

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 143 OF 2018

WITH

WRIT PETITION NO.161 OF 2018

WITH

WRIT PETITION NO. 149 OF 2018

Multi Commodity Exchange of India Ltd ..Petitioner

Vs.

The Deputy Commissioner of Income Tax,
Mumbai and Others ..Respondents

Mr. R. S. Padvekar, Mr. Mandar Vaidya, Tanzil Padvekar I/b Dave
and Padvekar Associates, for the Petitioner.

Mr. Nirmal Chandra Mohanty, for Respondent Nos.1 and 2.

Anjali
Tushar
Aswale

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by Anjali Tushar
Aswale

Date: 2018.10.05
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**CORAM:-S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.
DATE :- OCTOBER 1, 2018.**

ORAL JUDGMENT:(PER S. C. DHARMADHIKARI, J.)

These Petitions under Article 226 of the Constitution
of India raise common questions of fact and law. They were heard
together and are disposed off by a common order.

2 In Writ Petition No. 143 of 2018 the facts are that, the

Petitioner before us is a Public Limited Company registered under the Companies Act, 1956. It was incorporated in the year 2002. It is claiming to be a National Commodity Exchange duly recognized on permanent basis by the Government of India in consultation with the Forward Markets Commission, Ministry of Finance, Government of India under the provisions of the Forward Contracts (Regulation) Act, 1952.

3 The Petitioner does not dispute that it was promoted by one Financial Technologies India Limited. That company had a dominant role in the management of the Petitioner. The Petitioner claims that it is the largest Commodity Exchange in India with more than 77% market share in terms of the volume of trade. It is claimed that the company is under the control of the Securities and Exchange Board of India.

4 Respondent No.1 is the Assessing Officer and he had issued a notice under Section 142 (2A) of the Income Tax Act, 1961 (for short "I. T. A. T. Act") dated 28th April, 2017 for the Assessment Year 2010-2011.

5 Before we proceed further, we deem it fit and

proper to reproduce this provision.

*“ 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 interest 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 accountant, 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 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.]*

6 Annexure-A to the Petition is a copy of the notice issued under the above reproduced provision. It is claimed that this Assessing Officer acting on the directions of Respondent No.2 has referred the matter to the special audit by a Chartered Accountant for getting the Petitioner's accounts audited. Annexure-B is a copy of the letter dated 16th October, 2017.

7 It is Respondent No.2 who is the supervisory and administrative authority and his approval has to be obtained before the proposal of the special audit moved by the Deputy Commissioner - Respondent No.1 is implemented and carried into effect. By Annexure-C dated 15th September, 2017, the approval

has been granted.

8 It is this approval, which is challenged in this Writ Petition on several grounds.

9 We have found that the Petitioner relies upon the factual position as narrated in paragraphs 5 and 6. It is claimed that the return of the income for the Assessment Year 2010-2011 after its filing was subjected to an audit as per the provisions of the Companies Act, 1956 and also under Section 44AB of the I. T. Act.

10 It is claimed that the return was selected for scrutiny and assessment was completed under Section 143 (3) of the I. T. Act. There were letters addressed by the Assessing Officer raising several queries and questions. The mandatory notice under Section 143 (2) of the I. T. Act was also issued. While the assessment was in progress, Respondent No.1 sought information on several points for the purpose of completing the assessment. The letters of Respondent No.1 were replied and it is claimed that the assessment was completed under Section 143 (3) of the I. T.

Act by assessment order dated 22nd March, 2013, copy of which is at Annexure-I to the Petition.

11 In paragraphs 9 to 13 of this Petition, the Petitioner states as under:-

The Petitioner further submits that Financial Technologies (India) Ltd. which was the promoter company of Petitioner has also promoted National Spot Exchange Ltd. (NSEL) in the year 2005. The Forward Market Commission, Govt. of India, which was regulator for the Commodity Stock Exchange took action against National Spot Exchange Ltd. (NSEL) on the complaints of financial irregularities which resulted into the payment crisis of National Spot Exchange Ltd. as many contracts were not settled in time.

The Petitioner states that even though the Petitioner Company had no role or any kind of involvement in the payment crisis of National Spot Exchange Ltd., but as Financial Technologies (India) Ltd. was the Common Promoter Company for National Spot Exchange Ltd. as well as the Petitioner, the Forward Market Commission (FMC) directed the Petitioner to undertake a Special Audit in respect of the financial transactions of the

Petitioner Company for the period i.e. 2003 to 20th September, 2013. The Forward Market Commission also directed the Petitioner to take appropriate action for change in the Key Management like Managing Director & CEO, Heads of Operations etc. The Forward Market Commission also directed to constitute a committee of Five Independent and Institutional Shareholder Directors to provide oversight to the management. The Forward Market Commission issued said directions vide Letter dated 17th October, 2013. Annexure-J is the copy of the letter dated 17th October, 2013.

The Petitioner states that in compliance with the directions of the Forward Market Commission, Price Water-House Coopers Pvt. Ltd. (in short PWC), Chartered Accountant Firm was appointed by the Petitioner with the approval of Forward Market Commission to conduct the Special Audit on the points of reference vide letter dated 4th December, 2013. The PWC furnished the Special Audit Report to the Chairman, Forward Market Commission, Mumbai, on 21st April, 2014. Annexure-K is the copy of the Special Audit Report dated 21st April, 2014. The Petitioner further states that the Forward Market Commission, while ordering the Special Audit, was mainly concerned with National

Spot Exchange Ltd. and Financial Technologies (India) Ltd., as Financial Technologies (India) Ltd. was the promoter and holding company of the National Spot Exchange Ltd. At the same time Financial Technologies (India) Ltd. was also the promoter of the Petitioner Company. It is submitted that the promoter of Financial Technologies (India) Ltd. and National Spot Exchange Ltd. was one Mr Jignesh Shah who was also Managing Director and then Vice-Chairman of the Petitioner's Company.

The Petitioner says that as per the Special Audit Report the persons associated with Financial Technologies (India) Ltd. and some erstwhile Key Management Personnel and officers of the Petitioner were acting at the behest of the FT Group had conspired to commit a large scale economic scam at the cost of the Petitioner and its shareholders. The main allegations/charges of embezzlement were against the Key Management Persons of the Petitioner Company as well as the Directors of the Financial Technologies (India) Ltd. i.e. Shri Jignesh Shah, Managing Director and Vice Chairman, Shri Lambertus Rutten, Jt. M.D., Shri Joseph Massey etc. The Forward Market Commission on 17th December, 2013 declared Financial Technologies India Ltd. (FTIL) and his Directors, Shareholders and Officers are not "Fit and

Proper” to be Shareholders and Director in any Commodity Exchange including the Petitioner Company. As per the decision taken by the Forward Market Commission, Govt. of India the Key Management of the Petitioner Company underwent complete change by 26th December, 2013 and the new management comprising Directors nominated by the Forward Market Commission and other Institutional Stake holders were put in place of then existing management for the Petitioner.

The Petitioner states and submits that at the time of appointment of PWC for the purpose of Special Audit, the Forward Market Commission had given terms of reference and there was a constant monitoring by the Forward Market Commission on the directions issued to the Petitioner from time to time for initiating Criminal and Civil legal actions against erstwhile Key Management Persons of the Petitioner Company. The PWC completed the Special Audit and same was furnished to Forward Market Commission on 21st April, 2014. The Petitioner further states that there was consistent pressure by way of directions from the Forward Market Commission to take legal action on the points raised in the Special Audit Report by the PWC dated 21st

April, 2014. Hence in Petitioner's 80th Board Meeting, which was held on 9th May, 2014, the Board of Directors discussed the legal actions to be initiated in the form of Criminal as well as Civil against 10(ten) Companies/Entities. In the said meeting, copies of the report were forwarded to the Income Tax Department and SEBI for initiating necessary action, was also discussed. Annexure-L is the copy of the minutes of the Board of Directors' meeting dated 9th May, 2014. The Petitioner further states that Forward Market Commission directed the petitioner to pursue with the criminal complaints with Police (EOW), Mumbai, on the alleged financial fraud and misappropriation of money committed by Key Management Personnel, officers and Employees of the company and specified entities on the basis of the observations in the special Audit Report by PWC. Accordingly, as per the direction of the Forward Market Commission, Criminal Complaints were filed to the Additional Commissioner of Police (EOW), Mumbai against sixteen (16) Companies/Entities who were allegedly involved in the financial scam in connivance with the Key Management Personnel, Officers and the Employees of the Petitioner.

12 In paragraph no. 14, the Petitioner says that on the basis of the special audit report of the PWC, Respondent No.1 issued notice under Section 148 of the I. T. Act dated 30th March, 2017 and in pursuance of that notice, a return was filed under protest on 26th April, 2017 declaring total income of Rs. 296,05,13,703/-. Annexure-N is a copy of this return of income.

13 Within two days of filing of this return, the impugned notice has been issued and equally the approval obtained.

14 We have heard both sides in great details on this Petition. With their assistance, we have perused the Petition and the Annexures thereto.

15 It is common ground that there is a reference to certain discrepancies in the impugned notice under Section 142 (2A) of the I. T. Act. However, the assessment order has also been passed and in the meanwhile there are also the proceedings under Section 148 of the I. T. Act. With all these proceedings, we put it to both counsel, for the Petitioner as also the Respondents as to why

the whole gamut of a special audit and thereafter further legal proceedings under the I. T. Act. Instead, during the course of the assessment which will be undertaken pursuant to the resort by Respondent No.1 to Section 148 of the I. T. Act and when the Petitioner is possessed of a copy of the report of PWC, all contentions in relation to the said proceedings can be raised and orders thereafter can be passed on hearing the Petitioner. The Petitioner stated that they would make appropriate submissions on the report of the PWC. They would also raise other contentions. It is in these circumstances and facts peculiar to the case set up by the Petitioner, in these Petitions that we are of the view that these Writ Petitions can be conveniently disposed off without examining the larger issue. The Petitions can be disposed off with a direction that the special audit in terms of the impugned notice and the approval need not be undertaken for all the materials in relation to the Petitioner's transactions, their share holdings, are already referred to in the PWC report as also the pending proceedings under Section 148 of the I. T. Act. There is a return of income filed under protest by the Petitioners on 26th April, 2017 and that is under assessment. If during the course of assessment and pursuant to this return, the Petitioner desires to raise objections

with regard to the contents of the PWC report and to be relied upon by the Assessing Officer, then, the Assessing Officer shall allow the Petitioner to raise the necessary contentions and after dealing with them, he shall pass an order in accordance with law.

16 In the peculiar facts and circumstances of this case, we do not think that any useful purpose would be served by resorting to a special audit. That would delay the pending proceedings, as well. This course having been suggested to both parties and accepted by them, we do not think that the Writ Petitions need to be kept pending. The Writ Petitions are therefore disposed off with the above directions. The impugned actions are Quashed. No order as to costs.

17 Barring the dates of the impugned notice and approval and a few facts, there is absolutely no difference in the essential issue and controversy in the Writ Petition No. 149 of 2018. It is also disposed of in terms of our direction in Writ Petition No.143 of 2018 along with connected Petitions.

(B. P. COLABAWALLA, J.) (S. C. DHARMADHIKARI, J.)