

(2012) 12 AHC CK 0044
In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No's. 418 and 339 of 2010

ATS Infrastructure Limited

APPELLANT

Vs

Assistant Commissioner of Income Tax (Central Circle) and
Others

RESPONDENT

Date of Decision : 07-12-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 132, 132(4), 132(5), 142

Citation : (2012) 11 ADJ 454 : (2013) 256 CTR 46 : (2013) 350 ITR 563

Hon'ble Judges : Sunil Ambwani, J;Arvind Kumar Tripathi, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The ATS Infrastructure Ltd. (the petitioner) through its Director Mr. Getamber Anand in Writ Petition No. 418 of 2010 is aggrieved with the order dated 28.1.2010, passed by the Assistant Commissioner of Income Tax (Central Circle), Meerut (respondent No. 1) directing the petitioner-company to get its accounts audited u/s 142(2A) of the Income Tax Act, 1961 (the Act), for the financial years 2001-02 to 2007-08 relevant to assessment year 2002-03 to 2008-09, from M/s. Tandon Seth & Co., Kanpur, nominated by the Commissioner of Income Tax (Central), Kanpur, and approved by him, communicated vide his letter dated 28.1.2010. The petitioner has also prayed for a direction in the nature of certiorari for holding that the limitation for completing assessment u/s 153B of the Act has set in, and therefore no assessment order u/s 153A could be passed after 31.12.2009. The petitioner company has prayed to set aside all the actions taken by respondent Nos. 1 and 2 pursuant to the impugned order dated 28.1.2010. The Prateek Resorts & Builders Private Ltd. (the petitioner) through its Director Mr. Getamber Anand has filed the other Writ Petition No. 339 of 2010 against the order dated 18.2.2010 passed by the Assistant Commissioner of Income Tax (Central Circle), Meerut (respondent No. 1), directing the petitioner-company to get its accounts audited u/s 142(2A) of the Income Tax Act, 1961

(the Act) for the financial years 2001-02 to 2007-08 relevant to assessment year 2002-03 to 2008-09 from M/s. Tandon Seth & Co., Kanpur, nominated by the Commissioner of Income Tax (Central), Kanpur, with his previous approval communicated vide his letter dated 28.1.2010. The petitioner has also prayed for a direction in the nature of certiorari holding that the limitation for completing assessment u/s 153B of the Act has set in, and thus no assessment order u/s 153A could be passed after 31.12.2009. The petitioner company has also prayed to set aside all the actions taken by respondent Nos. 1 and 2 pursuant to the impugned order dated 18.2.2010.

2. We have heard Shri S.P. Gupta, Senior Advocate assisted by Shri Deepak Kapoor and Shri Anurag Khanna, for the petitioners. Shri Bharat Ji Agrawal, Sr. Advocate assisted by Shri Dhananjay Awasthi appear for the Income Tax Department.

3. The ATS Infrastructure Ltd. is a public limited company registered under the Companies Act, 1956, with its registered office at 711, Deepali, 92, Nehru Place, New Delhi. The Prateek Resorts & Builders Pvt. Ltd. is private limited company with its registered office at 111/2, Rajpur Road, Dehradun. Both the companies are income tax assesseees and are filing income tax returns. The ATS infrastructure Ltd. is filing income tax returns since the assessment year 1999-2000, whereas the Prateek Resorts & Builders Pvt. Ltd. filed its income tax returns for the first time in the assessment year 2002-03. The ATS Infrastructure Ltd. is engaged in the business of real estate development in different states in India. In para 6 of Writ Petition No. 339 of 2010, Prateek Resorts & Builders Pvt. Ltd. v. Assistant Commissioner of Income Tax, it is stated that Prateek Resorts and Builders Pvt. Ltd., the petitioner company did not develop any project upto the end of financial year 2001-02. It has not acquired any amount nor undertook any project for real estate development, and had only received the consultancy charges of Rs. 8850/- for financial year 2001-02, which was credited to its profit and loss accounts.

4. A search u/s 132 of the Act was conducted on 15.2.2008 at the business premises of both the companies, The income tax department carried out extensive investigation into the financial affairs of the company in which the records including computers with hard disks, seized alongwith investigation report was handed over to Assistant Commissioner of Income Tax (Central Circle), Meerut. It is stated by the petitioner that the petitioner companies regularly participated in the proceedings; made available all the documents and accounts books as and when required by the income tax department and submitted their replies, documents and details till November, 2008. Their Directors also appeared before the investigation team.

5. The Assistant Commissioner of Income Tax (Central Circle), Meerut initiated proceedings of assessment and issued notice to the ATS Infrastructure Ltd. u/s 153A/ 142(i)(ii) and (iii) of the Act for the assessment years 2002-03 to 2008-09 (corresponding to financial year 2001-02 to 2007-08) vide notice dated

6.11.2009.

6. The Assistant Commissioner of Income Tax (Central Circle) Meerut issued a show-cause notice u/s 142(2A) of the Act dated 7.12.2009 for the assessment year 2002-03 to 2008-09. The petitioner companies filed their reply to the notices on 14.12.2009. An order was, thereafter, passed on 18.12.2009 u/s 142(2A) directing the petitioner to get the accounts audited by special auditor. The petitioner filed Writ Petition No. 33 of 2010 on 11.1.2010 for setting aside the order. This High Court allowed the writ petition within two days at the stage of admission, and by its judgment dated 13.1.2010 set aside the order dated 18.12.2009 on the ground that the order directed special audit to be carried out does not contain any reasons, nor there is, from the order, appear any application of mind on the part of the officer concerned on the basis of the material available on record, and in the absence of the reasons in the order for the direction as contemplated u/s 142(2)(a), the order is vitiated in law and is not sustainable. The Division Bench referred to the judgment of the Supreme Court in Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and Another, ; Mahabir Prasad Santosh Kumar Vs. State of Uttar Pradesh and Others, ; Travancore Rayon Ltd. Vs. Union of India (UOI), and the judgment of the Supreme Court in Union of India (UOI) Vs. Mohan Lal Capoor and Others, . The Court, however, left it open to the Assistant Commissioner of Income Tax, Central Circle, Meerut to pass fresh order in accordance with law. The operative portion of the order is quoted as below:

Therefore, we are of the view that reasons must be recorded in the order to show that there is application of mind on the part of the officer concerned on the basis of the material available on record and in the absence of reasons in the order for the direction as contemplated u/s 142(2)(a), the order vitiates in law and is not sustainable.

We accordingly allow the writ petition and set aside the impugned order dated 18.12.2009 passed the Assistant Commissioner of Income Tax (Central Circle), Meerut.

However, it will be open for the Assistant Commissioner of Income Tax (Central Circle), Meerut to pass a fresh order in accordance to law.

Sd/Rajesh Kumar, J. Sd/-Subhash Chandra Nigam, J.

7. The Assistant Commissioner of Income Tax (Central Circle), Meerut has passed a fresh order on 28.1.2010 giving rise to this writ petition. On 19.3.2010 this Court passed the following interim order:

Heard Sri Anurag Khanna, Advocate and Sri Deepak Kapoor, Advocate for the petitioner and Sri Dhananjay Awasthi, learned Standing Counsel appears on behalf of the respondents. The contention of the petitioner is that the period of limitation of passing the assessment orders for the assessment years 2002-03 to 2008-09 has expired on 31.12.2009 in view of the provisions of Section 153B of

the Income Tax Act inasmuch as the assessment order would be passed within 21 months from the expiry of the financial year in which the authorization was issued.

In the present case, the authorization was issued on 15.2.2008 and, therefore, the limitation of passing the order was only upto 31.12.2009. Since the period of passing the assessment order has been expired, therefore, the power u/s 142(2A) of the Act could not be exercised.

There appears to be a substance in the argument of learned Counsel for the petitioner which requires consideration.

Learned Standing Counsel prays for and is granted two weeks time to file counter-affidavit. Rejoinder-affidavit may be filed within two weeks thereafter.

Connect with Writ Petition No. 339 of 2010.

List in the week commencing 19.4.2010.

Till the next date of listing, the operation of the order dated 28.1.2010 u/s 142(2A) of the Act passed by the Assistant Commissioner of Income Tax, Central Circle, Meerut, Annexure-1 to the writ petition, and the assessment proceeding for the assessment years 2002-03 to 2008-09 shall remain stayed.

8. The Assistant Commissioner of Income Tax Meerut, filed Special Leave to Appeal (C) No. 6120 of 2011 from the judgment and order dated 13.1.2010 in Writ Tax. No. 33 of 2010. On 16.6.2012, the Supreme Court has passed the following order:

Having heard learned Counsel on both sides, we request the High Court to expeditiously hear and dispose of Writ Tax No. 418 of 2010 within six weeks from today. We make it clear that the High Court will decide the matter on its own merits and merely because SLP filed by the Department is pending in this Court will not come in the way of the High Court expeditiously hearing and deciding Writ Tax No. 418 of 2010, we express no opinion on the merits of the case and all arguments are kept open. The SLP shall stand over for eight weeks."

9. Shri S.P. Gupta, learned Counsel appearing for the petitioners has raised the following questions of law to be considered by the Court, which are common in both the writ petitions:

(a) The assessment of the block period from assessment year 2002-03 to assessment year 2008-09, is barred by limitation as provided by Section 153B read with second proviso to the section. The limitation started from the end of the financial year in which the last authorization for search u/s 132 was executed. According to Clause (1) of the Second Proviso to Section 153B, the limitation period was curtailed by the statutory amendment to 21 months. Beginning from 1st April, 2008 (the end of the financial year in which the last authorization for search u/s 132 was executed), the period of 21 months came to an end on 31.12.2009. The assessment could not be made after 31.12.2009

except in cases in which the period of limitation should be extended under clause (i) to (viii) of the Explanation to Section 153B of the Act. None of these clauses are attracted in the present case. The assessments in respect of 7 years has thus become barred by limitation and consequently the directions of special audit u/s 142(2A) of the Act are impermissible in law, illegal, invalid and in any case futile.

(b) The essential conditions for special audit u/s 142(2A) of the Act, laid down in *Rajesh Kumar and Others Vs. D.Commissioner of Income Tax and Others*, , namely (i) there should be complexity in the account books of the assessee, and (ii) the interest of revenue is likely to suffer, are not satisfied. The required exercise for drawing the conclusion that there are complexities has not been done nor any complexity really exists, to direct special audit.

10. Elaborating the first contention, regarding the limitation, Shri S.P. Gupta submits that the revenue cannot take the advantage of the observations in the judgments of the Division Bench dated 13.1.2010 and 18.1.2010. Neither of the observations can extend the period of limitation, nor can it be so extended in law. The observations, "however it will be open to the Assistant Commissioner of Income Tax (Central Circle), Meerut to pass fresh order in accordance with law" will not extend the limitation curtailed by the Statute. In *Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi*, the Supreme Court held that a direction by statutory authority is in the nature of order requiring positive compliance. When it is left at the discretion of the statutory authority, whether or not to take action, it cannot be described as a direction.

11. In support of the bar of limitation Shri S.P. Gupta has relied on:

- (i) *Supdt. of Taxes, Dhubri and Others Vs. Onkarmal Nathmal Trust and Others*, .
- (ii) *Sirajul Haq Khan and Others Vs. The Sunni Central Board of Waqf, U.P. and Others*, .
- (iii) *Gokak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum*,
- (iv) *Hope Textiles Ltd. and Another Vs. Union of India (UOI) and Others*,
- (v) *P. Vittal Pai and Others Vs. Agricultural Income Tax Officer, Puttur*,
- (vi) *Commissioner of Income Tax Vs. Shyamal Bhattacharjee*, , Question in issue at page 109 and finding at page 110
- (vii) *Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and Another*,
- (viii) *Commissioner of Income Tax - I Vs. Shri Mohd. Farooq*,
- (ix) *Supdt. of Taxes, Dhubri and Others Vs. Onkarmal Nathmal Trust and Others*,

12. Shri S.P. Gupta submits that the notices u/s 142(2A) dated 20.1.2010 (in *ATS Infrastructure Ltd.*) and dated 3.2.2010 (in *Prateek Resorts & Builders Pvt. Ltd.*) were fresh notices to start with the proceedings u/s 142(2A) of the Act.

These notices referred to and relied on many averments, which do not find place in the earlier notice dated 7.12.2009. In substance these notices are fresh notices. In the impugned orders it is clearly stated that "it was deemed fit again to invoke the provisions of Section 142(2A)". The Assistant Commissioner of income tax has in its direction dated 5.3.2010 observed, "accordingly abiding by the directions given by Hon"ble Court and looking into the complexities involved in the account it has been deemed fit to invoke the provisions of Section 142(2) of the IT Act and accordingly the fresh order u/s 142(2A) has been passed on 28.1.2010".

13. Shri S.P. Gupta submits that the first notice, which culminated into the order had ceased to exist, in as much as the said order was quashed. He submits that the first relief is not simply a writ of certiorari but also a writ in the nature of prohibition for assessment on the expiry of period of limitation. By no stretch of imagination it can be said that the petitioner had not taken any step or done anything by which it can be said that it had taken any kind of unfair advantage by filing the writ petitions. The limitation had already expired prior to filing of the writ petition. The petitioner did not do anything to allow the limitation to expire. The fresh notice was also given after the expiry of the period of limitation. The orders directing special audit were passed after the expiry of limitation and thus it cannot be said that the petitioners have drawn any unfair advantage.

14. Shri S.P. Gupta submits that the strict construction of law requires, that a citizen does not become liable to tax unless he comes within the specific words of statute. There is no equity to taxation and thus in view of nature of the proceedings u/s 132(5) of the Act, the proceedings could not be initiated after the limitation had expired.

15. On the second point Shri S.P. Gupta submits that the word complexity has been explained in para 13 of the judgment in *Rajesh Kumar and Others Vs. D.Commissioner of Income Tax and Others*, , which would mean the state or quality of being intricate or complex or which is difficult to understand. The difficulty in understanding would however not lead the conclusion that the accounts are complex in nature. No order can be passed on whims or caprice of the income tax authorities. The Supreme Court has referred to *Swadeshi Cotton Mills Company Ltd. Vs. Commissioner of Income Tax and Another*, and quoted the observations from that case, which state; "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" These observations were affirmed in *Sahara India Firms v. CIT (Supra)*.

16. Shri S.P. Gupta submits that an enquiry relating to assessment is made u/s 142(1) of the Act. Section 142(i)(ii) says that a notice can be issued to produce,

or caused to be produced such accounts or documents as the Assessing Officer may require. Section 142(ii) authorizes the Assessing Officer to make such enquiry as he considers necessary for the purposes of obtaining full information in respect of income or loss of any person. Section 143(1) provides the manner in which the return is to be processed. Section 143(2) entitles the Assessing Officer to serve notice on the assessee to produce any evidence or particulars on which the assessee may reply in support of his claim for loss exemption, deduction authorization etc. Clause (ii) of Section 143(2) provides that the Assessing Officer may ask the assessee to produce any evidence on which he may rely in support of his return. The Assessing Officer framed the assessment u/s 143(2). Section 144 gives the powers to the Assessing Officer to make assessment of the total income or loss to the best of his judgment in the situation enumerated in that Section. The most relevant provision is Section 145(3), which reads:

Where the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, or where the method of accounting provided in Sub-section (1) or accounting standards as notified under sub-section (2) have not been regularly followed by the assessee, the Assessing Officer may make an assessment in the manner provided in Section 144.

17. Shri S.P. Gupta submits that when the Assessing Officer finds that the accounts are not correct or complete or where the method of accounting or accounting standards have not been regularly followed, he may make the assessment to the best of his judgment u/s 144 of the Act. It is only when the Assessing Officer cannot proceed in accordance with the provisions of Section 142 to 145, because of the nature and complexity of the accounts, the power to get the accounts audited u/s 142(2A) may be exercised. The power of framing assessment under Sections 142 to 145 is different and separate exercise of power, than the power of directing special audit u/s 142(2A). Merely because the assessee is not satisfied about the correctness or completeness of the accounts of the assessee or where the method of accounting provided by sub-section (1) or accounting standards as notified under sub-section (2) have not been regularly followed, the Assessing Officer cannot resort to the powers u/s 142(2A) of the Act.

18. Shri S.P. Gupta submits that even if the assessee does not comply with the notice u/s 142(1) or Section 143(2) or Section 144, the Assessing Officer can proceed to frame an assessment on the best of his judgment. In none of these situations he can exercise the powers directing special audit u/s 142(2A). It is only in a case in which he finds that the accounts books are such that he cannot, or should not frame assessment, to the best of judgment, that he may resort to Section 142(2A) of the Act. Such a situation will arise only when he has given an opportunity to the assessee to the account. He relies upon the observations in *Sahara India (Firm) v. CIT (Supra)* that before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt

on the part of the Assessing Officer to understand the accounts maintained by the assessee; appreciate the entries made therein. In the event of any doubt he should assistance or explanation from the assessee. Such opinion must be based on objective criteria and not on subjective satisfaction. He cannot simply shift his responsibility to scrutinize the account of an assessee and pass on the buck on the special auditor. The Chief Commissioner before granting such approval must have before him the material on the basis whereof and an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect an active application of mind on the facts of the case.

19. It is submitted that the petitioner had not filed all the books of accounts as it is evident from the letter dated 19.11.2009 filed by the respondents, namely the purchase book and journal book for the assessment year 2002-03 to 2006-07, the purchase book, general ledger, special ledger and debtor's ledger, for the assessment year 2007-08. For assessment year 2008-09 no print out of books of accounts were filed.

20. Shri S.P. Gupta has relied upon the order sheet entries dated 30.10.2009 and 19.11.2009, and submits that the photocopy of the order sheet entries was not made available to the petitioner by the respondents, when applications were made for issuing notice and the order sheet. The Assessing Officer recorded order sheet entires from the assessment year 2002-03 to assessment year 2008-09 in the respective files for each year. He maintained files for assessment year 2002-03 to assessment year 2008-09, which his successor in office was not aware of, and this is the reason why the successor in office did not provide the copy of order sheet entries recorded on 30.10.2009 and 29.11.2009. The petitioners have relied upon the order sheet entries dated 30.10.2009 and 19.11.2009, in which it is recorded by the Assessing Officer that the accounting software of the assessee is password protected. He requested the assessee to provide the password to operate and to read the hard discs. The original books and accounts as desired were not produced, and as such notice according to the Assessing Officer u/s 142(1) remained uncomplied. He requested the assessee to comply with the notice dated 3.11.2009, with the queries. It is submitted that the Assessing Officer, could not open the hard disc, as he did not have password, and also the accounting pages were not available on the computers of the department. The petitioner had filed print outs of some of the books of accounts, which would go to show that books of accounts were never examined by the Assessing Officer. He did not rely upon print outs and required original books of accounts. The petitioner has filed photocopy of the order sheet entries of all the assessment years 2002-03 to 2008-09, which according to him were made available to him on 15.9.2010, and from these order sheet entries, a strong case is sought to be made out that these entries, which are not countersigned by the authorized representative of the petitioner, would show that on none of the dates the authorized representative of the petitioner appeared or countersigned the entires and from this it is clear that the books of accounts were not examined by the Assessing Officer. He did not even examine the books of accounts of which

print outs were provided by the petitioner in the presence of the authorized representative of the petitioner, nor any query regarding complexity of the books of accounts was ever raised or any opportunity was given to the authorized representative to explain the queries with reference to the books of accounts.

21. It is submitted that the show-cause notice dated 20.1.2010 would show that the grounds taken up do not relate to the complexity of the books of accounts. These refer to discrepancies in the audit report of the petitioner-companies, on the basis of which it was stated that the books of accounts have complexities and thus the print out of the books of accounts cannot be relied upon. In substance it is submitted that the books of accounts were never examined and that the observations by the Assessing Officer are based merely on his reading of the balance sheets, the returns and audit report of the petitioner companies.

22. Shri S.P. Gupta submits that the object of special audit is not to remove the defect of incomplete accounts or to correct the accounts. The observations that the assessee attempts in correctness of the accounts showing undisclosed income of Rs. 9.30 crores, which was not recorded in the books found and seized, and the statement of the Managing Director of the assessee company through Mr. Getamber Anand that he has accepted on-money from the purchaser of flat, which was not recorded in the books is not sufficient to hold that the accounts are complex in nature. The observation in the order that in view of these facts it is necessary to recast entire accounts, and prepare fresh accounts, is beyond the purpose and object of Section 142(2A).

23. The petitioners have relied upon a recent judgment of the Delhi High Court in Delhi Development Authority and Another Vs. UOI and Another, , in which it was held that the detailed scrutiny of large number of entries by itself, on stand alone basis, will not amount to complexity of accounts. The accounts do not become complex because there are large number of entries. The scrutiny of the entries does not require the services of special auditor. Section 142(2A) is not a provision in which the Assessing Officer delegates his powers and functions to the special auditor. It only enables the Assessing Officer to take help of the specialist, who understand 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 till he has help and assistance of special auditor. The interest of the revenue is the other consideration. The revenue did not submit in that case that test check of entries was undertaken, but anomalies and mistakes were detected. It was not necessary to take assistance of accounting experts to compute the taxable income.

24. Shri Bharat Ji Agrawal, learned Senior Counsel appearing for the income tax department submits that a search u/s 132 of the Act was conducted on 15th February, 2002 at the business premises of the petitioner-companies, in which the records were seized on 15/16th February, 2008. Following the search it is admitted in para 6 of the writ petition that the income tax department carried out extensive investigation for about ten months into the financial affairs of the

companies and thereafter the records seized alongwith investigation report was handed over to the Assistant Commissioner, Income Tax (Central Circle), Meerut, who is the Assessing Officer. The petitioner admits that the representative of the petitioner companies regularly participated in the proceedings and made available all the documents and account books as and when required by the income tax department. It is also admitted in para 7 of the writ petition that all the documents and account books as and when required by the income tax department were made available during the period of investigation from February, 2008 to December, 2008. The seized records were handed over to the Assessing Officer in the month of December, 2008, who had the access of the entire seized records for the assessment year 2002-03 to 2008-09. It is further stated in para 29 of the writ petition that the investigation wing of the income tax department handed over the entire seized material alongwith the report to the Assessing Officer, who was to make the assessment of income of the petitioner and on the basis of this seized material, it is further admitted in para 30 of the writ petition as also on the basis of report of the investigation team, that the notice was issued for the assessment years 2002-03 to 2008-09, on 6.11.2009.

25. Shri Bharat Ji Agrawal submits that on 19.11.2009, in reply to the notice dated 17.11.2009 a reply/letter dated 19.11.2009 was filed. In paragraphs 1, 2 and 3 of the reply dated 19.11.2009 the assessee stated:

1. That the assessee maintains the books of accounts on computer system. The entries are done by feeding into computer from the vouchers. The original books, therefore, are on computer system only & the audit is also conducted through these books on computer itself.
2. That the complete list of books of accounts as maintained by the assessee is enclosed herewith for your kind perusal.
3. That the printout of the books of accounts as maintained by the assessee on computer are produced before your honour for verification.

The print out of books of accounts are also filed by the assessee.

26. Shri Bharat Ji Agrawal submits that for each assessment years the assessee submitted the books of accounts on 19.11.2009 as mentioned by the assessee namely: (1) cash book (2) bank book (3) purchase book (4) general ledger (5) special ledger (6) editor's ledger (7) creditor's ledger (8) general book.

27. In the said reply dated 19.11.2009 it was submitted through Shri Deepak Kapoor, the lawyer and authorised representative of the petitioner, who also furnished books of accounts, in which he mentioned that print out of the books of accounts as maintained by the assessee on computer are produced for verification and these print outs are also filed. On these documents the Assessing Officer applied its mind and sent a letter to the Commissioner of Income Tax giving detailed reasons regarding complexity etc. requiring special audit u/s

142(2A). A show-cause notice dated 7.12.2009 was issued to the assessee for getting the accounts audited u/s 142(2A), to which written reply was given by the assessee on 14.12.2009, and after considering the reply, the proposal was sent by A.O. on 15.12.2009 to the Commissioner of Income Tax seeking approval for special audit. On 18.12.2009 the Commissioner of Income Tax gave his approval after which on the same day the letter was issued by the Assessing Officer directing the assessee to get its account audited u/s 142(2A). Shri Agrawal submits that the assessee's audited books of accounts, print out of the accounts, the seized materials and all the account books namely cash book, bank book, purchase book, general ledger, special ledger, editor's ledger, creditors' book and journal book for the assessment year 2002-03 to 2007-08 were before the Assessing Officer, which were examined by him and after due application of mind the Assessing Officer came to conclusion that there are complexities in the account books, which require special audit u/s 142(2A) of the Act.

28. Shri Bharatji Agrawal submits that the High Court had quashed the earlier directions issued by the Assessing Officer on the grounds that reasons were not recorded in the order to show that there was application of mind on the part of officer concerned, on the basis of the material available on record and in the absence of reasons in the order for the direction contemplated u/s 142(2A), the order was vitiated in law. The department has not accepted the judgment and has filed a special leave to appeal against the judgment in the Supreme Court. Without admitting the correctness of the findings recorded by the Court, it is submitted that on account of special features of the case, in which large scale tax evasion has been detected and the interest of revenue is involved, the department decided, as it is open to it, to pass a fresh order and to proceed in the matter. The copy of the order of the High Court was received by CIT (Central), Kanpur on 20.1.2010, which was forwarded to the Assessing Officer. In view of the High Court's direction and looking to the complexity involved in the accounts of the assessee, it was deemed fit to invoke the provisions of Section 142(2A). A show-cause notice dated 20.1.2010 was issued to the assessee highlighting various complexities involved in its accounts and asking it to file its objections by 25.1.2010. The assessee filed its reply on 25.1.2010 for each assessment years separately. The objections were perused carefully in which it was noticed that the assessee had taken the common grounds in the preliminary objections in each assessment years. The assessee's objections was found to be unconvincing and misleading on the grounds given in the order, which were not incorporated in the earlier order dated 18.12.2009, and which are as follows:

From the perusal of returns, it has come to notice that till A.Y. 03-04, assessee company was adopting project completion method of accounting and from the A.Y. 04-05, it had changed the accounting to percentage completion method and from the printouts of books, it is not possible to determine as to how the profit from various project have been worked out and accounted for on the basis of sale declared in each year on the basis of percentage completion method.

Further, while examining the Audit Report and Balance Sheet for the A.Y. 02-03 filed by the assessed company, it is noticed that the closing inventory and work in progress as on 31-03-02 has been shown at Rs. 24,37,84,049/-. However, in the Audited Balance Sheet filed for the A.Y. 03-04, it is noticed that it has shown opening inventory and work in progress as on 01/04/02 at Rs. 23,42,84,049/-. Further, there is difference in other financial data/figures also with respect to amount shown under the heads sundry creditors, advance from customers and material consumed (as on 31/03/02) as per Audited returns filed for the A.Y. 03-04 and 02-03 as these figures shown in the return for A.Y. 02-03 are different from that declared as comparative figures as on 31.3.02 in the return filed for A.Y. 03-04, the details of which is as under:

Further, from the examination of return and audit report filed alongwith the return for the A.Y. 05-06, it is noticed that assessee has shown to have repaid loan of Rs. 68.50 lacs to its sister concern namely M/s. ATS Construction & Maintenance P. Ltd. whereas the Auditor, in his audit report in Form No. 3CD in Column 24 (b), has certified that the amount repaid to this sister concern during the year was Rs. 90 lacs. Also, in some assessment years, in the Balance Sheets, some amounts have been shown under the head unsecured loans whereas in the replies filed during the course of assessment proceedings, the AR of the company had taken plea that these were share application money but were shown under the head unsecured loans. This stand is different from audited balance sheet wherein these figures have been shown as unsecured loans. Thus, from the above discrepancies, it is clear that the audit reports conducted by the auditor and books of accounts have complexities and so the printouts of the books provided by it cannot be relied upon.

Besides the above mentioned defects, it is also found that accounting standard followed by the company involves many estimates of technical nature which is evident from the method of accounting followed by the assessee as mentioned in the accounts. The relevant portion of the accounting method is as under:

Revenue Recognition

Determination of revenues under the percentage of completion method necessarily involves making estimates by the company some of which are of a technical nature, concerning, where relevant, the percentage of completion, cost of completion the expected revenues from the project and foreseeable losses to completion. Such estimates have been relied upon by the Auditors.

Thus, from the above, it is clear that revenue is being shown by the assessee on the basis of estimates and thus correct picture of its affair is not being presented before the Department and a lot of complexities are involved in its accounts.

In view of the discussion made above, it is manifestly clear that the accounts of the assessee are defective and incomplete in as much as neither all the receipts nor the correct expenses have been recorded in the books. The assessee also admits the incorrectness of its accounts otherwise, it would not have shown

undisclosed income of Rs. 9.30 crores which is not recorded in the books found and seized. The Managing Director of the assessee company, Sh. Geetamber Anand, in his statement recorded in course of search, also admitted this fact by stating that "On money" taken from purchasers of flats were not recorded in the books. The statement has not only not been retracted till date, but return has also been filed voluntarily showing undisclosed income on this basis. In the situation, there cannot be any doubt that true income of the assessee cannot be determined from the books, a fact which the assessee also admits by declaring undisclosed income in the return filed as mentioned above. In order to determine the correct income of the assessee for Assessment Years 02-03 to 08-09, it is therefore, necessary to recast the entire accounts and prepare fresh accounts which will reflect the true and correct financial results of the company. Such recasting of accounts from a defective set of accounts obviously involves complex accounting process which cannot be done without the help of an expert in the field. It is precisely to deal with such complexity of accounts that the provisions of sec. 142(2A) has been incorporated in the Act. It is needless to add that determination of correct income is the interest of revenue involved. The objections raised by the assessee in response to show-cause dated 20.1.10 has already been dealt with earlier in this order and it is clear from the discussion made above that the assessee has raised general and unsubstantiated objection.

Thus, having regard to the nature and complexity of your accounts and in the interest of revenue, I hereby direct you to get your accounts audited u/s 142(2A) of the IT Act for the F.Ys. 01-2 to 07-08 relevant to A.Ys. 02-03 to 08-09 by M/s. Tandon Seth & Co., Kanpur who have been nominated by the Commissioner of Income Tax (Central), Kanpur in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such Auditor.

29. Shri Bharat Ji Agrawal submits that the Writ Tax No. 33 of 2010 was filed on 11.1.2010. It was decided on 13.1.2010 without giving any opportunity to the income tax department to substantiate that the entire accounts were examined, before arriving at a conclusion that there are complexities in the accounts found by the Assessing officer. The Court simply proceeded on the basis that no reasons were recorded in the order and in the absence of reasons the order could not be sustained. The Court did not decide any issue on merit and consequently it left it open to the Assessing Officer to pass a fresh order in accordance with law.

30. Shri Agrawal submits that the detailed reasons recorded in the file regarding complexity of account and the necessity of special audit could not be brought to the notice of the High Court at the time of hearing of the earlier writ petition. The Assessing Officer, however, in the given circumstances has with the approval of the Commissioner of Income Tax, given good and sufficient reasons, which point out to the complexities of the accounts requiring special audit, without which it is not possible for the Assessing Officer to complete the assessment. He submits that taking into account the fact that the assessee had voluntarily surrendered

Rs. 20 crores at the time of search, and admitted on record that he had accepted on money in respect of sale of flats, which was not recorded in the books of accounts maintained by it, and looking at the voluminous transactions in which about 2000 flats were sold, as well as the disclosure made by the assessee of Rs. 9.30 crores in the return, filed by it for the assessment year 2008-09, which was not brought to tax, it was in the interest of revenue, to get the special audit made so that the complexities of the account could be unwinded for making a fair assessment of the income.

31. Shri Bharat Ji Agrawal has also relied upon *Sahara India Ltd. v. CIT (Supra)* in support of his arguments and submits that the submissions regarding limitation are wholly misplaced. He admits that the assessment had to be completed within 21 months. Where the Assessing Officer finds genuinely and honestly that the accounts are complex, and require special audit, the last date of limitation gets extended upto the period when the special audit is completed with an addition of 60 days for assessment. He submits that the principle that no one should suffer on account of the orders of the Court, and that no one should draw any unfair advantage, which is principle of natural justice, the assessment would not be barred by limitation. Any undeserved advantage drawn, in the circumstances, has to be neutralised. He submits that remand proceedings can proceed without affected by limitation and for this purpose he has relied upon the observations of the Supreme Court in *M/s. Indian Air Gases Ltd. v. State of U.P.*, 2010 NTN (43) 208 (13) and *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others*, .

32. We have considered the respective submissions and do not find any merit in the submissions of Shri S.P. Gupta. On the first point regarding limitation it is admitted that the limitation after its statutory curtailment to 21. months was going to expire on 31.12.2009. It is also admitted that if the powers u/s 142(2A) are exercised, in accordance with law, the limitation would get extended under Explanation (ii) of Section 153B(1)(a), upto the period of completion of special audit and with 60 days for completing the assessment.

33. In Writ Tax No. 33 of 2010, the order for audit by special auditor u/s 142(2A) was not set aside on merits. The Court did not have any occasion to examine whether the requirement of Section 142(2A), regarding complexities of accounts was satisfied in as much as on the perusal of account books, the assessment could not be completed without carrying out special audit. The Court adopted a simple method of examining the reasons given in the order, and having found that reasons do not satisfy the test under *Sahara India (Firm) v. CIT (Supra)*, set aside the order with liberty to the department to proceed afresh. This liberty given in the proceedings u/s 226 of the Constitution of India, has to be interpreted in favour of the department. The assessee thus cannot draw an unfair advantage, by raising the bar of limitation.

34. In *Grindlays Bank Ltd. v. ITO, Calcutta (Supra)* repealing a similar argument in respect of the notice u/s 142(1) of the Act, the Supreme Court observed:

When passing such orders the High Court draws on its inherent power to make all such orders as are necessary for doing complete justice between the parties. The interests of justice require that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court, by the mere circumstance that it has initiated a proceeding in the Court, must be neutralised. The simple fact of the institution of litigation by itself should not be permitted to confer an advantage on the party responsible for it. The present case goes further. The appellant would not have enjoyed the advantage of the bar of limitation if, notwithstanding his immediate grievance against the notice under s. 142(1) of the income tax Act, he had permitted the assessment proceeding to go on after registering his protest before the income tax Officer, and allowed an assessment order to be made in the normal course. In an application under s. 146 against the assessment order, it would have been open to him to urge that the notice was unreasonable and invalid and he was prevented by sufficient cause from complying with it and therefore the assessment order should be cancelled. In that event, the fresh assessment made under s. 146 would not be fettered by the bar of limitation. Section 153(3)(i) removes the bar. But the appellant preferred the constitutional jurisdiction of the High Court under Article 226. If no order was made by the High Court directing a fresh assessment, he could contend as is the contention now before us, that a fresh assessment proceeding is barred by limitation. That is an advantage which the appellant seeks to derive by the mere circumstance of his filing a writ petition. It will be noted that the defect complained of by the appellant in the notice was a procedural lapse at best and one that could be readily corrected by serving an appropriate notice. It was not a defect effecting the fundamental jurisdiction of the income tax Officer to make the assessment. In our opinion, the High Court was plainly right in making the direction which it did. The observations of this Court in *Director of Inspection of income tax (Investigation), New Delhi and another v. Pooran Mall & Sons and another*(1) are relevant. It said:

The Court in exercising its powers under article 226 has to mould the remedy to suit the facts of a case. If in a particular case a Court takes the view that the income tax Officer, while passing an order u/s 132(5), did not give an adequate opportunity to the party concerned it should not be left with the only option of quashing it and putting the party at an advantage even though it may be satisfied that on the material before him the conclusion arrived at by the income tax Officer was correct or dismissing the petition because otherwise the party would get an unfair advantage. The power to quash an order under Article 226 can be exercised not merely when the order sought to be quashed is one made without jurisdiction in which case there can be no room for the same authority to be directed to deal with it. But, in the circumstances of a case, the Court might take the view that another authority has the jurisdiction to deal with the matter and may direct that authority to deal with it or where the order of the authority which has the jurisdiction is vitiated by circumstances like failure to observe the principles of natural justice, the Court may quash the order and direct the

authority to dispose of the matter afresh after giving the aggrieved party a reasonable opportunity of putting forward its case. Otherwise, it would mean that where a Court quashes an order because the principles of natural justice have not been complied with, it should not while passing that order permit the tribunal or the authority to deal with it again irrespective of the merits of the case.

The point was considered by the Calcutta High Court in Cachar plywood Ltd. v. income tax Officer, "A" Ward, Karimganj, Dist., Cachar and another(1) and the High Court, after considering the provisions of Section 153 of the income tax Act, considered it appropriate, while disposing of the writ petition, to issue a direction to the income tax Officer to complete the assessment which, but for the direction of the High Court, would have been barred by limitation.

35. This Court examined the similar argument raised in M/s. Indian Air Gases Ltd. v. State of U.P. (Supra), in which relying upon S.K. Traders Vs. Additional Commissioner, Grade-I, Trade Tax and Assistant Commissioner (Assessment), Trade Tax, , it was held that where proceedings have been set aside by this Court in exercise of powers under Article 226 of the Constitution of India, the period of limitation shall not apply, while initiating proceedings thereafter.

36. The petitioner had invoked the powers of the High Court under Article 226 of the Constitution of India in challenging the directions u/s 142(2A) of the Act for special audit, on the ground that no reasons were given in the order. The petitioner relied on the principles of natural justice to challenge the order. Having invoked the equity jurisdiction of the Court in which the Court did not go into any other question, and examined the issue of recording of reasons alone, the petitioners cannot draw any unfair advantage. The petitioners were aggrieved by the non-recording of reasons. They have not challenged the observations of the High Court, giving liberty to the department to proceed with fresh order in accordance with law. The petitioners thus cannot be permitted now on principles of equity, to challenge the fresh order on the ground of limitation. Any advantage gained in such circumstances must be neutralised. The prescription of limitation by itself should not be permitted to confer an advantage on the petitioner responsible for such delay.

37. If no order was made by the High Court directing fresh assessment, it could be contended by the petitioner that fresh assessment proceedings are barred by limitation. As explained in Grindlays Bank Ltd. v. ITO, Calcutta (Supra) the defect complaint in the notice was at best a lapse, which could be corrected by serving a proper notice and recording of reasons. The Court did not hold that the reasons were not sufficient. It held that the reasons were not recorded. It observed that reasons must be recorded in the order to show application of mind on the part of the officer concerned on the basis of the material available on record. The submissions that after the earlier notice was set aside, a fresh notice could not be issued, is thus devoid of any substance, and must be rejected.

38. On the second point regarding complexity of the accounts, we may point out

that the entire argument is based on the facts that the Assessing Officer did not have the entire account books, it did not examine the account books made available and did not give any opportunity to the petitioner to explain the manner and method of account keeping and to satisfy the A.O., if he had any queries on the discrepancies or inaccuracy in the accounts. Shri S.P. Gupta spent hours with the help of Shri Deepak Kapoor, who had represented the petitioners before the Assessing Officer to explain from the record including the order sheet, which according to him was not provided to the assessee, that the Assessing Officer did not apply his mind nor required the assessee to explain the method of accounting, which he found as complexities.

39. The petitioners obtained interim order from this Court on 19.3.2010 on incomplete record and placing inaccurate facts. It was. a clever act of deception. In the writ petition the copy of the first show-cause notice u/s 142(2A) issued by respondent No. 1 dated 7.12.2009, is indexed at pages 442-443. This is the crucial notice, which decides the fate of the case. The petitioners did not annex this notice and deliberately omitted pages 442 and 443 marked as Annexure 5 in the paper book. It was only when Shri Bharat Ji Agrawal mentioned about this paper in his counter arguments, a supplementary affidavit of Shri Tribhuvan Goyal, Assistant General Manager in ATS Infrastructure Ltd. affirmed on 18.9.2012, was filed during the course of counter reply, stating in para 2 that due to inadvertence and oversight, the document indexed as Annexure 5, and the covering page of Annexure 6 could not be filed at the time of filing of the writ petition, and which is filed now with the supplementary affidavit. This document, which has material bearing on record was thus introduced after two and a half years of filing of the writ petition in which interim order was operating. The advantage gained by the petitioner by not filing this document can be easily noticed from the contents of this document, and which reads as follows:

To, The Principal Officer M/s. ATS Infrastructure Ltd. K-19, Sec-18, NOIDA

Sir,

Subject: Show-cause notice for conducting Special Audit u/s 142(2A) of the IT Act, 1961 in your case for the assessment year 02-03 to 08-09-reg-

As you are aware, a search & seizure operation was conducted in the ATS Group of Cases on 15/02/08. In course of search, a sum of Rs. 20 crores was surrendered by you as undisclosed income. Shri Geetamber Anand, the Managing Director of your company, in his statement recorded u/s 132 (4) of the IT Act in course of search has admitted that cash was being received as on money in sale of flats. Evidences to this effect has also been found in course of search vide page No. 10 of Annexure A-17 which has been seized from your premise. Further vide Annexure A-9 page No. 1 seized from premise, it is clear that 30% on money in cash has been received which has not been recorded in the books of accounts. It has also been admitted by Shri Anand that Penthouses whose market value was 3.5 crores was sold to the Directors for a consideration of 1.5

crores only. In view of these facts found in course of search and also admitted by Shri Anand in his statement, it is not possible to ascertain the correct income on the basis of the books maintained by you.

Considering the fact that your Group is involved in large scale construction of nearly 2000 flats having investment of hundreds of crores, I am of the opinion that in view of the inaccuracy of accounts and the complexity arising therefrom, the books for the above mentioned years need to be subject to Special Audit u/s 142(2A) of the I.T. Act, 1961. If you have any objection to the proposed reference u/s 142(2A), you may file your reply positively by 14/12/2009 failing which, it shall be presumed that you have no objection to the proposed reference.

Yours faithfully,

(M.K. Jain) Assistant Commissioner of Income Tax Central Circle, Meerut

40. We further find that Shri S.P. Gupta in the presence of Shri Deepak Kapoor repeatedly argued that the copy of the order sheet was not provided to the petitioners. He placed before us list of dates in loose sheets in which he conveniently did not mention the proceedings dated 19.11.2009, and the business, which was transacted on that date. It was on this date, that Shri Deepak Kapoor, A.R. had filed the letter dated 19.11.2009, which was placed on record. The contents of this letter have been quoted while referring to the argument of Shri Bharat Ji Agrawal. This letter enclosed the complete list of books of accounts as maintained by the assessee for the perusal of the Assessing Officer.

41. We find that Shri S.P. Gupta, a Senior Advocate of the Court has for the benefit of his client in the presence of Shri Deepak Kapoor, who was present all along the proceedings before the Assessing Officer and in this Court, made an attempt to mislead the Court in believing that the Assessing Officer did not have the occasion to go through the records. He did not succeed in his effort as Shri Bharat Ji Agrawal, on our request, produced the entire record before us, and from which we now find that not only in the first notice dated 7.12.2009, the large scale tax evasion as noticed, was attempted, which was sought to be concealed from this Court; the Assessing Officer had in fact summoned the entire record, and had gone through the account books carefully before arriving at the findings that the accounts are complex, which he could not explain to the Court because the earlier writ petition was decided without calling for counter-affidavit. He has now sufficiently explained these facts in the impugned order for special audit passed u/s 142(2A) of the Act.

42. The petitioners are builders engaged in the construction and sale of residential and commercial flats. Their turn over exceeds hundreds of crores. Shri Getamber Anand, the Managing Director of ATS Infrastructure Ltd. surrendered 20 crores of rupees during the course of search. It was also stated by him that he accepted on money in respect of sale of flats and which was not recorded in the regular books of accounts. He has not retracted his statement, which was

confirmed to be given by him. He was aware as Managing Director of the company of his powers, and responsibilities, which are vested in him by the Board of Directors and was also fully aware of the contents of his statement and affairs of the assessee-company. He had also admitted additional income of Rs. 9.30 crores in the return, which he had voluntarily filed and signed as Managing Director of the company. These facts clearly demonstrate that the account books were not genuine.

43. Coming back to the question of complexities in the method and manner of maintaining the accounts, the Assessing Officer, after examining the accounts has recorded the reasons, namely that the company was changing the basis of valuation of flats by applying WIP, cost of construction, material consumed and other direct construction cost, which could not be correctly determined from the accounts, which was produced before him. The Assessing Officer found that calculation of cost is different in different years in respect of each type of flat/ shop constructed from which the cost of each flat/ shop could not be determined. The sale consideration was also not recorded correctly specially when there is an admission that on money was taken, which was not entered in the books of accounts. The Assessing Officer also found that it was not possible to determine the extent and nature of work remaining in the uncompleted flats, and justification of sale consideration mentioned in the books of accounts, for such uncompleted flats on the basis of manner in which books of accounts have been maintained. He also observed that upto assessment year 2003-04 the assessee company was adopting project completion method for accounting, and from assessment year 2004-05, it changed the accounting to percentage completion method and that from the print out of the books of accounts it was not possible to determine as to how profits from various projects was worked out and accounted for the purposes of sale.

44. The Assessing Officer is required to find out the income to be brought to tax. He has to apply the accepted methods of accounting and if there are any inaccuracies, he may direct the assessee to assist him in explaining and to reconcile such accounts. The Assessing Officer is not a specialist accountant or an auditor, to find out the methods adopted by the assessee for assessing the income to be taxed. He is not required to act as an investigator or a specialist auditor, nor does he have a team of assistants to enter into the web; decipher the codes, and to demystify the procedures adopted in accounting methods to find out and arrive at the aggregate income to be assessed to tax.

45. In *Rajesh Kumar and Others Vs. D.Commissioner of Income Tax and Others*, and in *Sahara India (Firm), Lucknow v. CIT Central-land another*, (Supra) decided on 11th April, 2008 the Supreme Court has relied on *Swadeshi Cotton Mills Company Ltd. Vs. Commissioner of Income Tax and Another*, . In this judgment Hon"ble Mr. Justice K.J. Shetty explained the import of Section 142(2A) as follows:

K.J. Shetty, J. in *Swadeshi Cotton Mills Company Ltd. Vs. Commissioner of*

Income Tax and Another, , succinctly laid down the import of the said provision in the following terms:

The exercise of power to direct special audit depends upon the satisfaction of the income tax Officer with the added approval of the Commissioner. But he must be satisfied that the accounts of the assessee are of a complex nature, and, in the interests of the Revenue, the accounts should be audited by a special auditor. The special auditor is also an auditor like the company's auditor, but he has to be nominated by the Commissioner and not by the company. The accounts are again to be audited at the cost of the company.

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:

The state or quality of being intricate or complex "or" that is difficult to understand.

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.

We may, however, notice that the learned Judge referred to the guidelines of the Central Board of Direct Taxes and having regard to the facts and circumstances of the case opined that the exercise of the power was not arbitrary.

46. The principles on which accounts may be treated to be inaccurate or complex have been sufficiently explained in Sahara India and do not require any reiteration. In the present case we are of the view that the petitioner companies are engaged in large scale tax evasion, and for that purpose it was adopting dubious methods in maintaining the accounts, which were examined and were found to be complex by the Assessing Officer. He made a genuine attempt to understand the method of calculation of the value of the flats, which were being changed frequently by the assessee and having failed to understand the manner and method in which accounts were maintained firstly required the petitioners to explain and having faced an uncooperative attitude directed special audit to be carried out by special auditor. We do not find any legal error in the order directing the petitioners to get their accounts audited by special audit or appointed by the Commissioner of Income Tax, for which the cost is now to be paid by the Central Government and thus the exercise would not cause any prejudice to the petitioners.

47. We have examined the records produced by Shri Bharat Ji Agrawal and find that the assessee had filed reply dated 19.11.2009 before the A.O., in which the counsel appearing for the petitioners (Shri Deepak Kapoor) had produced print out of the accounts. This fact is mentioned in the order sheet and thus the submissions that the books of accounts were not examined is not true. Besides the seized material was also available with A.O., which also form part of the accounts. The financial statements were also" available with the A.O., which were also part of accounts of the assessee. The record further demonstrates that before giving directions to get accounts audited vide letter dated 7.12.2009, to which the assessee had submitted reply on 14.12.2009, first time directions were issued on 18.12.2009. Even at this stage detailed reasons were recorded on the file as well as in the letter written to the approving authority [CIT (Central), Kanpur] on 2.12.2009.

48. On the directions of the High Court another opportunity was given to the petitioners vide letter dated 20.1.2010 to which the petitioners replied on 25.1.2010. The impugned order dated 28.1.2010, was passed after considering the objections.

49. We also find that the A.O. had given specific instances of complexity of the accounts namely the varying figures of opening balance in the previous years and the closing balance in the subsequent year; closing inventory and WIP as per balance sheet and the different figures given in respect of repayment of loans. The assessee company had admitted additional undisclosed income of Rs. 20 crores over and above the regular income; however, while filing return of income only Rs. 9.3 crores was included as additional income for the assessment year 2008-09.

50. The record also demonstrates that while seeking approval u/s 142(2A) from CIT (Central), Kanpur the A.O. had referred to the disclosures of Rs. 26.65 crores made by the group concerned/persons at the time of search out of which major disclosure of Rs. 20 cores was made by M/s. ATS Infrastructure Ltd. The returns were filed by the petitioners for the assessment years 2002-03 to 2007-08 and notice u/s 143(2) was issued for assessment year 2008-09 in which ATS Infrastructure Ltd. has shown gross total income of Rs. 12,33,22,442/-, which included surrendered undisclosed income to the tune of Rs. 9.30 cores, as against the disclosure of Rs. 20 cores and the tax was worked out at Rs. 4.54 crores on the total income declared at Rs. 12.33 crores. Out of the tax payable, the TDS amounted to Rs. 7,81,915/- only, claim of advance tax was not allowed, which resulted in demand of Rs. 5,34,96,570/- out of which M/s. ATS Infrastructure Ltd. had paid Rs. 1,16,77,092/-, besides claiming credit of the seized cash of Rs. 3.30 crores. A notice u/s 153A was issued on 13.3.2009. Instead of complying with the notice the assessee filed petition before the High Court of Delhi challenging the jurisdiction, which was dismissed. Later on the jurisdiction of the Central Circle, Meerut was also challenged before Hon"ble the Supreme Court. The SLP was dismissed. Since the petitioner did not comply with

the notice u/s 153A, a show-cause notice u/s 271F and 276CC were issued on 11.9.2009. It is only thereafter that the returns were filed on 16.6.2009. After examining these returns and seized material a detailed questionnaire for all assessment years from 2002-03 to 2008-09 (block assessment period) were issued calling for the details to which only part replies were filed to these notices.

51. The A.O. has mentioned in his letter to the approving authority that the data in the seized hard discs/CDs could not be accessed as the account books were stated to be on the FCA package, which could not be opened as all the files were password protected. The petitioner inspite of being repeatedly asked did not produce accounting package and correct password to enable the A.O. to open the accounting files. Passwords given by the petitioner on 25.11.2009 were found to be incorrect. The petitioner admitted that it was the mistake and promised that the correct passwords will be provided by 27.11.2009, which were not provided. In the absence of these details the completed constructions and the work in progress could not be verified. The matter was, thereafter, referred to the valuation cell. From the correspondence received from valuation cell it was noticed that the petitioner was not cooperating with the Valuation Cell also and was not providing requisite details/date, nor producing books of accounts, bills and vouchers and requested to withdraw the reference made to Valuation Cell.

52. The A.O. thereafter required the petitioner to furnish the details of inventory and work in progress giving the details of the opening balance, addition, transfer and closing balance including that of cost of construction, finance charges, selling and administrative expenses and depreciation shown in stocks in respect of all the projects. It was also asked to give basis of valuation alongwith supporting documentary evidence. The petitioner was also asked to give details and evidence of the bill of cost of construction claimed, material consumed, expenses through contractor, lease rent and other direct construction cost, and was also asked to furnish copies of the agreement/contracts made for contracts entered by the petitioner, details of all the projects constructed and completed during the year giving details of various types of flats, shops, other residential and commercial establishments giving details of area of each type of flat/shop. It was also asked to give details of the land purchased and the copies of the allotment letters, purchase deeds giving the total purchase consideration, details of cost of construction including material cost, labour cost, and other expenses and to produce bills and other evidence in support of the same. The details of the cost per sq. feet in respect of each type of flat/shops were also required alongwith details of the area, name and address of the purchaser with total sale consideration, date wise amount receive on booking installments, allotment, possession etc. The petitioner was also asked to justify sale consideration including that of the parking space, club membership and other facilities in respect of each project separately and the details of completed and uncompleted flats giving extent and nature of the work remaining in the uncompleted flats. The petitioner did not provide any information on these points. The returns scrutinised by the A.O. demonstrated that the petitioner was adopting project

completion method of accounting till assessment year 2003-04 and changed its accounting to percentage completion method from assessment year 2004-05. Accordingly in the questionnaire of the assessment year 2004-05 and subsequent assessment years he was asked to explain the reasons for change of the method, which was also not provided. The Managing Director of the company in his statement recorded u/s 132(4) of the Act had accepted that 30% of the sale consideration was taken as on money for various projects on account of sale/cancellation and renovation of flats. The amount accepted as on money was not disclosed.

53. We do not agree with the submission of Shri S.P. Gupta, learned Counsel appearing for the petitioners that in such a case it was open to the A.O. to proceed with the best judgment assessment u/s 144 and that the submission of incomplete accounts or the refusal to disclose true and correct accounts cannot be a ground for special audit u/s 142(2A) of the Act. It is not a case, where the accounts produced were not examined. As discussed above after adopting non-cooperative attitude, finally copies of the accounts were produced alongwith the letter dated 19.11.2009. These accounts, however, were not sufficient to unwind the complex character of the methods adopted by the petitioners for working out the cost of the flats and the details of the sales. The Assessing Officer inspite of his best efforts was not able, in the absence of special audit, which could unwind the methods adopted by the petitioners, to assess the income to be brought to tax.

54. Before parting with the case we may observe that the petitioners not only adopted dubious method of maintaining accounts, they have virtually admitted that they have been accepting on money of one third of the cost on sale of flats, which is not disclosed in their account books. The petitioners were thus very keen to hide the income to be brought to tax and were ably assisted in their design by unscrupulous counsels, with whose help false statements were made and records were concealed to gain unfair advantage. The interim order was obtained by concealing relevant documents, which were indexed but were not annexed to the writ petition, and were sought to be introduced at the time of final hearing on the pretext of inadvertence. Shri Deepak Kapoor was present before the Assessing Officer on 19.11.2009 and had produced complete list of books of accounts and print outs of the books of accounts as maintained by the assessee on computer alongwith a letter. He did not mention about these dates either in the list of dates alongwith writ petition, or in the list of dates provided by him to the senior counsel at the time of hearing. Shri Deepak Kapoor is prima facie guilty of professional misconduct in misleading the Court. He also misled Mr. S.P. Gupta, a Senior Counsel of the Court, who was cautioned time and again to be more precise in his submissions. He seems to think that the time of the Court is at his mercy, and consumed almost eight hours in explaining the facts, which was full of inaccuracies and repetition.

55. In the special facts and circumstances of the case, we impose exemplary

costs of Rs. Two lacs on the petitioner in Writ Petition No. 418 of 2010, and Rs. One lac in Writ Petition No. 339 of 2010 to be deposited by the petitioners with the Registrar General of the Court within one month. The amount will be credited to the account of the State Legal Services Authority, Lucknow and will be spent for assisting poor litigants, who do not have access of justice. Both the writ petitions are dismissed. The interim orders are discharged.