeev Rajpal, Sr. Standing Counsel.

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MR. JUSTICE R.V. EASWAR**

**SANJIV KHANNA, J.**

Delhi Development Authority, a statutory body/authority was created by the Delhi Development Act, 1957, to promote and secure development of Delhi, has filed these writ petitions against the Income Tax Authorities namely Assessing Officer and the Director of Income Tax (Exemptions)/Commissioner of Income Tax (Exemptions) who have given directions or approval for initiation of special audit under Section 142(2A) of the Income Tax Act, 1961 (Act, for short).

2. These writ petitions relate to assessment years 2003-04 to 2009-10, as in respect of each of these assessment years, direction for special audit has been issued. The grounds for initiation of special audit in most

of the years are similar. It is also the contention of the petitioner assessee that the order of special audit in respect of 2003-04 forms the basis of the subsequent orders. We have heard and are disposing of the said writ petitions by this common judgment. For the sake of convenience, we have treated Writ Petition (Civil) No. 19746-47/2005, as the lead case as the said writ petition pertains to assessment year 2003-04 and is against the first order directing special audit. Wherever required, facts peculiar to each assessment year have been noticed and dealt with.

3. We may note that earlier Writ Petition (Civil) No. 19746-47/2005 was disposed of vide order dated 29th November, 2006 on the ground that clearance/approval of Committee of Disputes had not been obtained, but on Appeal by Special Leave filed by the petitioner herein, the said order was set aside and the matter remanded for fresh decision on merits in view of the judgment of the Supreme Court in ***Rajesh Kumar and Ors. v. Deputy CIT and Ors.*** (2007) 2 SCC 181.

4. Before we go to the factual matrix of the present case, it may be relevant to read and consider the provision of Section 142(2A) and examine the decisions of the Supreme Court and High Courts on the scope and ambit of the power under the said Section. Section 142(2A) of the Act reads as under:-

> "S. 142 **Enquiry before assessment-**
>
> xxx
>
> (2-A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the

> opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of Section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require:
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> *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."*

(Amendments made w.e.f. 1st June, 2007, for the sake of convenience have been printed in italics.)

5. There was considerable divergence and difference of opinion whether principles of natural justice should be complied with before an order under Section 142(2A) is passed and whether the said order is purely an administrative order or whether the order directing special audit has adverse civil consequences or is a quasi judicial order. In ***Rajesh Kumar's case*** (supra), the Supreme Court examined the conflicting views of the High Courts and opined that the difference between administrative orders and quasi judicial orders stands obliterated. An order under Section 142(2A) directing special audit entails civil consequences and, therefore, principles of natural justice in the form of hearing have to be complied with, albeit this does not require an elaborate hearing. The Supreme Court also considered the issue of recording of reasons or the contention of duty to ascribe reasons. Duty to

assign reason, it was stated, was a judge-made law and there was a dispute whether it could be described as the third pillar of natural justice. Referring to the section in question, it was observed that the notice may contain briefly the issues that the Assessing Officer thinks to be necessary and need not be detailed ones. An order of approval by the Commissioner/Director should not be granted or passed mechanically. The same should be done having regard to materials on record. Explanation of the assessee could be a relevant factor. Commissioner/Director can form a different opinion than to one expressed by the Assessing Officer who initiates the process. The scope and ambit of Section 142(2A) was examined. Interpretation of the said section as discussed and made in the said judgment has been referred to below.

6. The ratio expressed in ***Rajesh Kumar's case*** (supra) was referred to a larger Bench of three Judges and their judgment in the case of ***M/s Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Central-I & Anr.*** (2008) 14 SCC 151, affirms the view that principles/rules of natural justice have to be complied with before an order under Section 142(2A) is passed. It was held that the said rules are not embodied in writing and are not capable of a precise definition, but they have evolved under the common law to check every arbitrary exercise of power by the State and functionaries. The principle implies a duty to act fairly i.e. fair play in action and prevent miscarriage of justice. The *audi alteram partem* rule, it was observed, has many facets but two important facets are- notice of case to be met and opportunity to explain. It was accordingly held as under:-

> *"**19**. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial."*

7. Referring to expression 'civil consequences', the Supreme Court quoted from ***Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.*** 1978 (1) SCC 405, wherein the majority had observed that the said connotation means everything that affects a citizen in his civil life and inflicts a civil consequence. The Supreme Court had noticed that w.e.f. 1st June, 2007, proviso to Section 142(2D) had been inserted and thereafter the expenses payable to the auditor had to be paid by the Central Government and not by the assessee. However, this did not materially affect the civil consequences from an order under Section 142(2A). The Bench observed that there could be some debate or doubt on the question whether an order directing special audit is quasi judicial or administrative but this distinction is no longer relevant once it is held that the said order has "civil consequences". It was finally observed that rule of *audi alteram partem* is required to be observed, elucidating;-

> *"**26**. In the light of the aforenoted legal position, we are in respectful agreement with the decision of this Court in Rajesh Kumar [(2007) 2 SCC 181 : (2006) 287 ITR 91] that an order under Section 142(2-A) does entail civil consequences. At this juncture, it*

*would be relevant to take note of the insertion of proviso to Section 142(2-D) with effect from 1-6-2007. The proviso provides that the expenses of the auditor appointed in terms of the said provision shall, henceforth, be paid by the Central Government. In view of the said amendment, it can be argued that the main plank of the judgment in Rajesh Kumar [(2007) 2 SCC 181 : (2006) 287 ITR 91] to the effect that direction under Section 142(2-A) entails civil consequences because the assessee has to pay substantial fee to the special auditor is knocked off.*

***27**. True it is that the payment of auditor's fee is a major civil consequence, but it cannot be said to be the sole civil or evil consequence flowing from directions under Section 142(2-A). We are convinced that special audit has an altogether different connotation and implications from the audit under Section 44-AB. Unlike the compulsory audit under Section 44-AB, it is not limited to mere production of the books and vouchers before an auditor and verification thereof. It would involve submission of explanation and clarification which may be required by the special auditor on various issues with relevant data, document, etc. which, in the normal course, an assessee is required to explain before the assessing officer. Therefore, special audit is more or less in the nature of an investigation and in some cases may even turn out to be stigmatic. We are, therefore, of the view that even after the obligation to pay auditor's fees and incidental expenses has been taken over by the Central Government, civil consequences would still ensue on the passing of an order for special audit."*

8. This brings us to the question of what is meant by the term 'complexity' of account and interest of the Revenue. It is now well settled that both conditions have to be satisfied and the conditions are cumulative and not in alternative. The expression 'complexity' of

accounts was explained by Allahabad High Court in ***Swadeshi Cotton Mills Co. Ltd. v. CIT*** 1988 (171) ITR 634 as:-

> *"10. This is the substance of the statutory provisions. The power thereunder cannot, in our opinion, be lightly exercised. The satisfaction of the authorities should not be subjective satisfaction. It should be based on objective assessment regard being had to the nature of the accounts. The nature of the accounts must indeed be of a complex nature. That is the primary requirement for directing a special audit. But the word " complexity " used in Sub-section (2A) is a nebulous word. Its dictionary meaning is :*
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> *" The state or quality of being intricate or complex ' or ' that is difficult to understand."*
> *11. However, all that are 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. Therefore, special audit should not be directed on a cursory look at the accounts. There should be an honest attempt to understand the accounts of the assessee."*

9. The aforesaid reasoning and ratio has been approved by the Supreme Court in ***Rajesh Kumar*** and ***Sahara India (Firms) Lucknow's*** case (supra). On behalf of the Revenue, it is submitted that decision in ***Sahara India (Firms) Lucknow's*** case (supra) is applicable prospectively. The said decision was rendered on 11th April, 2008 and, therefore, will not apply to orders passed under Section 142(2A) before the said date. We have examined the said contention but do not find any merit in the same. The actual wording of the order passed by the Supreme Court reads as under:-

> *"……Accordingly, we hold that the law on the subject, clarified by us, will apply prospectively and it will not be open to the appellants to urge before the Appellate Authority that the extended period of limitation under Explanation 1 (iii) to Section 153(3) of the Act was not available to the Assessing Officer because of an invalid order under Section 142(2A) of the Act. However, it will be open to the appellants to question before the appellate authority, if so advised, the correctness of the material gathered on the basis of the audit report submitted under Sub-section 2A of Section 142 of the Act."*

10. The Supreme Court clarified that law on the subject as expounded by them will apply prospectively and it will not be open to the appellant i.e. the assessee, to urge before appellate authority that the extended period of limitation under Explanation 1(iii) to Section 153(3) of the Act which is applicable to the cases of special audit, was not available to the Assessing Officer because the direction for special audit was invalid. This clarification and observation was required because once the order directing special audit was declared invalid, then the assessment order passed by the Assessing Officer would be barred by limitation. The appellant in the said case was, therefore, prohibited from raising the said contention. It was also clarified that the assessee could question before the appellate authority, if so advised, the correctness of material gathered on the basis of special audit report. Moreover, in the present case as noticed below, show cause notice was issued and was replied to by the petitioner. We also notice that for the assessment year 2003-04, the jurisdictional Commissioner of Income Tax had given a hearing to the petitioner. These aspects have been discussed below.

11. It may be now appropriate to refer to two judgments of the Delhi High Court in ***Gurunanak Enterprises v. Commissioner of Income-tax and Anr.*** (2003) 259 ITR 637 and ***Yum! Restaurants India Pvt. Ltd. v. Commissioner of Income-Tax***, (2005) 278 ITR 401. The later judgment was referred to in the case of **Rajesh Kumar's case (supra)** and some observations have been made. However, we are referring to the said decision for a different purpose. In the case of **Gurunanak Enterprises (surpa)**, D.K. Jain, J. (as His Lordship then was) observed that the Assessing Officer must form an opinion with regard to twin conditions viz., nature and complexity of accounts and the interest of the Revenue. Additionally, special audit requires approval of the Chief Commissioner or the Commissioner. Further the power under Section 142(2A) is not to be lightly exercised, and it is to be based on the foundation of available material. A genuine and honest attempt must be made to understand the accounts since an order under the provisions not only entails a heavy monetary burden but it also causes a lot of inconvenience to the assessee. In the said case, the challenge to the special audit order was rejected after recording that reasons clearly established the need of comprehensive and in depth examination of assessee's accounts as the profits shown were very low and there was possibility of suppression of income in crores of rupees. It was held that the authorities concerned had applied their mind to the relevant facts and it was not a case where irrelevant factors had weighed with the authorities in ordering special audit. The court was not to substitute its own understanding and comprehension of the accounts of the assessee. The contention that the assessee was already subject to audit under Section 44AB of the Act was rejected holding that the audit by statutory auditor does not denude the Assessing Officer of his power to pass an

order of special audit. In the said case, the assessee had produced books of accounts before the Assessing Officer and thereafter the Assessing Officer recorded relevant findings which were germane, cogent and not extraneous. It was not based merely on ipse dixit of the Assessing Officer. It was held:-

> *"A bare perusal of the provision would show that the opinion of the Assessing Officer has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessed 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 Revenue" are the pre-requisites for exercise of power under Section 142(2A). Although the object behind enacting the said provision is to assist the Assessing Officer in framing the assessment when he finds the accounts of the assessed to be complex and is to protect the interests of Revenue but recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinising the accounts of an assessed to determine his true and correct income, on to an auditor. True that an order under the said provision cannot be passed on the ipse dixit of the Assessing Officer merely because he finds some difficulty in understanding the accounts.* ***There has to be a genuine and honest attempt on his part to understand the accounts of the assessed, appreciate the entries therein and if in doubt, seek Explanation from the assessed or his representative, rather than pass on the buck to the special auditor. A cursory look on the books of accounts is not sufficient. It needs little emphasis that the opinion required to be formed by the Assessing Officer for exercise of power under Section 142(2A) must be based on objective***

> ***consideration and not on the basis of subjective satisfaction****. Similarly, the requirement of the previous approval of the Chief commissioner or the Commissioner, being an in-built 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 add 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. A bare endorsement of the proposal would not be sufficient. Peerless General Finance and Investment Co. Ltd. v. Dy. CIT [1999] 236 ITR 671 (Cal) and and Muthoottu Mini Kuries v. Dy. CIT [2001] 250 ITR 455 (Ker) hold so."*
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> *(emphasis supplied)*

12. The highlighted portion of the said paragraph indicates that the Assessing Officer should have examined the books of accounts and made a genuine and honest attempt to understand the accounts. A cursory look at the books, it was stated, was not sufficient. The aforesaid observations find resonance and acceptance in another Division Bench decision of this court in **Yum! Restaurant's case** (supra), in which it has been held :-

> *"Therefore, next we would proceed to discuss the nature of the proceedings before the authorities under section 142(2A) of the Act. Every person is required to file return of income under section 139 of the Act. Once such a return is filed, the Assessing Officer may conduct an inquiry before*

*the assessment, in consonance with the provisions of section 142 of the Act. Thereupon under section 143 of the Act, the Assessing Officer would pass an order of assessment requiring the assessee to pay the tax in terms thereof. All these powers are vested in the Assessing Officer under Chapter XIV relating to "procedure for assessment". Section 142(2A) of the Act forms part of this procedure and mandates that if at any stage of the proceedings before the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and interest of the Revenue, he is of the opinion that it is necessary so to do, he may with the previous approval of the Chief Commissioner direct the assessee to get the accounts audited by an accountant as defined in the Explanation below sub-section 2 of Section 288 and nominated in this regard. Exercise of power by the Assessing Officer under this provision is subject to satisfaction of the limitations specified in the section itself. The Assessing Officer must form an opinion that having regard to the nature and complexity of the accounts, it would be in the interest of the Revenue to direct special audit under this provision. Formation of this opinion cannot be strictly equated to an order. This is merely a formation of an opinion during the course of assessment proceedings and is not a final order in itself. The direction for special audit under this provision could be issued only with the previous approval of the Chief Commissioner. The provisions of section 142 of the Act under its various sub-sections and provisos provide more than needed, checks and counter-checks for the purposes of providing a fair opportunity to an assessed to contest the report made out by the accountant in furtherance to such an order. Section 142(2C) imposes an obligation upon the Assessing Officer to furnish a copy of the report received by him under section 142(2A) to the assessee within the period specified. Thereafter the*

*Department is obliged to give an opportunity and assessee has a right of being heard in regard to the material gathered on the basis of the audit conducted by the Special Auditors. The law was amended and by Taxation Laws (Amendment) Act, 1974 post hearing was specifically provided to the assessee w.e.f. April 1, 1996. The law has specifically contemplated an effective post-decisional hearing to the assessee and requires the authorities to comply with these provisions prior to passing of final order of assessment. It is necessary for us to discuss these provisions primarily to indicate as to what would be the scope in a pre-decisional hearing. The assessee would have to be put to a notice by appropriate procedure permissible under the provisions of the Act before an order under Section 142(2A) can be passed requiring the assessee to go through the special audit. At the same time, it cannot be in the form of a show cause or a prolonged and multi-faceted hearing at the pre-decisional stage. The scope of the pre-decisional hearing would be very limited and should be confined to proper interaction and confrontation of complexity of accounts as understood by the Assessing Officer to the assessee and requiring him to explain. In the event of Assessing Officer is not satisfied, he would be at liberty to form an opinion and pass a direction under section 142(2A) subject to the approval of the Commissioner for a special audit of the accounts of the assessee.* ***The Assessing Officer should form the required opinion upon examining of books of accounts, after making sincere effort to understand the books of accounts and after putting the assessee at notice. Inability on the part of the assessed to provide the requisite clarifications to the satisfaction of the Assessing Officer would normally be a sufficient ground for the Assessing Officer to exercise his jurisdiction under this provision and to record the opinion on a subjective satisfaction recorded***

> ***objectively. The Assessing Officer is not required to loose sight of the provisions of the Act and the objects sought to be achieved thereunder. The orders should be founded on application of mind relatable to the nature and complexity of the accounts and in the interest of the Revenue****. Once these ingredients are satisfied, the scope of judicial review of such a direction would normally be not possible, as the High Court in exercise of its powers under section 226 of the Constitution of India does not sit as a Court of Appeal over such orders particularly when they are interim orders and post-decisional protection and remedy is available to the assessed under the same very provisions."*
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> *(emphasis supplied)*

13. The aforesaid observations are relevant as it is accepted by the Revenue that for the assessment year 2003-04 and 2004-05, the Assessing Officer did not call for, examine or consider the books of accounts or even sample accounts. Highlighted portion of the aforesaid observations is clearly to the contrary and requires examination of the books by the Assessing Officer. Failure to even call for books of accounts or relevant accounts and examination thereof is an indication of the casual and unacceptable approach and exercise of power. It was contended by Mr. A.S. Chandhok, Additional Solicitor General that in this case books of accounts were not required to be examined as the notes of accounts stated/recorded by the assessee's auditor itself justify and establish complexities in accounts and also disclose the need to have special audit in the interest of Revenue. In the present case, we are not concerned with an assessee who does not maintain books of accounts as per law or has duplicate books of account. It is a case of a statutory authority which is maintaining books of accounts. Notes of accounts

may be the basis for the Assessing Officer to ask for queries and examine the accounts but, before an order under Section 142(2A) was passed and keeping in mind the consequences and the ratio expounded by the Supreme Court and this Court, we feel that it was necessary and required that the Assessing Officer should have examined the books of accounts or the relevant accounting entries himself before forming an opinion. Non-examination of books of account would show that there was haste and hurry and that the Assessing Officer not fully appreciate the consequences and the harassment/inconvenience which the assessee may suffer if a wrong order directing special audit was passed or directed.

14. Assessment proceedings in respect of assessment year 2003-04, were initiated by selecting the case for scrutiny and issue of notice under Section 143(2) for the first hearing on 9th November, 2004. A questionnaire dated 1st November, 2003 was issued to the assessee for 9th November, 2004. There is dispute as to what had happened on 9th November, 2004. The order sheet records no one had appeared but the petitioner (assessee) had written a letter dated 17th January, 2005, in which it had stated:

> *"In this connection, we would like to submit that on 9th November, 2004, the undersigned alongwith Ms. Mala Rajan, C.A. had reached the Office at 10.30 A.M. and waited till 11.30 A.M., but you were not in office. We had left a message with your Office and your goodself had even spoken to the undersigned on his mobile after you had reached your office and it was agreed that we can come some other day to attend the case. On 20th December, 2004, we had attended the hearing and given all the explanations and clarifications that your goodself had sought. The clarifications were on the same points as were raised in the*

*Questionnaire dated 1st November, 2003. After the hearing, your goodself had informed us that another Questionnaire would be framed and we would be informed of the same as soon as the same was ready. The next date of hearing was fixed on 3rd January, 2005. On 3rd January, 2005 since the undersigned was out of station, the case could not be attended and as such we had also not received any new Questionnaire and all the points raised in the previous Questionnaire had already elaborately explained on 20th December, 2004.*

*The undersigned again attended your good Offices on 11th January, 2005 and had already explained the above position personally when your goodself informed about the service of the above-referred letter on 11th itself which had not been received till then. Your goodself would appreciate that there is no reason for the case to be decided ex-parte. Regarding the compliance of statutory requirements and elaborate administrative procedures, we may submit that the same was explained to your goodself only in reply to the proposition that was put across to us during the discussion with your goodself and the Addl. C.I.T. that the Department intended to complete the case before 31st December, 2004 itself. In the said context, we had expressed the practical difficulties in view of the size and volume of operations of the assessee which is spread across Delhi and the decentralized accounting procedures. The details have to be called for from the various accounting centres and consolidated for proper presentation before your good offices. However, as of now all the queries raised by your goodself have already been answered and clarified and we assure you of our fullest cooperation at all times."*

15. We have quoted the said letter because it does appear that there was some controversy between the assessee and the Assessing Officer

about the manner and nature in which the proceedings were being conducted. Acrimony and bitterness on both sides is apparent from the letter quoted above. The order sheet thereafter reads;-

> "20/12/2004
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> Sh. K.N. Goel CA, AR of the assessee appeared along with Ms. Mala Rajan appeared and the case was discussed. The next hearing fixed on 3rd January, 2005.
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> ---
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> 03/01/05
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> No body appeared on this date. No adjournment letter furnished. The reply to the questionnaire which was issued on 3/11/04 is yet to receive.
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> ---
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> 11/01/05
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> Letter was issued to the DDA for delay in furnishing the information and completion of the assessment ex parte. This letter was issued on directions of CIT-XI.
>
> ---
>
> 11/01/05
>
> Sh. K.N. Goel CA, AR of the assesse appeared along with Ms. Mala Rajan CA and furnished the detaisl as per the questionnaire issued on 03/11/04. The next hearing is fixed on 17/01/05.
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> ---
>
> 11/03/05

A letter has been up to the Add CIT, Range 32 proposing special audit u/s 142 (2A) of the IT Act, 1962, keeping in view the nature and complexity of the accounting system followed by the DDA."

16. In response to the notice dated 1st November, 2004 of the Assistant Commissioner, the petitioner had vide reply dated 20th December 2004, stated that (i) the petitioner was maintaining Receipts and Payments based government accounts and the system of accounting and manner of preparing accounts was drawn up and based on the recommendations of the Accountant General, India. DDA (Budget and Accounts) Rules, 1982 were applicable and the accounts were drawn up based on the cash receipts, but at the year end the accounts were converted into Income and Expenditure based accounts and this accounting system had been followed in the earlier years. There was no change. The petitioner had initiated steps for conversion of Receipts and Payment based government accounting into transaction based Double Entry Accounting. (ii) The reconciliations, referred to in the Notes, relate to position as on 31st March, 2002 and prior period liability or asset was adjusted to a separate account. The same did not affect the year accounting and had no bearing on the transactions/income for the year 2002-03. (iii) Regarding policy on ground rent and service charges, it was stated that the petitioner had introduced a scheme for payment of one-time capitalized ground rent and this was capitalized in the books up to 31st March, 2002 on accrual basis. Subsequently, it was thought that the amount should be charged on receipt basis and the accrued charges booked on 31st March, 2002 were reversed by adjustment of opening surplus. All allotments from 2001-02 were made on one-time capitalized charge basis and, therefore, the policy change

had no implication or adverse impact on the year in question. (iv) General Provident Fund or Pension Fund was not a contributory fund. Provident Fund Act, 1925 applied and had been notified and, therefore, exempted under Section 10(25) of the Act. Pension Fund had not been approved and, therefore, the fund and the income earned thereon were added to the taxable income. (v) The revolving fund, it was explained, was established with a corpus of Rs.5 crores of the Central Government and entrusted to the Chief Commissioner, Land and Building Department. The Personal Ledger Account was opened in the Reserve Bank of India and the petitioner was only an agent or trustee of the Land and Building Department. (vi) The lands were dealt with as per the directions of the Central Government and as per the Nazul Rules notified. It was not revenue/income in the hands of the petitioner. (vii) Value of all the fixed assets had been computed on actual cost. In respect of small items like chairs, tables, coolers etc. purchased prior to 31st March, 2003, where the actual cost was not ascertainable, they were taken at a nominal value. (viii) The cost of construction was calculated by taking average of construction cost incurred during a particular period and to this, a fixed percentage of departmental charges and interest were added. The petitioner, being a public institution, utilized the profits earned in housing for the higher income groups and other sale considerations received to make up for the rebates allowed in the Janta or lower income group housing. The authority worked on a non-profit motive and on a special compensatory pricing mechanism. The value of stocks was calculated at a disposal price or cost whichever was lower. In special rebate schemes, the value was calculated at lower than cost, but other stocks are valued at cost. (ix) All adjustments for period prior to 31st March, 2002 were routed through a separate adjustment account

and so they did not affect the income of the years in question. (x) The accounts involved in inter se transfer of funds and Personal Ledger Accounts were personal accounts and had no bearing on the income and expenditure accounts of the petitioner. The personal accounts were subject to re-conciliation.

17. Thereafter, ACIT sent a questionnaire on 18th January, 2005 to the petitioner. In response, vide letter of the same date to the Assistant Commissioner of Income Tax, it was stated that the Ground Rent and Service Charges up to 31st March, 2002 were accounted for on accrual basis, but the same had been accounted for on cash basis from the financial year 2002-03 as a scheme for payment of one-time capitalized ground rent and service charges was introduced. However, new allotments were made on free-hold basis and, therefore, no ground rent or service charges were levied. The earlier year payments had been accounted for and the change made did not affect the income earned. The Land and Building Department was a department of the Central Government and was not under the DDA. There was no agreement between the Central Government and the DDA. Development was being undertaken under the scheme of Large Scale Acquisition, Development and Disposal of Land in Delhi dated 2nd May, 1961 and to finance the same, a revolving fund had been created. Section 22 of the DDA Act, 1957 prescribes the manner of dealing with the Nazul Land. Copy of the Nazul Rules was enclosed.

18. After notice and reply was furnished by the petitioner, the matter was put to the Commissioner of Income Tax. The petitioner was heard by Mr. R.N. Dash, Commissioner of Income Tax on 22nd March, 2005.

The noting made by the Commissioner of Income Tax in his file reads as under:-

> "Ms. Mala Rajan, CA and Mr. K.N. Goyal CA appeared and filed a written reply objecting to the proposal for special audit in the case of DDA. They requested for a early hearing as they would be away on 24.3.05.
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> 2. It is submitted that there are no accounting items involved in the case nor there is any inconsistency in the books of accounts of DDA.
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> 3. With regard to the debit entry of Rs.82.32 crores, it is object as to have no bearing upon the revenue recognition. It is only an adjustment entry being revenue neutral and affects income of earlier years.
>
> 4. The accounts stated that the entire pension income is offered to tax. GPF is covered by notification and is not an accounting issue.
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> 5. Nazul receipt is covered by a notification. Copy enclosed. Accounting responsibility lies not with DDA but with Chief Commissioner, Delhi.
>
> Discussed. For orders please see copy of submission to Range head & AO for _____"

19. The Assessing Officer thereafter filed a reply dated 22nd March, 2005 to the Commissioner of Income Tax. The reply goes into about eight typed pages. The first submission relates to debit entry of Rs.82.32 crores on account of adjustment account. As explained by the assessee that the same was not a revenue account, related to prior period and did not affect the income. The Assessing Officer stated that all entries made in the adjustment account need scrutiny. The exact words used, read as under:-

> "All the entries made in the adjustment account needs scrutiny w.r.t. the treatment given to such entries. The assessee has stated that there was no revenue loss involved by such an entry but what has to be examined is that though such an entry may not be having any revenue loss temporarily but the same may be having profound revenue impact in future entries in "Adjustment A/c" which involves very complex accounting issued needs examination rather that looking at the revenue loss/gain temporarily."
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> (emphasis supplied)

20. The Assessing Officer recorded that conversion from receipt and payment system of accounting into accrual system needed a closed monitoring and it was observed as under:-

> "But the conversion from Receipt & payment system of accounting to accrual system itself involves lot of accounting complexities for such a large organization like DDA. Hence this conversion needs to be closely monitored w.r.t. the accounting treatment given to various issues. The assesse himself stated that in respect of ground rent & service charge, the accounting system has been changed to cash basis as accrual system involves assumption about the future act of the allottee. Whether the system of accounting followed by the DDA w.r.t. various entries were in accordance to I.T. Act, 1961 has to be examined rather that going into the practicality and logics of the accounting system followed by DDA."
>
> (emphasis supplied)

21. With regard to one-time settlement scheme, it was observed that there were complexities whether "the change was in accordance with Income Tax provisions or not and this had to be examined." With

respect to the income from Nazul I and Nazul II lands, which as per the petitioner did not belong to or constitute their income, the Assessing Officer observed:-

> "With respect to the income from Nazul I & Nazul II, the assessee stated that DDA is just one of the Agents through which the land & building department is getting the work done under Revolving fund. The role of DDA w.r.t. the Nazul I and Nazul II lands and the income inflow & outflow between the DDA and the Land & Building Department involves lot of complex issues which needs deep scrutiny."
>
> (emphasis supplied)

22. As noticed, some items purchased prior to 2002-03, like tables, chairs, etc., the purchase price for the purpose of depreciation was taken on estimate basis. It was observed that this required scrutiny and the effect on the depreciation had to be examined. This involved a lot of accounting complexities. On the question of valuation of stock of built up units and housing stock, it was stated that the said valuation policy might have been followed by the petitioner for a number of years, but it had to be examined whether the policy adopted was in accordance with the provisions of the Act as income of DDA was exempted till 2002-03. The words used by the Assessing Officer read as under:-

> "Since the income of the DDA was under exemption till the A.Y. 2000-03 and the concerned Assessment year was the first year in which the income of the DDA was brought into the Tax net, the above valuation system followed by the DDA needs deep scrutiny. As the system of valuation adopted by the DDA involved lot of complex accounting issues, special audit is recommended."

(emphasis supplied)

23. With regard to the DDA's contention that personal accounts do not belong to them, it was observed that reconciliation of personal accounts was required:-

> "When the Authority is maintaining two accounts, one personal and the other Revenue account, both the accounts needs deep scrutiny whether the same was in accordance with the provisions of the IT Act, 1961. The nature of reconciliation carried out by the authority involves complexity in accounts w.r.t. the treatment given various entries and just because the reconciliation pertained to the past years, it doesn't necessary mean that the process has no bearing on the revenue of the current year."

(emphasis supplied)

24. We have referred to the aforesaid note in detail for two reasons. Firstly, the note reveals that the Assessing Officer felt that the case required detailed scrutiny or monitoring, verification of entries, which were substantial in number. Detailed scrutiny of large number of entries by itself, on standalone basis, will not amount to complexity of accounts. The accounts do not become complex because merely there are large number of entries, e.g., a petrol pump may have substantial sales, to thousands of customers daily at prices fixed under law/Rules, but this by itself will not be the accounts complex. Similarly, an Assessing Officer is required to scrutinize the entries and verify them, but this does not require services of a special auditor or a Chartered Accountant to undertake the said exercise. Section 142(2A) is not a provision by which the Assessing Officer delegates his powers and functions, which he can

perform to the special auditor. The said provision has been enacted to enable the Assessing Officer to take help of a specialist, who understands accounts and accounting practices to examine the accounts when they are complex and the Assessing Officer feels that he cannot understand them and comprehend them fully, till he has help and assistance of a special auditor. Interest of the Revenue being the other consideration. In the present case, the Revenue has not submitted that test check of entries was undertaken, but anomalies or mistakes were detected. For proceeding further, and to compute the taxable income, help and assistance of an accounting expert was required. Secondly, we notice that the Assessing Officer felt that special auditor is required for determining and deciding certain legal issues, i.e., nature and character of Nazul I and Nazul II land, payments received and the treatment of the said payments, receipts or expenditure in the books for the purposes of taxation. The special auditor cannot go into and examine the said legal issue or question regarding taxability. This has to be determined and decided by the Assessing Officer. This determination/decision requires passing of the assessment order. However, at this stage, the Assessing Officer should indicate his prima facie or tentative view on why the legal issue requires examination of accounts by the specialist. A Chartered Accountant, a specialist in accounts does not have a role to play and cannot be delegated and asked to decipher, decide or express his opinion on nature and character of Nazul I or Nazul II land receipts and payments. In a given case, the complexities of account and the legal issue may be intertwined or connected and, therefore, examination of accounts may indirectly or directly require his opinion on a legal matter/issue, but this is not true or so stated in the present case. The case and the stand of the assessee is that as per the statute, including the

Rules, Nazul I and Nazul II land, payments received, expenditure incurred etc., belong to the Central Government and nothing whatsoever can be attributed to them. There is no examination, consideration of the legal aspect and formation of a tentative view. The decision on this legal issue cannot be transposed and passed to the Chartered Accountant as a special auditor as he is not a specialist and mandated by the Act to undertake the said exercise. The case of the assessee is that it is maintaining separate accounts for Nazul I and Nazul II lands and the General Development Account. The said accounts are audited by the Comptroller and Auditor General and have been accepted by the Central Government.

25. We also find merit in the contention raised by the petitioner that the Assessing Officers have repeatedly in all orders, for the purpose of recording reasons, taken the "notes of accounts" and verbatim incorporated the same. This is apparently correct and, therefore, discloses non-consideration and non-application of mind, which constitutes an error in the decision making process. It is an easy and convenient manner to transfer the obligation of scrutiny and examination to the special auditor. It may be true and correct that certain aspects mentioned in the Notes of Accounts may, if required and necessary and after in depth examination, justify appointment of a special auditor but the Assessing Officer has to be cautious and careful to segregate them from others while recording the reasons. If such an exercise is undertaken, it will show due and proper application of mind and not exercise of power under Section 142(2A) on the pretend or on the pretext that such power exists and, therefore, should be exercised. Existence of the power is not in dispute; it is the exercise of power,

which is in dispute and question. The exercise of power must withstand and meet the requirements prescribed. Failure to exclude irrelevant and extraneous matters negates the "opinion" as the said matters should not cloud or dent formation of opinion. Reasons recorded must be genuine and have a nexus with the twin statutory requirements i.e. complexity of accounts and interest of the Revenue.

26. We may also notice one additional ground and reason for Assessment Year 2003-04. After the issue of show cause notice and hearing by the Commissioner of Income Tax on 22nd March, 2005 and the report received from the Assessing Officer, the then Commissioner, who had given the hearing did not grant approval. However, upon transfers when a new incumbent joined as the Commissioner after nearly six months on 31st May, 2005 vide Order No. 79/2005 dated 31st May, 2005 approval was granted.

27. What is rather surprising and noticeable is that right from the first year 2003-04 onwards and in all the assessment years thereafter, the Assessing Officers have directed special audit. The reasons given for the Assessment Year 2003-04 have been substantially followed in the subsequent years or have been taken from the notes of accounts for the year in question. The following table/chart illustrates and establishes the said facts:

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| **Sr. No.** | **Issues raised in Show Cause Notice as involving complexity** | **Reply** | **Reference of Notes on Accounts/Statement of significant Accounting** | **Asst. Year** |
|---|---|---|---|---|

| | | | **Policies** | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | 03-04 | 04-05 | 05-06 | 06-07 | 07-08 | 08-09 | 09-10 |
| 1 | Adjustment of Rs.82.32 crores to Reserves | This is a reversal of opening debtors on account of ground rent and service charge to reserve account due to introduction of one-time capitalized payment scheme. | Note No. 2 of asst. year 2003-04 | √ | x | x | X | x | x | X |
| 2 | Change in accounting policy for Ground Rent & Service charges from accrual to cash basis | The change is in consonance with the introduction of one-time payment scheme.<br><br>Already disclosed in Notes to Accounts<br><br>Cash accounting more appropriate and poses no complexity | -do- and Accounting Policy No. 7 (d) | √ | √ | √ | √ | √ | √ | √ |
| 3 | Taxability of interest on GPF, Pension | Both Funds exempt. GPF u/s 10(25) & Pension Fund already | Accounting Policy No. 14 (a) and (b) | √ | √ | √ | √ | √ | √ | √ |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | Fund to be verified | recognized by Commissioner of Income Tax. Hence, no revenue impact | | | | | | | | |
| 4 | Nazul I & II being Authority's revolving fund, income thereon needs to be examined | Nazul I & II record transactions on Central Government Account and accounts forms part of L&B Deptt. Of the Government. | Accounting Policy No. 1 and Nazul Notification | √ | √ | √ | √ | √ | √ | √ |
| 5 | Basis of estimation of WDV of old assets as on 31.3.2002 | Estimation made is only in respect of tables, chairs at nominal value of Rs.50 & 100- Total depreciation on these is less than 10 lacs.<br><br>Now u/s 11 no diff between capital & revenue expenditure | Accounting Policy No. 4 | √ | √ | √ | √ | √ | √ | √ |
| 6 | Reworking of WDV consequent to change in depreciation rates | Under income tax, income tax rates being constantly applied. Hence, no change for income tax | Note No. 3 of A.Y. 2003-04 | √ | √ | √ | √ | √ | √ | √ |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | purposes.<br><br>Even in books since basis adopted is written down value, there is no need for re-working of opening written down value because of change in rates | | | | | | | | |
| 7 | Method of accounting of 'Other stock including developed land held' not explained. | Fully disclosed in accounting policy. | Accounting Policy No. 6(c) | √ | √ | √ | √ | x | x | √ |
| 8 | Valuation of stock is complex | Valuation method consistently followed since inception is at disposal price and fully disclosed in Accounts | Policy No. 6 | √ | √ | √ | √ | √ | √ | √ |
| 9 | Interfund account, bank account, etc needs reconciliation | Some very old bank accounts of not very significant amounts are pending reconciliation<br><br>Others are routine accounts reconciled | Note No. 4 and 6 of asst. year 2003-04 | √ | X | √ | √ | √ | √ | √ |

| | | | | | | | | | | |
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| | | periodically and also being looked into by AG | | | | | | | | |
| 10 | Conversion of account on accrual as at year end is complex | Observation too general, no specific entry discussed because AO had not gone through any entry. | Accounting Policy No. 2 | x | √ | x | X | x | x | √ |
| 11 | Adjustment passed in adjustment to surplus account under Reserves | Prior period adjustment of Rs.18 lacs in asst. year in asst. year 2008-09 of which full details available, but not perused by AO. The amounts not even claimed in utilization of funds. | Schedule to the Balance Sheet | x | X | √ | √ | √ | √ | √ |
| 12 | Accounting procedure described elaborately to show complexity | The AO has not pointed out what he wanted to verify from the accounts that he could not. In fact, the description shows simple accounting and availability of information in all forms viz., periodical, zone- | Our submissions | x | X | √ | √ | √ | √ | √ |
| 12 | Application of section 269SS | Section is inapplicable | Tax Audit Report of | x | x | √ | √ | x | x | X |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | on earnest money from contractors | to Corporation established by Central, Provincial, or State Act. Also, there is no specific | Tax Auditor in Form No. 3 CD for the asst. year 2003-04 | | | | | | | |
| 14 | Reproduction of accounting policies w.r.t.-<br><br>Fixed Assets<br><br>Rent of Staff Quarters<br><br>Valuation of Stocks<br><br>Revenue Recognition<br><br>Recoveries/payments to Nazul Accounts | No specific finding about complexity | Policy No. 4, 6, 7, 11 | x | x | X | √ | √ | √ | √ |
| 15 | Expenditure on Commonwealth Games need to be verified | No specific finding about complexity | Vague comment | x | x | x | X | x | √ | √ |
| 16 | License fee/services charges for use of Nazul properties such as staff quarters involves complexity | No specific finding about complexity | Accounting Policy No. 11(c) | x | x | x | X | x | x | √ |
| 17 | Land Premia in respect of lands nazul lands appropriated to housing | No specific finding about complexity | Accounting Policy No. 11 (B) and Notes No. 4 | x | x | x | X | x | x | |

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | projects transferred to Nazul Account | | | | | | | | | |
| 18 | Non-recovery of old balances from Slum Department and Sports Authority of India | Has no accounting implication for the year | Note No. 10 | x | x | x | X | x | x | √ |
| 19 | Short booking of license fee of Rs. 26 lacs | This is not a discovery by the AO, but has been taken from the Management Letter of C& AG. Even they did not find this significant to qualify the accounts for this short booking | Management Letter of C&AG | x | x | x | x | x | x | √ |

”

28. The table is indicative that direction for special auditor in the first year swayed and it is apparent has been largely responsible for the direction of special audit in the subsequent years. There is also justification and merit in the plea of the petitioner that in case special audit was not directed in the subsequent years, the direction for special audit in the first year, i.e., Assessment Year 2003-04 would itself falter because the reasons to some extent are followed/reiterated and are inter connected. The reasons recorded for the first year have, therefore, prompted and compelled the Revenue/Assessing Officers to direct special audit in the subsequent years.

29. As noticed in the assessment years 2003-04 and 2004-05, books of accounts were not called and examined. In the counter affidavit, it is stated that accounts/statement and replies were called for and considered. As noticed, the reasons recorded do not refer to examination of books of accounts or any entries therein which could be a cause for confusion or complexity relating to accounts. In the counter affidavit, it is stated that the Assessing Officer asked for the details and after considering the details came to the conclusion that the details supplied were too complex.

30. In the assessment year 2005-06, the respondents have stated that the books of accounts for a part period were called for and examined and thereafter the Assessing Officer vide letter dated 17th October, 2007, referred the matter to the Director of Income Tax (Exemption) recommending special audit in view of the accounting complexity. The case of the petitioner, however, is that the notice under Section 143(2) was issued by the Assistant Director of Income Tax (Exemption), Trust Circle-II, vide letter dated 6th August, 2007. Subsequently, the jurisdiction was transferred to Additional Director of Income Tax (Exemption), Range-I, who had fixed the first hearing on 7th September, 2007. The petitioner vide letter dated 24th September, 2007, had submitted documents at the time of hearing. On 15th October, 2007, books of accounts were produced before the Assessing Officer who had perused and examined the same and adjourned the case to 5th November, 2007. On 5th November, 2007, the matter was again adjourned to 26th November, 2007, with direction that the petitioner should explain how their activities were covered under the definition of "Charity" i.e. Section 2(15) of the Act. Before the next date of hearing, show cause

notice dated 13th November, 2007, was issued under Section 142(2A). Reply was filed on 22nd November, 2007. Thereafter order dated 11th December, 2007 was passed under Section 142(2A). As noticed above, the recommendation for special audit was made on 17th October, 2007, within two days after the books of accounts were produced on 15th October, 2007. The letter dated 17th October, 2007 has not been placed on record by the respondent. In the show cause notice dated 13th November, 2007, it was stated by the respondent that the petitioner in the course of assessment proceedings had explained that the cash book, record of receipts and payments was kept zone wise and at the end of the month the summary of receipts and payments under different heads were submitted to the Head Office for consolidation. At the end of the year, ledgerisation of receipts and payments was made on consolidated basis under each head. The cash book maintained in different zone levels had a separate receipts and payments side, under the heads "temporary advance, permanent imprest, special permanent imprest, cheques and chest and cash in hand". This along with the conversion of accounts at the year end, it was observed involved accounting complexity for a large organization as DDA. In this regard, our observations in paragraph 24 above are relevant. A genuine attempt to understand the accounts and entries should be made. Details and questions should be raised with regard to accounts and entries and only when the explanation offered is not satisfactory, or verification is not possible without the help and assistance of a special auditor, action under Section 142(2A) is required. Secondly, in the audit report, it was mentioned that the petitioner had received earnest money and security deposits from contractors. Section 269SS, it was observed applied to loan and deposits and examination and whether there was violation of Section 269SS involved accounting

complexity. The petitioner had stated that the deposits made were not released except by way of account payee cheques. The Assessing Officer records this aspect was not verifiable in view of the nature and complexity involved. In the reply, the petitioner had also stated that Section 269SS was not applicable to a corporation established under the Central, State or Provincial Act. Payments or refunds by the petitioner could be verified from the accounts and bank records. The petitioner could be asked to collate the deposits received with payments made. This would not be a complex accounting exercise, if it is not specifically indicated and stated why and how it involved complexity in accounts.

31. In the assessment year 2006-07, the respondents have stated that books of accounts were produced but the copy of the C&AG report was not filed before the Assessing Officer. Again it was stated that the cash books were maintained at different zone levels and monthly accounts were prepared and sent to the Head Officer for consolidation. Similarly, applicability of Section 269 SS involved complexity of accounts. The petitioner has stated that a preliminary questionnaire dated 12th November, 2008, was issued fixing the hearing on 18th November, 2008. On the date of the hearing, the petitioners were informed that there was change in jurisdiction and the case was transferred to Deputy Director of Income Tax (Exemption) Trust Circle-II. The petitioner was asked to and had filed reply to the questionnaire along with a note on the accounting procedure and had produced sample books on 26th November, 2008. Books of accounts were not opened by the Assessing Officer nor any specific query was raised on any entry in the books. On 4th December, 2008, show cause notice was issued and after reply was

filed on 11th December, 2008, impugned order directing special audit dated 29th December, 2008 was passed.

32. In the assessment year 2007-08, reference is made to complexity of accounts as accounts were maintained at zonal level and then transferred to the Head Office on monthly basis and applicability of Section 269SS was involved. This amounts to complexity of accounts. The petitioner on the other hand has stated that questionnaire dated 12th November, 2008 was issued by the Director of Income Tax (Exemption) Range-I, but subsequently jurisdiction was transferred to Deputy Director of Income Tax, Trust Circle-II and the case was adjourned to 26th November, 2008. In terms of notice dated 18th November, 2008, reply to the questionnaire was filed on 26th November, 2008 and on the said date the books of accounts were produced. However, they were never opened and no specific query was raised on any entry in the books of accounts. Thereafter, show cause notice dated 4th December, 2008, was issued. Reply was filed on 11th December, 2008 and on 29th December, 2008, order under Section 142(2A) directing special audit was passed.

33. In the writ petition for assessment year 2008-09, the petitioner has stated that scrutiny notice dated 16th September, 2009, was issued. On 28th July, 2010, a fresh notice with preliminary questionnaire was issued. Reply to the questionnaire was filed on 2nd August, 2010. On 28th November, 2010, copy of the audit report of AG was filed and books of accounts of Commonwealth Games was called for but no examination was undertaken nor any query was asked. On 26th November, 2010, show cause notice under Section 142(2A) was issued. On 6th December, 2010, reply thereto was filed. By the order dated 15th December, 2010,

special audit was directed. In the show cause notice, in addition to the other grounds it was stated that in the year, expenditure for commonwealth games was incurred on construction. The books of accounts did not reveal whether a transparent tender process was resorted to. In receipt and payment accounts, there was expenditure of Rs.39 crores under the head "Commonwealth Games Reserve Fund break-up". Rs.300 crores had been transferred to Commonwealth Game Reserve" from income and expenditure account. There was need to verify whether the threshold limit below which tendering was not done, was breached. It was to be examined whether contracts were broken down into smaller contract. Monitoring mechanism in cases of small contracts was required to be verified. In the reply dated 6th December, 2010, it was stated that in the last hearing or earlier, no accounting issue was raised that was difficult to understand or comprehend. The C&AG report had been submitted. It was submitted that the accounts were maintained in a systematic manner and in just one hearing nobody could come to the conclusion that the accounts were complex. There was no complexity in the accounts. Question of transparency in tendering, we may observe, is not an accounting issue or problem.

34. In the assessment year 2009-10, in the counter affidavit, it is stated that the books of accounts were produced. Cash book etc were maintained on zone level and entries were subsequently made on monthly basis at the Head Office. This process involved complexity. Verification of loan and deposits and applicability of Section 269SS also involved complexity. The Director of Income Tax (Exemption) while granting approval for audit has stated that special audit had been directed

for the assessment year 2008-09 and the reasons were not being repeated. He has further recorded that the direction for special audit was derived from the fact that the assessee had failed to give proper reply regarding declared income and whether any part of the property was used for benefit of person referred in Section 13(3). Special audit was necessary to examine irregularities committed in connection with the expenditure in relation to Commonwealth games. It is pointed out by the petitioner that in the show cause notice, there is no reference to Section 13(3) or any related person and misuse of assets or funds by a related person. Irregularities can be examined and verified by the Assessing Officer and for this purpose, special audit is not required. Exemption and verification by themselves cannot and do not constitute complexity in accounts.

35. Inconsistencies, vague views and non- application of mind, it has been argued, is apparent from other reasons recorded. To avoid prolixity we are not specifically dealing with the said contention on each reason/ground in detail. But it does appear that some of the reasons do not relate to complexities of accounts or are not relevant. By way of illustration, we may also refer to reason No. 11 recorded in the order dated 15th December, 2010 for the Assessment Year 2008-09, which is as under:

> "Comments/findings of the C&AG report which may be obtained by the auditor and the implications, are to be examined."

36. The aforesaid reason shows that the Assessing Officer had not obtained comments/ findings on the C&AG report but he had directed the special auditor to obtain/ask for the same, and then give his opinion. The aforesaid reason itself justifies quashing of the said order on the ground of non application of mind and failure to exercise jurisdiction keeping in view the parameters of Section 142(2A).

37. One more additional factor for the initial assessment years may be noted that the petitioner DDA was granted registration as a charitable institution under Chapter 12AA of the Act in 2006 with retrospective effect w.e.f. 1st April, 2002. This fact was not in the knowledge of the respondent authorities when the first few orders for special audit were passed. Counsel for the Revenue has relied upon Section 13(3) of the Act and submitted that the registration under Section 12AA is not final and facts and accounts of each year have to be examined. There can be no doubt that facts and accounts of each year have to be examined but this is different from stating or alleging that Section 13(3) is applicable. Various contentions and issues have to be examined before a finding is recorded that Section 13(3) is attracted and applicable. It is the contention of the petitioner that misappropriation, if any, by the employees or third persons which causes loss to the petitioner cannot be a ground to invoke Section 13(3) as the petitioner is a distinct taxable entity. The petitioner suffers when there is misappropriation of the funds or misuse of assets/funds because of malafide or criminal intent of a third person. These are aspects and facts which are to be examined in the assessment proceedings. However, the contentions raised by the petitioner are relevant factors which have to be considered. It is different matter that the Assessing Officer may or may

not accept the said contention. The contention is as such not an accounting issue, unless it is held that the accounts indicate or prima facie show misuse or wrong use of funds by related persons and Section 13(3) is attracted. For details and exact figures in a given matter, special audit may be justified. The legal contention raised by the petitioner cannot be decided by a special auditor and has to be decided by the Assessing Officer.

38. In these circumstances, we have no option but to quash the direction/orders for special audit in each of these years. The writ petitions are allowed and the orders under Section 142(2A) are quashed. This, however, does not mean that if the Assessing Officer during the course of the assessment proceedings feels and requires special audit, he cannot record reasons and justify special audit. It will be open to the Assessing Officer in the course of the assessment proceedings to record fresh reasons and direct special audit under Section 142(2A) of the Act. It will be equally open to the petitioner to contest the direction for special audit in accordance with law on the ground that the mandatory conditions stipulated in the said Section are not satisfied.

39. Pursuant to interim orders passed in writ petitions the assessment proceedings for the Assessment Years 2003-04 onwards have been stayed. Now, assessment proceedings have to be restarted but taking up of all the assessment years together would unnecessarily entail difficulties and result in assessments being framed in haste and hurry. The petitioner and the Assessing Officer will be put to considerable inconvenience. In these circumstances, we feel that the assessment proceedings for the Assessment Year 2003-04 shall be taken up for scrutiny and hearing first and will be completed before the assessment

proceedings for other years are taken up for hearing. The interim stay orders granted earlier will continue for the Assessment Years 2004- 05 onwards till the assessment proceedings for the Assessment Year 2003-04 are concluded.

40. The writ petitions are accordingly disposed of. No costs

**(SANJIV KHANNA)**
**JUDGE**

**(R.V. EASWAR)**
**JUDGE**

**September 10th, 2012**
kkb/VKR/NA