
(2013) 05 AHC CK 0373
In the Allahabad High Court
Case No : Writ Tax No. 444 of 2008

Kanpur Development Authority

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 17-05-2013

Acts Referred:

Income Tax Act, 1961 — Section 11, 12, 12A, 142(1), 142(2A)

Citation : (2013) 263 CTR 233 : (2013) 216 TAXMAN 312

Hon'ble Judges : Ram Surat Ram (Maurya), J;Prakash Krishna, J

Bench : Division Bench

Advocate : S.K. Garg and Ashish Bansal, for the Appellant; Bharat Ji Agarwal and Ashok Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—The petitioner an "authority" constituted under provisions of the U.P. Urban Planning and Development Act, 1973 has filed the present writ petition questioning the legality and validity of the order passed u/s 142(2A) of the income tax Act for the Assessment Year 2005-2006 i.e. the Financial Year 2004-2005. The petitioner claims that its income has been exempted vide certificate dated 25th of July, 2005 issued u/s 12A of the income tax Act. Its return of income was exempt for the Assessment Year 2003-2004 and assessment for the Assessment Year 2004-2005 is pending. Its income of return for the relevant Assessment Year 2005-2006 was filed on 29th of October, 2005 claiming exemption u/s 11 read with section 12 of the Act. The return was accompanied with an audited statement of account, tax audit report in form no. 3 CD u/s 44AB of the Act. The notice for assessment was issued on 19th of July, 2006, in response thereof the petitioner appeared and sought adjournment. During the course of assessment proceedings, the Assessing Authority raised number of queries which could not be replied by the petitioner fully. Only part compliance was made. A show cause notice u/s 142(2A) dated 12th of November, 2007 was served on the petitioner for making reference to get the

books of account audited by a chartered accountant having regard to the nature of complexity of accounts of the assessee and the interest of the Revenue. Cause was shown which was not found satisfactory. The reference was made by the Assessing Authority to the Commissioner of income tax who vide his order dated 18th of December, 2007 found that there are various complexities in the accounts of the assessee and it is not possible to arrive at the correct income of the assessee on the basis of the tax audit report furnished with the return of the income. Consequently, it granted the approval for getting the account books audited u/s 142(2A) of the Act and appointed M/s. Tandon Seth & Co. as the auditor. Challenging the order dated 18th of December, 2007, the present writ petition has been presented on 5th of March, 2008. In reply, the Department came out with the case that the present writ petition has been filed with deliberate intention just to avoid the proceedings u/s 142(2A) of the Act. The petitioner neither cooperated with the assessment proceedings pending before the Assessing Authority nor appeared before the Special Auditor whereas the limitation is prescribed for completing the audit proceedings. All the three conditions for invoking the provisions of section 142(2A) of the Act exist. Even the auditor of the petitioner who submitted the tax audit report u/s 44AB has pointed out the complexities on several points which are vital for determination of the income of the assessee. The details have been enumerated in para-3(e) of the counter affidavit. In substance, the case of the respondent is that from the observations made by the assessee's auditor in para-12(a) it becomes evident that the assessee has not valued its assets and properties fully as they stood on 31st of March, 2004, the process of identification and quantification of all assets is under progress. Various other remarks made by the petitioner's auditor in the audit report have been referred and relied upon in the counter affidavit in support of the impugned order.

2. In the rejoinder affidavit, the stand taken in the writ petition has been reiterated.

3. Heard Sri S.K. Garg, learned counsel for the petitioner and Sri Ashok Kumar, learned standing counsel for the respondents. When the matter was taken up earlier, the learned counsel for the petitioners had submitted that on the like grounds, for the preceding Assessment Year order was passed u/s 142(2A) of the Act which was challenged in the Writ Tax No. 587 of 2007 and was allowed on 9th November, 2010. It was also submitted that since the petitioner has not been served with any demand notice thereafter, it is reasonable to presume that the return income of the petitioner has been accepted. This necessitated the adjournment of the case asking the respondent to clarify the position after getting instructions. A supplementary affidavit has been brought on record stating that the assessment proceeding for the immediately preceding Assessment Year is still pending as the petitioner who was under an obligation to approach the Department along with the certified copy of the judgment delivered in the above referred writ petition failed to approach. The assessment matter is still pending consideration. We find that the said writ petition was allowed on the

point that before passing of the order u/s 142(2A) opportunity of hearing was not afforded to the petitioner. Meaning thereby, this Court did not examine the merits of the order. The petitioner, therefore, cannot derive any advantage from the judgment of the writ court delivered for the immediately preceding Assessment Year.

4. Then, it was submitted that proper opportunity of hearing was not afforded before passing of the impugned order and at any rate, the Assessing Authority had no occasion to form an opinion that due to complexity of the accounts, the report of special auditor is required. Elaborating the argument, it was submitted that the report of petitioner's auditor is already on record. It was further submitted that the matter was taken up for the first time by issuing notice dated 19th of July, 2006 when there was sufficient time at the end of the Department to obtain the report of the Special Auditor but the assessment proceeding did not proceed and finding that the limitation for assessment is going to be completed soon, with a view to get the extension of period of limitation, proposal was given which has been approved by the Commissioner to get the accounts of the petitioner audited by the special auditor.

5. In reply, Sri Ashok Kumar, learned counsel for the Department, submits that, as a matter of fact, the position is otherwise. The petitioner failed to cooperate with the assessment proceeding and attempted to linger it on one pretext or the other. The number of information by way of queries were sought for by the Assessing Authority from the petitioner and when the petitioner failed to make full compliance the Assessing Officer in absence of the relevant information has also taken into consideration the "remark" of the petitioner's auditor that "it is necessary to get the account books audited by special auditor", to arrive at the correct figure of the income.

6. Having considered the arguments of learned counsel for the parties and on a perusal of the record, we find that there is no substance in the argument of the petitioner that either the special auditor was appointed for the purposes of getting the prescribed period of limitation extended or proper opportunity of hearing was not afforded to the petitioner. A bare perusal of the record would show that the petitioner was called upon to show the cause by the notice dated 12th of November, 2007 as to why a reference be not made in view of the proviso to section 142(2A) of the Act. Admittedly, the petitioner submitted the reply vide Annexure-D to the writ petition. In the reply the petitioner insisted that a receipt method of accounting followed by "institution" recognised u/s 12A, the particulars of the "receipts" and also "utilization" thereof have been given on cash basis. As a consequence thereof, all the objections raised by the Department on the maintenance of the accounts, specially those regarding valuation of the shop, profit and loss on the building operations, remarks given in the tax audit report according to the petitioner have no bearing on the return and assessment of the petitioner as it is claiming exemption u/s 11 read with section 12 of the income tax Act. It further shows that the petitioner had

submitted the print out of General Ledger Volumes-I and II of books of accounts on 12th of November, 2007 before initiation of proceedings u/s 142(2A) of the Act. The books of accounts submitted by the petitioner run approximately into 2500 pages of computer print. This negates the above contention of the petitioner that either proper opportunity of hearing was not given or power u/s 142(2A) was exercised just to get the extension of the prescribed limitation.

7. Reliance was placed on *Swadeshi Cotton Mills Company Ltd. Vs. Commissioner of Income Tax and Another*, in support of contention that there is no complexity in the account books maintained by the petitioner. It has been held that the exercise of power to direct the special audit depends upon the satisfaction of the Assessing Officer with the added approval of the Commissioner. But the Commissioner must be satisfied that the accounts of the assessee are of complex nature and in the interest of revenue the accounts should be audited by the 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 Court has further held that this power should not be lightly exercised. The satisfaction of the authority should not be subjective satisfaction but it should be based on objective assessment regard being had to the nature of the accounts. The nature of accounts indeed must be of a complex nature i.e. primary requirement for directing a special audit. It has been held that 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.

8. 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. Elaborating the argument, the learned counsel for the petitioner submitted that if the petitioner was not in a position to answer the queries raised by the Assessing Authority, resort to the best judgment assessment should have been made, as there is no complexity in the accounts. At this juncture, it is apt to have a look to the remarks of the petitioner's auditor itself in its tax audit report submitted u/s 44AB. The said remarks are reproduced below:-

10. The auditor in the audit report at serial Nos. 12(a) and (b) has observed as follows:

He has made further qualificatory remarks in respect of serial No. 13(a) to (e), Serial No. 17(a) to (e) and Serial No. 22(b) which is as follows:-

To the best of our checking and as informed by the Management as it is not possible to verify whether there are such items due to necessary evidence and information not being readily available.

11. It appears that faced with the above remarks of the petitioner's auditor in the audit report, the Assessing Authority tried to complete the assessment but was faced with the fact that the assessee has not made compliance of queries and defects in maintenance of the books of account as pointed out by the assessee's own auditor. The defect has not been removed. The show cause notice dated 21st November, 2007 is self speaking and evidently demonstrates that the satisfaction recorded by the Assessing Authority to get the accounts of the petitioner audited by special auditor is based on objective consideration i.e. there is defects in the maintenance of the books of account and qualificatory remarks in the audit report. Few paragraphs from the show cause notice i.e. 5.1, 5.2 and 5.3 are being produced below:-

5.1 During the course of assessment proceedings, the assessee has submitted written reply dated 12.11.2007 and 21.11.2007. However, only part compliance was made. The assessee has not made compliance of various queries and the defects in maintenance of books of account as pointed out by the assessee's own auditor has also not been removed. The assessee has claimed that its entire activity including acquisition/construction of land and building and its sale constitute activity of charitable in nature and it has carried out its activity in accordance with the law and procedure prescribed under the U.P. Urban and Planning Act, 1973.

5.2 In order to verify correctness of claim made by the assessee, it was required to furnish project wise details of inventory of opening and closing stock, details of sale and purchase which is very vital to determine whether the assessee had ventured into such activity with a profit motive or not. The assessee has neither furnished these details before the auditor nor did it comply with the requirements given vide notice u/s. 142(1) dated 28.09.2007 coupled with the reminders given by the order sheet entry dated 24.10.2007 and 21.11.2007. The report of auditor is replete with qualifying remarks at various places which reveal that the assessee has not furnished vital information before the auditor. During the course of assessment proceedings, it has been claimed that there was no need to furnish such details as the income has to be computed u/s. 11/ 12 of the Act.

5.3 The assessee has submitted copy of ledger account in 5 volumes but supporting vouchers of receipts and payment has not been submitted on the ground that there are voluminous records. In absence of vouchers, the correctness of state of affairs could not be verified and looking to the complexities and enormity and assessee's inability to substantiate its income and expenditure by producing supporting vouchers, it is in the interest of revenue, justice and fair play to make a reference u/s. 142(2A) of the Act to get the accounts of the assessee audited.

12. This shows that the Assessing Authority felt that the complexity and the enormity of assessee's inability to substantiate its income and expenditure by producing supporting vouchers, it is in the interest of justice to get the accounts of the assessee audited. It has got approval by the Commissioner of income tax by the order dated 18th of December, 2012. Viewed as above, we do not find any substance in the argument of the learned counsel for the petitioner that it is not correct to say in view of the petitioner's audit report that the accounts of the petitioner is not complex or the special audit report has been called for either just for extension of time to complete the assessment or otherwise. The impugned orders have been passed taking into account the relevant facts and circumstances of the case and on valid grounds germane to the assessment of the income of the petitioner.

We do not find any merit in the writ petition. The writ petition is hereby dismissed.