
(2012) 03 JH CK 0087

In the Jharkhand High Court

Case No : Writ Petition (T) No. 199 of 2012

Ramjee Power Construction Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-03-2012

Acts Referred:

Income Tax Act, 1961 — Section 132, 132A, 139, 142, 142(2A)
Income Tax Rules, 1962 — Rule 6G

Citation : (2012) 2 JCR 535

Hon'ble Judges : Prakash Tatia, C.J;Aparesh Kumar Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the parties.

2. Petitioner's premises was searched by the Income Tax Authorities u/s 132 of the Income Tax Act 1961 on 31.10.2009 and just before seven days of expiry of the period of limitation of making assessment, which would have expired on 31st December, 2011 the assessing officer proceeded to invoke the provisions u/s 142(2A) of the Income Tax Act of 1961 to refer the matter to the special audit which extends the period of limitation for making assessment order. The assessing officer's forming opinion was forwarded to the Commissioner of Income Tax for approval as required u/s 142 (2A). The Commissioner of Income Tax accorded approval on 22nd December, 2011. Hence this writ petition has been preferred by the writ petitioner.

3. It will be appropriate to narrate the facts of the case in brief. As we have already noticed that search was conducted in the premises of the writ petitioner on 31st October, 2009 and according to the writ petitioner it was continued and again search was conducted on 26th December, 2009. Since, assessment year would have come to an end on 31st March, 2010 and, therefore, from 31st March, 2010 the assessing officer in this proceeding could have passed the order of block assessment within 21 months from 31st March, 2010. This limitation

was going to expire on 31st December, 2011. In spite of the fact the petitioner was served with the first notice under provision of Section 153A of the Income Tax Act, 1961 only after 17 months, on 30th March, 2011. The petitioner submitted to the assessing officer that he has nothing to disclose and has already submitted return which may be treated to be a return in the present proceeding. The assessing officer received the Appraisal Report by the investigation team on 12th May, 2011. The assessing officer then gave another notice to the writ petitioner on 27th May, 2011 and issued a questionnaire on 8/9th September, 2011. Since the petitioner did not answer the questionnaire therefore, another letter was issued to petitioner on 7th October, 2011. The petitioner then submitted reply to the questionnaire on 25th October, 2011. The assessing officer was of the view that answers are not complete and requires detailed explanation, therefore, the assessing officer issued another letter to the petitioner on 17th November, 2011 which was to be responded by the petitioner by or on 27th November, 2011. However, without waiting for the supplementary/ additional reply of the writ petitioner the assessing officer on 25th November, 2011 itself proceeded to consider the matter for referring the case to the Special Audit u/s 142(2A) of the Income Tax Act. However, petitioner submitted reply to the queries in response to the assessing officer's letter dated 27.11.2011 and 28.11.2011. It will be worthwhile to mention by this time that the petitioner's stocks seized in search and seizure operation were not opened and, therefore, petitioner's accounts were not down loaded which were alleged to have been lying in the hard disc of the petitioner's computer. With these facts, learned counsel for the petitioner vehemently submitted that when there was a statutory period of limitation for making assessment order in the proceeding u/s 153A then in that situation the Revenue Authorities proceeded casually and when found that period of limitation is about to expire they resorted method to refer the matter to the Special Auditor for special audit and, therefore, in fact sending the matter to the special audit is nothing but for co-lateral purpose.

4. Learned counsel for the petitioner further vehemently submitted that the Commissioner of Income Tax was to give opportunity of hearing before according approval to the proposal signed by the assessing officer in view of the proviso appended to sub-section 2A of Section 142. However, learned counsel for the petitioner submitted that assessing officer though gave the opportunity of hearing to be forming opinion under Sub-section 2A of Section 142 but that is not the complete compliance of the principles of natural justice as the petitioner would have demanded before the Commissioner of Income Tax that there is a complexity in the accounts nor it is in the interest of Revenue to refer the matter to the auditor for special audit. Admittedly, in this case the Commissioner of Income Tax did not give any opportunity of hearing to the writ petitioner and accorded approval for sending the matter to the special audit.

5. Learned counsel for the petitioner also submitted that the word "complexity" has been considered in detail by the Hon'ble Supreme Court in the case of *Rajesh Kumar and Others Vs. D. Commissioner of Income Tax and Others*, and

further in detail in the case of Sahara India (Firm), Lucknow Vs. Commissioner of Income Tax, Central-I and Another, and the Hon''ble Supreme Court categorically held that the formation of opinion of the assessing officer u/s 142 requires complete application of mind to the facts of the case and arrive at a question that the accounts are complex. The Hon''ble Supreme Court also held that to avoid to understand the accounts the assessing officer cannot resort to the provision provided u/s 142 (2A).

6. It is held by the Hon''ble Supreme Court that before holding that accounts are complex or difficult to understand there has to be a genuine attempt to understand the accounts maintained by the Assessee.

7. Learned counsel for the petitioner vehemently submitted that the facts of the present case are clear that the assessing officer kept the matter pending with it for a very long period and that too for 17 months and thereafter, he gave the questionnaires which were duly answered by the writ petitioner and a supplementary questionnaire was raised by the assessing officer and without awaiting for petitioner's reply to the supplementary questionnaires. The assessing officer proceeded with the proceeding u/s 142(2A) which clearly indicate that the assessing officer even did not apply mind to the accounts of the petitioner.

8. It is also submitted that even the soft copy of the accounts were not obtained as even computer was not opened before the Assessing Officer invoking the provision of Section 142(2A) of the Income Tax Act, therefore, in this case not only there was no honest attempt on the part of the assessing officer to understand the accounts but in fact there was no attempt at all. It is submitted that the petitioner was cooperating the Revenue fully and he gave the reply to the questionnaires raised by the department and also appeared before the department for opening of the hard disc by providing the pass word to the Revenue for computing the complete accounts from the computer.

9. The Hon''ble Supreme Court in Sahara India's case held that assessing officer should bring the entries made in the books of accounts and in the event of doubt may seek explanation from the assessee and here in this case even required material was not before the assessing officer not explanation of the petitioner was with the assessing officer while he decided to form an opinion and recommended the case for approval for special audit.

10. It is also submitted that the Commissioner of Income Tax, who was required to give approval had right to reject the proposal of the assessing officer but without application of mind proceeded to accord the sanction. It is submitted that for approval of the proposal of the assessing officer the Commissioner of Income Tax is required to examine the complete material but in this case even material was not placed before the Commissioner of Income Tax and the copy of the order of the Commissioner has not been provided to the writ petitioner. However, it will be relevant to mention here that because of the order passed, the Revenue has

provided a copy of the order passed by the Commissioner of Income Tax who approved the proposal of the assessing officer.

11. Learned counsel for the petitioner further vehemently submitted that admittedly the block assessment year consists of six years and those are year, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009 and 2009-2010.

12. Learned counsel for the petitioner submitted that assessment of the petitioner for the year 2004-2005 was subject matter even before the Income Tax Appellate Tribunal from where final order has been passed and, therefore, no proceeding for that year's assessment is pending. For assessment year of 2005-2006 the matter was decided finally by the Appellate Authority and matter of the assessment of the year 2006-2007 is pending before the Appellate Authority. According to the learned counsel for the petitioner, in view of the second proviso to sub-section 1 of Section 153A only assessment proceeding were pending on the date of initiation of search u/s 132 of the Income Tax Act stands abated and that means that the matter which have already been decided and assessment order have attained the finality, those matters cannot be reopened and, therefore, the special audit could not have been ordered for those years.

13. Learned counsel for the petitioner drew our attention to the stand taken by the Revenue in their reply that the proceeding which have already been decided though have not abated in view of the stand of the Revenue the proceeding which have not been abated cannot be reopened u/s 153A for reassessment. According to the learned counsel for the petitioner in his interpretation the Revenue in reply also admitted that proceeding for re-assessment is pending only for the remaining years proceeding which have not been abated.

14. Learned counsel for the petitioner also vehemently submitted that it is a case of total passing of mechanical order which is clear from the reference made to the special auditor by the assessing officer which indicate that mere empty formality have been done by the assessing officer so as to complete with Section 44-AB of the Act of 1961 and Rule 6G of the Income Tax Rules of 1962 and it appears that some heading have been picked up by the assessing officer prescribed for the purpose of obtaining report of the audit and without specifying the facts and details and figures under any of the headings not only this but even assessing officer have directed the auditor to reply Profit and Loss Accounts which is not the duty of the auditor but such accounts is prepared only by the assessee and, therefore, the reference which has been made to the special auditor is also absolutely illegal. It is also submitted that no audit report can be obtained with respect to the assessment which have attained the finality.

15. Learned counsel for the petitioner further submitted that the Hon'ble Supreme Court held that even if order of special audit may not result in Civil consequence because of another financial liability even this may be stigmatic, therefore, such order cannot be passed in a mechanical order and without

specifying the statutory requirement for passing the order of special audit.

16. Learned counsel for the petitioner also drew our attention towards the guidelines issued by the Department of Revenue, Central Board of Direct Taxes dated 22.12.2006 (Annexure-13) wherein the guidelines for assessments in search and seizure cases have been prescribed. According to the learned counsel for the petitioner the guidelines provided that after obtaining the appraisal report from the investigating team by the assessing officer he may proceed to scrutinize the accounts for the purpose of finding out the applicability or simplicity of the accounts and before that he cannot proceed to invoke the provision of Section 142(2A).

17. Learned counsel for the respondent Revenue vehemently submitted that a search in the premises of the writ petitioner was part of big search operation conducted on the Madhu Kora Group of cases wherein more than 120 persons were covered in the search operation and a total of 167 premises were covered at stations like, Delhi, Kolkata, Noida, Lucknow, Mumbai, Pune, Nashik besides various remote places and towns of Jharkhand. Post search enquiry and investigations were carried out with the help of Enforcement Directorate and C.B.I and several documents were seized and were transferred to the assessing officer on 04.02.20011 and thereafter notice u/s 153A was issued to the petitioner on 30.03.2011.

18. Learned counsel for the Revenue also submitted that these facts itself sufficiently project that the entire matter was very complex because of several dealings of the writ petitioner having some connections with the others with several money transactions in the bank as well as cash deposit and withdrawal from the banks. However, more transactions were related to various contracts obtained by the writ petitioner or according to the allegations of the Revenue in the name of the writ petitioner or other persons having direct connection with the writ petitioner. It is alleged that huge amounts in large numbers of transactions have been transferred from one bank to another bank by mode of R.T.G.S. transfers. There were several interconnected and circuitous transactions which made accounts complex. There were several deposits and payments exceeding the amount of Rs. 20,000/-in violation of the terms of Section 40A(3) of the Act. The assessing officer found from the seized material that the assessee company is perusing number of arbitration proceeding before different Arbitration Authorities and the assessee company has received Rs. 10,75,46,964/-against Arbitration claim with M/s Jharkhand State Electricity Board and also received a substantial amount against arbitration claim with M/s. RITES Ltd. The accounts did not show clear picture of accounts.

19. We are not giving details of the transactions, which have been mentioned in the reply to the writ petition, but it will be relevant to mention here that the petitioner was given due notice by the assessing officer before forming opinion and that notice is very relevant for the purpose of finding out the manner in which the Assessing Officer proceeded to form opinion. The copy of the notice

served upon the petitioner has been placed on record by the Revenue as Annexure -D, which has been placed on record by the petitioner himself as Annexure-4. The notice is self contained and gives the detailed facts with respect to the various transactions and thereafter the assessing officer observed that in view of the fact that petitioner did not make available the complete books of accounts and relevant documents, therefore, as well as because of the several complexity in the transactions of the bank accounts as well as the facts, which are available under the seized documents the matter became complex and, therefore, required to be referred for special audit u/s 142(2A). The petitioner was then by another notice given opportunity of personal hearing. The petitioner availed that opportunity and thereafter, the assessing officer formed the opinion for referring the matter to the special audit and proceeded to obtain sanction from the Commissioner of Income Tax and accorded the sanction for special audit vide interim order.

20. We have perused the order passed by the Commissioner of Income Tax on 22.12.2011. The Commissioner of Income Tax observed that for follow up enquiries and examination of seized documents revealed that Ramjee Power Construction was a principal contractor of the Jharkhand State Electricity Board Ltd. and in turn awarded sub-contract work to M/s. Quantum Power Tech Pvt. Ltd. The bank statement of the two concern reveal transactions in cash against which cheques have been issued to each other as well as to other parties. This indicates a collusive arrangements for siphoning of the profits of the two concern. The statement of Sri B.K. Singh, director of M/s. Quantum Power Tech Pvt. Ltd. also makes its amply clear that M/s,. Quantum Power Tech Pvt. Ltd. was only a front company for S/Sri Madhu Koda and Binod Sinha and substantial funds have been introduced in them. Examination of the seized documents seized from the office premises of M/s. Ramjee Power Construction Ltd. revealed that several payments have been made in cash and in excess of Rs. 20,000/- which is the maximum permitted amount in terms of section 40A(3) of the Act. Further the assessee is involved in a criminal case with J.S.E.B. Relating to furnishing of fake bank guarantee bonds. It is also seen that the company has received substantial amount in different years against arbitration claim from various authorities whose accounting treatment remains to be verified. The Commissioner of Income Tax also observed that the assessee has not produced books of accounts despite a number of opportunities and hence it is not possible to verify the claims made in the return of income filed or to establish the true and correct nature for the years for which returns have been filed. The Commissioner of Income Tax specially mentioned this fact that the records were produced before him and thereafter he has proceeded to accord the approval u/s 142(2A). Therefore, so far as the facts established is concerned the petitioner was given full opportunity before the assessing officer so that he can show that the accounts are not complex and referring the matter to the special audit will not be in the interest of Revenue.

21. This order as such is not under challenge by the writ petitioner as admitted

by the learned counsel for the writ petitioner, therefore, the recent order which is not under challenge have been challenged only because of the alleged non application of mind by the Commissioner on the facts of the case and not affording opportunity of hearing to the writ petitioner. The learned counsel for the petitioner submitted that in all cases as per his knowledge as well as in the cases of the Hon''ble Supreme Court i.e. in the case of Rajesh Kumar and Others -Vrs. Deputy Commissioner of income tax and Others, and in the case of Sahara India (Firm), Lucknow - Vrs. Commissioner of Income Tax, Central-1 and another, (Supra) the opportunity of hearing was given by the Commissioner of Income Tax and therefore, this indicates that the Commissioner was under obligation of giving opportunity of hearing before according approval on the proposal of the assessing officer. To examine this issue it will be appropriate to quote Section 142(2A) with its proviso which is as under:-

142. (2-A) If, at any stage of the proceedings before him, the assessing officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the Revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of Section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the assessing officer may require.

22. A bare perusal of sub-section 142(2A) reveals that the opinion for sending matter to the special auditor is required to be formed by the assessing officer himself and proviso says that assessing officer shall not direct the assessee to get the accounts so added unless the assessee has given reasonable opportunity of being heard, therefore, this proviso provides only opportunity of hearing to be given by the assessing officer so that after hearing the assessee he can form an opinion either to refer the matter for special audit or to withdraw his notice for sending the matter for special audit. The proviso is interpreted in the manner which has been said to be interpreted by the learned counsel for the petitioner then it may lead to holding that in a case where a proposal is forwarded by the assessing officer to the Commissioner of Income Tax the approval does not give any opportunity of hearing to the assessee and accorded approval for the proposal of the assessing officer then by virtue of the proviso the assessing officer inspite of approval of the Commissioner of Income Tax will not refer the matter to the auditor. Such interpretation cannot be given to the proviso as the assessing officer is bound to follow the affect of approval upon his proposal and cannot try to find fault in the order passed by the Commissioner of Income Tax.

23. At this juncture it will be relevant to mention here that in the case of Rajesh Kumar and Others -Vrs. Deputy Commissioner of income tax and Others, and in the case of Sahara India (Firm), Lucknow - Vrs. Commissioner of Income Tax,

Central-1 and another, (Supra) this point was not before the Hon"ble Supreme Court for consideration whether the opportunity of hearing is required to be given by the Commissioner of Income Tax before according approval to the proposal by the assessing officer send after forming opinion after giving full opportunity to the assessee and in that proceeding the assessing officer has disclosed full reasons for forming reasons in the notice itself which was contested by the assessee and thereafter, the assessing officer formed opinion.

24. We are of the considered opinion that as per sub-section 2A of Section 142 of the Act it is the assessing officer who is required to form the opinion having regard to the nature and accounts of the assessee and therefore, opportunity is provided to the assessee of hearing before that original authority who is having all the materials with him on the basis of which he proposes to proceed to form an opinion whether it is a fit case for referring the matter for special audit or not.

25. So far as the roll of the Commissioner of Income Tax is concerned in the matter of according approval to the proposal of the assessing officer is concerned, we are of the considered opinion that this issue is no more res-integra in view of the judgements of the Hon"ble Supreme Court which clearly indicate that the approval to the proposal by the assessing officer is mechanical error but it is required to be done by application of mind and after careful examination of the facts and reasons for according of the approval. In this case as we have referred from the order of the Commissioner of Income Tax, he was having all the materials with him, examined all the materials and thereafter recorded his satisfaction for according the approval, therefore, the order passed by the Commissioner of Income Tax according the approval for sending the matter to the special audit on the grounds raised by the writ petitioner cannot be held to be illegal in any manner.

26. If the order is legal and valid it will not passing order which is not beyond the period of limitation itself cannot be ground for setting aside such order. Any procedure after time is taken and that time remains unexplained day to day wise that does not mean that that till vitiate the lawful order passed after application of mind as well as after considering the objection of the assessee. Sometimes, prima-facie, it may appear that the delay has been caused just to take benefit of extension of the period of limitation.

27. We may examine, whether such is the position in the present case and, therefore, we have again looked into the facts which have been specially pleaded by the Revenue in the reply stating therein that it was not a case of search and seizure in the premises of one party but it was a case where within this period 630 assessment orders have been passed in Madhu Koda group of cases within a statutory period i.e. by 31st December, 2011 out of huge number of cases. Only in nine cases the matter has been referred for special audit.

28. From the facts already mentioned in the facts given by the assessing officer to the petitioner, it is clear that the petitioner alleged to have been having

relation with these very parties who have some financial transactions of which large amounts of rupees with the former Chief Minister of the State of Jharkhand (Madhu Koda and his group) and we are of the considered opinion that we may take judicial notice of the fact that said former Chief Minister alongwith a few other ministers having the allegation of shifting of money is behind the bars even today. The assessing officer whether could have passed the order for referring the matter to the special audit when he did not get the supplementary reply on the queries raised by the assessing officer is also a question for consideration, whether the assessing officer could have formed the opinion without even opening the hard disc of the computers wherein it has been alleged that accounts were lying whether the assessing officer could have formed the opinion without obtaining the books of accounts. Prima-facie the arguments advanced by the learned counsel for the petitioner appears to be very attractive that if the assessing officer would have put some labour and enquired from the writ petitioner he may have understood the accounts himself.

29. Another argument of the learned counsel for the petitioner may also be attractive that to avoid the responsibility of doing of job which statutorily he was required to do has resorted the method of sending the matter to the special audit and it may also be attractive argument that since merely before seven days the provision of Section 142(2A) of the Act have been invoked which merely to save the period of limitation for passing the assessment order. Independently and in isolation to the fact of the case this ground may be sufficient for holding as suggested by the learned counsel for the petitioner but as we have already observed with respect to the complexity of the facts of the case of the writ petitioner in view of having large number of transactions with large number of companies which companies are having connections with large number of other persons and companies wherein series of transactions, the department had to pass 630 assessment orders within a statutory period of limitation and these matters even jointly cannot affect the decision taken by the assessing officer as well as by the Commissioner of Income Tax.

30. At the cost of the writ petitioner, we may observe that from limited material the assessing officer too have formed the opinion with respect to the issue of referring the matter to the special audit. If this limited material themselves clearly indicate involvement of several unexplained transactions as well as doubtful transactions. At this juncture we may like to refer the circular issued by the Central Board of Direct Taxes in the form of instruction no. 1076. These guidelines are as under :-

Section 142(2A):

1. The Board has issued instruction regulating the discretion conferred by section 142(2A). Instruction No. 1076, dated 12th July, 1977, inter alia, provides: Subject: Guidelines for selection of cases for audit u/s 142(2A). The Board have laid down the following guidelines for selection of cases for audit u/s 142(2A) of the income tax Act, 1961.

2. As regards companies, only those cases are to be referred for special audit where: (I) there are reports of misfeasance, gross neglect or breach of duty on the part of the principal officer or director in relation to the affairs of the company, or (ii) the company's affairs have been the subject of a search or seizure under the income tax Act or been the subject of a probe under the Foreign Exchange Regulations Act, or (iii) the company has foreign collaboration arrangements, or (iv) where the company's principal is a foreign company and deduction of head office expenses, etc., have been claimed, or (v) where the company has import/export business with a yearly turnover of more than a crore of rupees, or (vi) where there are allegations of substantial tax evasion, or (vii) where the income tax Officer has any other information necessitating special audit.

3. As regards non-company assesseees, the following cases should be referred for a special audit :--:not printed:

4. While the above guidelines give a broad spectrum of the area of selection, the actual selection should be confined to a few carefully selected cases needing special probe. Further, when a case is referred for special audit for any particular assessment year, it would be desirable if the other intervening years as well as the latest assessment years are also covered. While submitting such cases for approval to the Commissioner of income tax, the reasons for selecting the case/cases should be stated.

31. These guidelines are binding upon the assessing officer and these guidelines clearly provide that as regards companies those cases are required to be referred where the company's affairs have been the subject of a search or seizure under the Income Tax Act and there are allegations. We may make it clear as has been made by instruction no. 1076 that it is not mandatory to refer the matter to the special audit u/s 142(2A) but in such cases the assessing officer may refer the matter for special audit.

32. Learned counsel for the petitioner submitted that petitioner's accounts were duly audited and therefore, petitioner's assessments were concluded for few years as referred above and sending the matter again to another auditor will be humiliation of the writ petitioner for no reasons and the Hon'ble Supreme Court held that even if it may have civil consequences it may be stigmatic.

33. We are of the considered opinion that the petitioner tried to stress too much observation of the Hon'ble Supreme Court to condemn the action of the Revenue by which the accounts sought to be sent to special audit. The Hon'ble Supreme Court observed that "An auditor is a professional person. He has to function independently. He is not an employee of the assessee. In case of misconduct, he may become liable to be proceeded against by a statutory authority under the Chartered Accountants Act, 1949. This observation only indicates that how the auditor should act because he is a professional person and he has to function independently and should not act as an employee of a person whose accounts he

has to audit. The question has been also included in this para for the Chartered Accountants that in case of misconduct, they are liable to be proceeded against by a statutory authority under the Chartered Accountants Act, 1949. This phrase does not mean that whatever auditor has given once it cannot be made subject matter of scrutiny by another auditor. If we hold so that certificate of the Chartered Accountant or Auditor Accounts cannot be disturbed then we will be holding that Auditor Accounts already stands conclusively proved. This view will be just contrary to the entire scheme of the Income Tax Act and may make Section 142(2A) of the Income Tax Act redundant in the matter where the company has submitted his audit report. Not only this the consequence will be that even assessing officer will be bound by that audit accounts and may not pass any assessment order which he found just reasonable legal and necessary by rejecting certain entries already approved by the Auditor / Chartered Accountant.

34. If we look from another angle then the auditor who has been placed at better stage he will only add the accounts of the assessee u/s 142(2A) of the Income Tax Act and, therefore, that will also bring truth in front only and the assessee then cannot question the sending the matter to second audit as it will be truth only in front.

35. Learned counsel for the petitioner vehemently submitted that the assessing officer should not have referred the accounts for the period for which none of the proceeding is pending and relied upon the second proviso of Section 153A(1). It will be proper to quote Section 153A as a whole.

153A. [(1)] Notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, in the case of a person where a search is initiated u/s 132 or books of account, other documents or any assets are requisitioned u/s 132A after the 31st day of May, 2003, the Assessing Officer shall

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause(b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139;

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made:

Provided that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years:

Provided further that assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in

this [Sub-Section] pending on the date of initiation of the search u/s 132 or making of requisition u/s 132A, as the case may be, shall abate.

[(2)]. If any proceeding initiated or any order of assessment or reassessment made under sub-Section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-Section (1) or Section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-Section(1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner:

Provided that such revival shall cease to have effect, if such order of annulment is set aside.]

Explanation.-For the removal of doubts, it is hereby declared that,

(i) save as otherwise provided in this section, section 153B and section 153C, all other provisions of this Act shall apply to the assessment made under this Section;

(ii) in an assessment or reassessment made in respect of an assessment year under this Section, the tax shall be chargeable at the rate or rates as applicable to such assessment year.

36. Section 153A clearly provides with statutory and says that notwithstanding anything contained in Section 139, Section 147, Section 148, Section 149, Section 151 and Section 153, in the case of a person where a search is initiated u/s 132 or books of account, other documents or any assets are requisitioned u/s 132A after the 31st day of May, 2003, the assessing officer shall issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years referred to in clause(b) and clause(b) of sub-section 153A requires for assessment or reassessment of the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made, therefore, inspite of the other provisions for reopening of the assessment a special provision has been enacted in the form of 153A allowing the assessment of the years for which assessment have already been completed subject to previous six years only. The proviso (2) of Section 153A has limited application and has been rightly indicated so that all pending proceedings during pendency u/s 153A should abate. The abatement does not mean the final decision on the issue which were pending consideration and second proviso has not provided that all pending proceedings has been dropped because of the initiation of the proceedings u/s 153A. The pending proceeding which are pending u/s 153A only have been declared abated statutorily for the reasons that they cannot be of useful purpose for getting the proceeding pending when several times by virtue of the power explained u/s 153A of the Act of the 1961 the assessing officer gets the power to assess as well as reassess the total income of the assessee of six assessment years

immediately preceding the assessment year relevant to the previous years in which search was conducted or requisition is made. Therefore, the second provision has been indicated purposeful to avoid the multiplicity of the proceedings. This proviso cannot be interpreted to mean that all assessment years which have attained finality relating to the relevant previous six assessment years cannot be looked into as such as not permissible by virtue of section 153A which required "Assess or Re-assess" the total income of six assessment years immediately preceding the previous years....

37. Sub-section 2 of Section 153A is also relevant to specifically provides if any proceeding initiated or any order of assessment or reassessment made under sub-Section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-Section (1) or Section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-Section(1), shall stand revived with effect from the date of receipt of the order of such annulment by the Commissioner.

38. As we have already observed that abatement is not end of the proceeding but is keeping the proceeding in abeyance and, therefore, with the end of the proceeding u/s 153A the assessment were pending during that proceeding which could not have proceeded and has been abated are required to be revived for a lawful decision and, therefore, the abatement applies to the pending proceedings and abatement revives u/s 153A and the assessment or re-assessment is required to be done by the previous six assessment years u/s 153A, therefore, we are not in agreement with the view expressed by the Allahabad High Court in the case of Commissioner of Income Tax (Central), Kanpur -vs.-Smt. Shaila Agarwal reported in 2011 TIOL 778 HC ALL IT.

39. Learned counsel for the petitioner relied upon the Division Bench judgement of the Rajasthan High Court delivered in the case of Commissioner of Income Tax -vs.-Bajrang Textiles reported in (2007) 294 ITR 561 (Raj). It is true that the Division Bench of the Rajasthan High Court in the case of Commissioner of Income Tax -vs.-Bajrang Textiles held that no authority has been given to assessing officer to direct the preparation of fresh books by referring the matter to an auditor under special audit is beyond the scope of provisions of section 142(2A) of the Income Tax Act but we are of the considered view that the terms of reference, copy of which has been placed on record by the petitioner at page 217 of the writ petition may be misconstrued to mean that auditor has been directed to prepare profit and loss accounts of the items referred in Clause-b of the terms of reference whereas this clearly indicate only that a special audit is required to address on this issue after examination of materials which are required to be examined by the auditor for finding out the relevant materials necessary for the purpose of assessment.

40. The contention of the learned counsel for the petitioner is only for item no. (d) under the heading Profit in sub contract work awarded to various concerns in which there are various clauses. We cannot go by the heading of the terms of

reference because heading (a) is bank account, (b) loans and deposits, (c) TDS and heading (d) profit in sub contract work awarded to various concerns and heading (e) is other issues, therefore, these are the subjects wherein the auditor have to address about the transactions.

41. In view of the above, we are of the view that the auditor has not been directed to prepare the profit and loss accounts of the writ petitioner.

42. In view of the above reasons, we are of the considered opinion that the writ petition has not merit and hence is liable to be dismissed, hence dismissed. No order as to costs.