Rajesh Kumar & Ors vs D.C.I.T. & Ors on 1 November, 2006

Author: S.B. Sinha

Bench: S.B. Sinha, Dalveer Bhandari

CASE NO.:
Appeal (civil) 4633 of 2006

PETITIONER:
Rajesh Kumar & Ors.

RESPONDENT:
D.C.I.T. & Ors.

DATE OF JUDGMENT: 01/11/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:

J U D G M E N T [Arising out of SLP (Civil) No. 9427-9430 of 2005] S.B. SINHA, J :

Leave granted.

Appellant No. 1 is a proprietory concern. It is an assessee under the Income Tax Act, 1961 (for short "the Act"). A raid was conducted in their premises on 18.12.2002. Some documents including their books of accounts were seized; a few of which were in the hard disk of the computer. They upon seizure all through remained in possession of the respondents. Assessment was under the law required to be completed within a period of two years. A notice was issued under Section 158BC of the Act by the Deputy Commissioner of Income Tax, Central Circle 18 requiring the appellants to submit return of undisclosed income for the block period of ten years pursuant whereto returns were filed. A notice was issued under Section 142(1) of the Act. Questionnaire was issued on 1.11.2004. On 22.11.2004, the Deputy Commissioner decided to proceed first with the assessment proceedings under Section 158BC of the Act in the case of three individuals, viz., Smt. Sushila Rani, Smt. Sunayana Prabhakar and Smt. Sunanda Prabhakar as also two companies, viz., M/s. Daily Agro Milk Food (P) Ltd. and M/s. Sushila Milk Specialities (P) Ltd. The said questionnaire was responded to. Affidavits were also filed before the Deputy Commissioner on behalf of M/s. Sushila Milk Specialities (P) Ltd.

By a letter dated 23.11.2004, the Deputy Commissioner mooted a proposal for special audit in terms of Section 142(2A) of the Act to the Commissioner of Income Tax stating:

> "There is no link between the business conducted by the assessee and books of account prepared for the purpose of filing return of income. Two sets of books of accounts have been found for the same concern for the same financial year in two separate computers.
>
> There have been numerous instances of transactions outside the books. Few of them are listed as under:..."

Several instances thereafor were given. It was furthermore stated:

> "There are many more instances like these listed above. The above analysis makes it clear that the account of the assessee involves complication and requires an expert audit to bring out the financial results which can be relied upon at the time of assessment"

The Commissioner of Income Tax approved the said proposal of the Deputy Commissioner of Income Tax by a letter dated 29th February, 2004 stating:

> "After carefully considering the matter and discussing the same with the Assessing Officer at length I am of the opinion that having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, it is necessary to carry out special audit in this case u/s 142(2A). In particular, it has been kept in mind that a sizeable amount of the purchases and sales of the assessee are outside the books of accounts. Also the trading account and financial statements of this concern would have to be prepared after thoroughly analyzing the two sets of books of accounts maintained by the assessee, as well as the seized material, which shows clear evidence of huge unaccounted transactions. Keeping in view the above you are required to have the special audit of the assessee conducted u/s 142(2A) by M/s Dhanesh Gupta & Co., CA, 1-1/16, Ansari Road, Shanti Mohan House, Darya Ganj, New Delhi. He should be asked to furnish a report of such audit in the prescribed manner, i.e., in Form No. 6B, within 120 days of the order u/s 142(2A) to be issued by the Assessing Officer. The terms of reference of this audit should include the following:-
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> To prepare final accounts and draw-up a statement of accounts for each assessment year falling within the Block period, i.e., 1.4.96 to 18.12.2002, after auditing the two sets of books of account maintained by the assessee and after keeping in view all the unaccounted transactions revealed by the seized material, which are outside the books of account.
>
> The fees to be paid to the Special Auditor by the assessee will be determined subsequently, as per norms."

Pursuant thereto one M/s. Dhanesh Gupta & Co. was appointed as a special auditor. Only on 7.12.2004, Appellant Nos. 1 to 3 were informed by a letter in regard to appointment of an auditor for special audit of their accounts in terms of Section 142(2A) of the Act. Indisputably, prior thereto no opportunity of hearing was given to them. The Deputy Commissioner was requested by the appellants herein to supply a copy of the reasons therefor by a letter dated 11.12.2004 which was refused by a letter dated 13.12.2004. The Chartered Accountant submitted its audited report on 17.1.2005.

A Writ Petition was filed by the appellants before the Delhi High Court raising inter alia a question that the order impugned therein was vitiated in law having been passed without giving an opportunity of hearing to them as also on the ground that the same suffers from total non-application of mind. Mala fide on the part of the Deputy Commissioner was also alleged. By the impugned judgment, the said writ petition has been dismissed.

Submissions of Mr. K. Sampath, learned counsel appearing on behalf of the appellants are:

> (i) Section 142(2A) of the Act having regard to the enormity of power deserves a strict construction.
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> (ii) Principles of natural justice inhere in the said provisions.
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> (iii) Application of mind on the part of the assessing officer on three relevant factors is imperative.
>
> (iv) Statutory power contained in Section 142(2A) of the Act cannot be used for collateral purposes.

Submissions of Mr. Gopal Subramanium, learned Additional Solicitor General, on the other hand, are:

> (i) As Section 142(2A) of the Act is juxtaposed between the provisions for filing return and assessment, the said provision must be interpreted to be in aid of assessment and not as a part of the order of assessment.
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> (ii) The proposal mooted by the assessing officer to the Deputy Commissioner would show the nature of accounts as also the complexity thereof, particularly, in view of the fact that the assessee was said to have been maintaining two different sets of accounts. The complexity of the accounts was also evident as the parties were associated with various firms and companies.
>
> (iii) Section 142(2A) contains sufficient safeguards including the approval to be granted by a high ranking officer and in the event an order passed thereunder is subjected to judicial review the authorities would place the entire records to satisfy the conscience of the court that the same does not suffer from non-application of

mind.

(iv) If the principles of natural justice are held to be implicit in the said provision, the extent thereof must be confined to the requirements of the provisions only and not a detailed hearing.

(v) Giving an opportunity of hearing sometimes would lead to assessment of reasons as the assessing officer is not required to go into the correctness or otherwise of the accounts at that stage.

Interpretation and application of Section 142(2A) of the Act, thus, falls for our consideration.

We may at the outset notice that the following are the relevant factors for invoking Section 142(2A) of the Act:

(i) The nature of accounts

(ii) Complexity of accounts and

(iii) Interest of the revenue.

The formation of opinion of the assessing officer must be on the premise that while exercising his power regard must be had to the factors enumerated therein. The use of the word 'and' shows that it is conjunctive and not disjunctive. All the aforementioned factors are conjunctively required to be read. The formation of opinion indisputably must be based on objective consideration.

The expression "complexity" would mean the state or quality of being intricate or complex or that it is difficult to understand. Difficulty in understanding would, however, not lead to the conclusion that the accounts are complex in nature. No order can be passed on whims or caprice.

It is also not in dispute that whereas the Calcutta High Court and the Kerala High Court have taken a view that before issuance of a direction under Section 142(2A) of the Act, it is necessary to comply with the principles of natural justice, the Allahabad High Court, the Bombay High Court and the Delhi High Court have thought it otherwise.

When a raid is conducted on the premises of an assessee, block assessment is permissible, procedures wherefor have been laid down under Section 158BC of the Act.

Section 158BE(b) of the Act contemplates that the order thereunder is necessary to be passed within two years from the end of the month in which the last of the authorizations for search under Section 132 or for requisition under Section 132A, as the case may be, was executed in cases where a search is initiated or books of accounts or other documents or any assets are requisitioned.

Statute of limitation is a statute of repose. Indisputably the same, subject to the exceptions contained in the explanation appended to Section 158BE, is imperative.

Having regard to the aforementioned, we may have to construe Sub- section (2A) of Section 142 of the Act. Before, however, we do so, it may be noticed that the said provision is meant to be applied for passing an order of assessment. An order of assessment is to precede filing of a return in terms of Section 139 of the Act. Various other steps in that behalf are also contemplated under Sections 139A, 140 and 141A of the Act. An inquiry may be made prior to passing of an order of assessment by the assessing officer under Section 142 of the Act. Section 136 raises a legal fiction that proceeding under the Act shall be a judicial proceeding and every income tax authority shall be deemed to be a civil court for the purposes of Section 195 of the Code of Criminal Procedure. The power of inquiry conferred upon the assessing authority is of wide amplitude.

Sub-sections (2A), (2B), (2C), (2D) and (3) of Section 142 of the Act read as under:

> "(2A) If, at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue, is of the opinion that it is necessary so to do, he may, with the previous approval of the Chief Commissioner or Commissioner, direct the assessee to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288, nominated by the Chief Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed and such other particulars as the Assessing Officer may require.
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> (2B) The provisions of sub-section (2 A) shall have effect notwithstanding that the accounts of the assessee have been audited under any other law for the time being in force or otherwise. (2C) Every report under sub-section (2 A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer:
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> Provided that the Assessing Officer may, on an application made in this behalf by the assessee and for any good and sufficient reason, extend the said period by such further period or periods as he thinks fit; so, however, that the aggregate of the period originally fixed and the period or periods so extended shall not, in any case, exceed one hundred and eighty days from the date on which the direction under sub-section (2A) is received by the assessee.
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> (2D) The expenses of, and incidental to, any audit under sub-section (2A) (including the remuneration of the accountant) shall be determined by the Chief Commissioner or Commissioner (which determination shall be final) and paid by the assessee and in default of such payment, shall be recoverable from the assessee in the manner provided in Chapter XVII-D for the recovery of arrears of tax.

(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under sub-section (2) or any audit under sub-section (2 A) and proposed to be utilised for the purposes of the assessment."

Principles of natural justice are based on two basic pillars:

(i) Nobody shall be condemned unheard (audi alteram partem)

(ii) Nobody shall be judge of his own cause (nemo debet esse judex in propria sua causa) Duty to assign reasons is, however, a judge made law. There is dispute as to whether it comprises of a third pillar of natural justice. [See S.N. Mukherjee v. Union of India, (1990) 4 SCC 594 and Reliance Industries Ltd. v. Designated Authority and Others, 2006 AIR SCW 4911] However, the other view is that the question as to whether reasons are required to be assigned is a matter of legislative policy which should be left to the decision of Parliament. In Raipur Development Authority and Others v. M/s. Chokhamal Contractors and Others [(1989) 2 SCC 721], a Constitution Bench opined:

"It is no doubt true that in the decisions pertaining to Administrative Law, this Court in some cases has observed that the giving of reasons in an administrative decision is a rule of natural justice by an extension of the prevailing rule. It would be in the interest of the world of commerce that the said rule is confined to the area of Administrative Law. We do appreciate the contention, urged on behalf of the parties who contend that it should be made obligatory on the part of the arbitrator to give reasons for the award, that there is no justification to leave the small area covered by the law of arbitration out of the general rule that the decision of every judicial and quasi-judicial body should be supported by reasons. But at the same time it has to be borne in mind that what applies generally to settlement of disputes by authorities governed by public law need not be extended to all cases arising under private law such as those arising under the law of arbitration which is intended for settlement of private disputes. As stated elsewhere in the course of this judgment if the parties to the dispute feel that reasons should be given by the arbitrators for the awards it is within their power to insist upon such reasons being given at the time when they enter into arbitration agreement or sign the deed of submission. It is significant that although nearly a decade ago the Indian Law Commission submitted its report on the law of arbitration specifically mentioning therein that there was no necessity to amend the law of arbitration requiring the arbitrators to give reasons, Parliament has not chosen to take any step in the direction of the amendment of the law of arbitration. Even after the passing of the English Arbitration Act, 1979 unless a court requires the arbitrator to give reasons for the award [vide sub-sections (5) and (6) of Section 1 of the English Arbitration Act, 1979], an award is not liable to be set aside merely on the ground that no reasons have been given in support of it."

[See also Rajendra Construction Co. v. Maharashtra Housing & Area Development Authority and Others, (2005) 6 SCC 678] We, however, need not dilate on the said question being not very necessary for the purpose of this case. But it is beyond any cavil that ordinarily unless excluded by operation of a statute, the superior courts while exercising power of judicial review shall proceed on the basis that assignment of reasons is imperative in character. When an authority be it administrative or quasi-judicial adjudicates on a dispute and if its order is appealable or subject to judicial review, it would be necessary to spell out the reasons therefor. While, however, applying the principles of natural justice, however, the court must also bear in mind the theory of useless formality and the prejudice doctrine.

If an assessee files a return the same is not presumed to be incorrect. When the assessing officer, however, intends to pass an order of assessment, he may take recourse to such steps including the one of asking the assessee to disclose documents which are in his power or possession. He may also ask third parties to produce documents. Section 136 of the Act by reason of a legal fiction makes an assessment proceeding, a judicial proceeding. The assessment proceeding, therefore, is a part of judicial process. When a statutory power is exercised by the assessing authority in exercise of its judicial function which is detrimental to the assessee, the same is not and cannot be administrative in nature. It stricto sensu is also not quasi judicial. By way of example, although it may not be very apposite, we may state that orders passed under Order XII of the Code of Civil Procedure by a court cannot be held to be administrative in nature. They are judicial orders and subject to the order which may be passed by higher courts in regard thereto. Indisputably, the prejudice of the assessee, if an order is passed under Section 142(2A) of the Act, is apparent on the face of the statutory provision. He has to undergo the process of further accounting despite the fact that his accounts have been audited by a qualified auditor in terms of Section 44AB of the Act. An auditor is a professional person. He has to function independently. He is not an employee of the assessee. In case of a misconduct, he may become liable to be proceeded against by a statutory authority under the Chartered Accountants Act, 1949.

In this case, the fee of the special auditor has been fixed at Rs. 1.5 lakhs. The assessee during the audit of the account by the special auditor had to answer large number of questions. Whether he defaulted therein or not is a matter of little or no consequence for the purpose of construction of the said provision. We may, however, notice that whereas according to the Revenue the assessee was not cooperating, according to the assessee, as all the books of accounts having been seized, there was nothing it could do in the matter.

Effect of civil consequences arising out of determination of lis under a statute is stated in State of Orissa v. Dr. (Miss) Binapani Dei and Others [AIR 1967 SC 1269: (1967) 2 SCR 625]. It is an authority for the proposition when by reason of an action on the part of a statutory authority, civil or evil consequences ensue, principles of natural justice are required to be followed. In such an event, although no express provision is laid down in this behalf compliance of principles of natural justice would be implicit. In case of denial of principles of natural justice in a statute, the same may also be held ultra vires Article 14 of the Constitution.

K.J. Shetty, J. in Swadeshi Cotton Mills Company Limited v. Commissioner of Income-Tax and Another [171 ITR 634] 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.
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> 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.

The applicability of the principles of natural justice, on the other hand, has been highlighted in Peerless General Finance & Investment Co. Ltd. (supra), West Bengal Co-Op. Bank Ltd (supra) Bata India Limited v. CIT [2002 (257) ITR 622], Joint Commissioner of Income Tax v. I.T.C. Ltd. and Another [239 ITR 921] and Muthootu Mini Kuries v. Deputy Commissioner of Income-Tax and Another [250 ITR 455].

In Swadeshi Cotton Mills v. Union of India [(1981) 1 SCC 664], Chinnappa Reddy, J., in his dissenting judgment summarized the legal position in the following terms:

> "The principles of natural justice have taken deep root in the judicial conscience of our people, nurtured by Binapani, Kraipak, Mohinder Singh Gill, Maneka Gandhi etc. etc. They are now considered so fundamental as to be 'implicit in the concept of ordered liberty' and, therefore, implicit in every decision making function, call it

> judicial, quasi-judicial or administrative. Where authority functions under a statute and the statute provides for the observance of the principles of natural justice in a particular manner, natural justice will have to be observed in that manner and in no other. No wider right than that provided by statute can be claimed nor can the right be narrowed. Where the statute is silent about the observance of the principles of natural justice, such statutory silence is taken to imply compliance with the principles of natural justice. The implication of natural justice being presumptive it may be excluded by express words of statute or by necessary intendment. Where the conflict is between the public interest and the private interest, the presumption must necessarily be weak and may, therefore, be readily displaced."

In Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Others [1991 Supp (1) SCC 600], Ray, J. opined:

> " It is now well settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in Article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the Rule of Law which permeates our Constitution demands that it has to be observed both substantially and procedurally "

[See also Basudeo Tiwary v. Sido Kanhu University and Others, (1998) 8 SCC 194 and Uptron India Ltd. v. Shammi Bhan, (1998) 6 SCC 538] Some exceptions to the applicability of the principle is stated in Jagdish Swarup's Constitution of India, 2nd Edition, page 289 in the following terms:

> "Not only, therefore, can the principles of natural justice be modified but in exceptional cases they can even be excluded. There are well-defined exceptions to the nemo judex in causa sua rule as also to the audi alteram partem rule. The nemo judex in causa sua rule is subject to the doctrine of necessity and yields to it as pointed out by the Apex Court in J. Mohapatra and Co. v. State of Orissa. So far as the audi alteram partem rule is concerned, both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. This right can also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion, nor can the audi alteram partem rule be invoked if importing it would have the effect of paralyising the administrative process or where the need for promptitude or the urgency of taking action so demands, as pointed out in Maneka Gandhi's case."

[See also Haji Abdul Shakoor & Co. v. Union of India and Others, (2002) 9 SCC 760] Exceptions, therefore, are required to be provided for either expressly or by necessary implication.

We may at this stage notice the views of the Delhi, Bombay and Allahabad High Courts where it was held that principles of natural justice are not required to be complied with in appointment of a special auditor.

A Division Bench of the Delhi High Court considered the question at some length in Yum Restaurants India Pvt. Ltd. V. Commissioner of Income-Tax [2005 (278) ITR 401 (Delhi)].

The ratio of the judgment, however, is not very clear. Same inconsistencies appear to have crept therein, which would be noticed a little later. While holding that, as a proposition of law, the distinction between an administrative order and a quasi-judicial order is a very fine one, it had been observed that the same would not mean that the principles of natural justice would be mandatorily required to be complied with only because the consequence of an order passed thereunder would be adverse to the interest of the party or it prejudically affects the person. It was stated that the functions of the statutory authority under Section 142(2A) are more of an administrative action than a quasi-judicial function. Relying on or on the basis of a decision of this Court in Canara Bank and Ors. v. Debasis Das and Ors., [(2003) 4 SCC 557], the learned Judges opined that although principles of natural justice are integral part of the procedure but one must notice that the concept of natural justice has undergone a great deal of change. But, then while observing that Section 142(2A) of the Act do not exclude the application of principles of natural justice, it was opined that interaction with and confrontation of the assessee would serve the purpose.

Distinguishing the judgment of Calcutta High court in the cases of Peerless General Finance & Investment Co. Ltd. v. Dy. CIT and Ors., (1999) 236 ITR 671 and West Bengal Co-Op. Bank Ltd. v. Commissioner Income- tax and Ors., (2004) 267 ITR 345, the High Court observed:

> " However, the scope of the kind of hearing that an assessee would be entitled to, was not discussed even in these judgments, primarily for the reason that in one case the Assessing Officer had taken into consideration irrelevant material like litigation pending between the Reserve Bank of India and the assessee while in other cases, the Assessing Officer had not even asked for books of accounts of the assessee before passing an order of special audit under section 142(2A). These judgments have no application to the facts of the case in hand on any known canon of ratio decidendi.
>
> Respectfully we would differ with the view taken by the Calcutta High Court in the above noticed judgment only with regard to the extent of application of principles of natural justice at a pre- decisional stage in exercise of powers under section 142(2A) by the Assessing Officer. The expression used in these judgments "reasonable opportunity of hearing and also to meet the cause against him' cannot apply in stricto senso to a direction for a special audit during the pendency of the assessment proceedings. Pre-decisional hearing in this regard would fall within a very restricted and limited scope. The purpose would be sufficiently achieved if the assessee is questioned or confronted with his accounts in relation to nature and complexity thereof."

The court, however, considered the question as regards post- decisional hearing in regard to a report received by the assessing authority in furtherance of an order passed under Section 142(2A) of the Act opining:

> " Equally true is that the provisions do not indicate complete exclusion of the principles of natural justice as well. It is difficult to provide any straight-jacket formula which without variations can be applied to the cases universally. Every case would have to be decided on its own merits and with reference to the judgments which are squarely applicable to that case."

The learned Judges concluded:

> "a) Provisions of Section 142 (2A) of the Act do not contemplate by specific language or necessary implication, issuance of a show cause notice or grant of comprehensive hearing to the assessee by the Assessing Officer.
>
> b) Limited to the extent indicated hereinafter, principles of natural justice would be read into the principles of Section 142 (2A) of the Act. It is for the reason that the directions issued under this provision are bound to vest the assessee with civil consequences of compulsive expenditure and audit of its books by an accountant, who but for such a direction would have no right to such examination.

This would, to some extent, be an interference in the internal management of a company related to its accounts.

c) Before the Assessing Officer seeks an approval of the competent authority under Section 142 (2A) of the Act, it would be obligatory upon him to call upon the assessee during the course of assessment proceedings for a 'purposeful interaction and confrontation' in regard to nature and complexity of the assessee's accounts.

d) Such interaction with and confrontation of, the assessee with his account books should be with an object to attain better clarity and understanding of the accounts by the Assessing Officer. There has to be serious attempt on the part of the Assessing Officer to seek clarification of his doubts in regard to nature and complexity of assessee's accounts for better comprehension."

[Highlighting is ours for showing the inconsistencies in the judgment] In any event, the learned judges did not exclude the application of the principle altogether.

A Division Bench of the Bombay High Court in V.S. Samuel, Assistant Commissioner of Income-Tax and Others [2006 (283) ITR 56], however, disagreed with the decisions of the Calcutta High court and the Kerala High Court stating that the order passed under Section 142(2A) of the Act is purely administrative in nature. It was opined:

> " Such order, in our opinion, does not entail any civil consequences. No decision is given. Merely because the assessee is required to pay the auditor's fee, that does not mean that any liability is created against the assessee and that such order entails any civil consequences. The issuance of direction for special audit facilitates the AO to have the complex accounts of the assessee examined by an independent auditor. That helps and assists him in assessing the income of the assessee..."

We would consider the reasonings of the learned judges at an appropriate stage.

In Gurunanak Enterprises v. Commissioner of Income-tax and Another [259 ITR 637], a Division Bench of the Delhi High Court observed:

> "It is, thus, clear from the decisions referred to supra that before exercising the power to direct special audit under Section 142(2A) the Assessing officer must form an opinion with regard to the twin conditions, namely, the nature and complexity of the accounts and the interests of the revenue, with added approval of the Chief Commissioner or the Commissioner, as the case may be. Both these conditions would of course depend upon the facts of each case. Further, power under the Section is not to be lightly exercised and has to be based on objective criteria and an honest and sincere effort should be made to understand the accounts of the assessee since an order under the provision not only entails heavy monetary burden on an assessee, it causes a lot of inconvenience to him as well."

It was, however, stated:

> "It is not within the province of judicial review to minutely analyse the materials on which the opinion of the Assessing Officer is rested to find out whether the same is sufficient for the authority concerned to come to the conclusion that the accounts of the assessee need to be subjected to special audit. As noticed above, what is complex to one may be simple to another and, therefore, the issue has to be examined from the view point of the Assessing Officer concerned. The Court is not expected to substitute its own understanding and comprehension of the accounts of an assessee."

The decisions of the Calcutta High Court and the Kerala High Court were held to have been decided on their own facts.

It is significant to note that except the Bombay High Court, the views taken by the Calcutta and Delhi High Court had not been explicitly dissented from. The learned Judges of the Delhi High Court in Yum Restaurants India Pvt. Ltd. (supra) and Gurunanak Enterprises (supra) did not hold that the decisions have been incorrectly rendered. They were, however, held to be inapplicable to the facts of the cases.

We may place on record that even the learned Additional Solicitor General categorically stated before us that the doctrine of procedural safeguards applied by the Calcutta High Court and the

Kerala High Court cannot be faulted with having regard to the peculiar fact situation obtaining therein. The fact, thus, remains that there may be a situation when provision would be misused. An order may be passed not only without any application of mind but also in ignorance of the requirements of law.

The Bombay High Court and the Delhi High Court, with respect, in our opinion, are not correct in stating that a direction issued under Section 142(2A) of the Act to be administrative in nature. In view of Section 136 of the Act, the entire proceedings of assessment before the Assessing Officer being judicial, it is difficult to understand how a part thereof, which indisputably is resorted to in aid of the ultimate order of assessment, without any statutory interdict would be called to be an administrative order. When the books of accounts have been produced and examined, the assessing officer would be proceeding to make ultimate order of assessment.

In SBP & Co. v. Patel Engineering Ltd. and Another [(2005) 8 SCC 618], a Seven-Judge Bench of this Court opined that an order of the Chief Justice or the Designated Judge being final in nature, an order passed thereunder would be a judicial order and not an administrative order stating:

> "The power exercised by the Chief Justice of the High Court or the Chief Justice of India under Section 11(6) of the Act is not an administrative power. It is a judicial power."

In any event, when civil consequences ensue, there is hardly any distinction between an administrative order and a quasi judicial order. There might have been difference of opinions at one point of time, but it is now well-settled that a thin demarcated line between an administrative order and quasi-judicial order now stands obliterated [See A.K. Kraipak and Others v. Union of India and Others - (1969) 2 SCC 262 and Chandra Bhawan Boarding and Lodging, Bangalore v. State of Mysore and Another AIR 1970 SC 2042 and S.L. Kapoor v. Jagmohan and Others - AIR 1981 SC 136].

Recently, in V.C. Banaras Hindu University v. Shrikant [2006 (6) SCALE 66], this Court stated the law, thus:

> "An order passed by a statutory authority, particularly when by reason whereof a citizen of India would be visited with civil or evil consequences must meet the test of reasonableness "

The expression "having regard to" in this context assumes some significance. An opinion must be formed strictly in terms of the factors enumerated therein. The expression indicates that in exercising the power regard must be had also to the factors enumerated therein together with all factors relevant for exercise of that power.

In India Cement Ltd. and Others v. Union of India and Others [(1990) 4 SCC 356], it was stated:

> "The meaning of the expression 'having regard to' is well settled. It indicates that in exercising the power, regard must be had also to the factors enumerated together with all factors relevant for exercise of that power."

In Delhi Farming & Construction (P) Ltd. v. Commissioner of Income Tax, Delhi [(2003) 5 SCC 36], it is stated:

> "The words "having regard to" used in the section do not restrict the consideration only to two matters indicated in the section as it is impossible to arrive at a conclusion as to reasonableness by considering only the two matters mentioned isolated from other relevant factors. It is neither possible nor advisable to lay down any decisive tests for the guidance of the Income Tax Officer. The satisfaction depends upon the facts of each case. The only guidance is his capacity to put himself in the position of a prudent businessman or the director of a company and his sympathetic and objective approach to the difficult problem that arises in each case."

The factors enumerated in Section 142(2A) of the Act, thus, are not exhaustive. Once it is held that the assessee suffers civil consequences and any order passed by it would be prejudicial to him, principles of natural justice must be held to be implicit. The principles of natural justice are required to be applied inter alia to minimize arbitrariness.

It is trite, even if there is a possibility that the Tribunal would correctly follow the statutory provisions, still compliance of principles of natural justice would be required. [See R. v. Kensington and Chelsea Rent Tribunal, ex p. MacFarlane (1974) 1 WLR 1486] Justice, as is well known, is not only be done but manifestly seem to be done. If the assessee is put to notice, he could show that the nature of accounts is not such which would require appointment of special auditors. He could further show that what the assessing officer considers to be complex is in fact not so. It was also open to him to show that the same would not be in the interest of the Revenue.

In this case itself the appellants were not made known as to what led the Deputy Commissioner to form an opinion that all relevant factors including the ones mentioned in Section 142(2A) of the Act are satisfied. If even one of them was not satisfied, no order could be passed. If the attention of the Commissioner could be drawn to the fact that the underlined purpose for appointment of the special auditor is not bona fide it might not have approved the same.

Assuming that two sets of accounts were being maintained the same would not mean that the nature of accounts is difficult to understand. It could have furthermore not been shown that the power is sought to be exercised only for an unauthorised purpose, viz., for the purpose of extension of the period of limitation as provided for under Explanation 2 to section 158BE of the Act.

An order of approval is also not to be mechanically granted. The same should be done having regard to the materials on record. The explanation given by the assessee, if any, would be a relevant factor. The approving authority was required to go through it. He could have arrived at a different opinion. He in a situation of this nature could have corrected the assessing officer if he was found to have

adopted a wrong approach or posed a wrong question unto himself. He could have been asked to complete the process of the assessment within the specified time so as to save the Revenue from suffering any loss. The same purpose might have been achieved upon production of some materials for understanding the books of accounts and/ or the entries made therein. While exercising its power, the assessing officer has to form an opinion. It is final so far he is concerned albeit subject to approval of the Chief Commissioner or the Commissioner, as the case may be. It is only at that stage he is required to consider the matter and not at a subsequent stage, viz., after the approval is given.

In K.I. Shephard and Others v. Union of India and Others [(1987) 4 SCC 431 : AIR 1988 SC 686], this Court observed:

> "It is common experience that once a decision has been taken, there is a tendency to uphold it and a representation may not really yield any fruitful purpose."

[See also H.L. Trehan and Others v. Union of India and Others (1989) 1 SCC 764, L.N. Mishra Institute of Economic Development and Social Change, Patna v. State of Bihar and Others (1988) 2 SCC 764 and V.C. Banaras Hindu University and Ors. v. Shrikant, 2006 (6) SCALE 66] Whereas the order of assessment can be subject matter of an appeal, a direction issued under Section 142(2A) of the Act is not. No internal remedy is prescribed. Judicial review cannot be said to be an appropriate remedy in this behalf. The appellate power under the Act does not contain any provision like Section 105 of the Code of Civil Procedure. The power of judicial review is limited. It is discretionary. The court may not interfere with a statutory power. [See for example Jhunjhuwala Vanaspati Ltd. v. Assistant Commissioner of Income-Tax and Another (No. 1), 266 ITR 657, see, however, U.P. State Industrial Development Corporation Limited v. Commissioner of Income-Tax and Others, 171 ITR 640] The hearing given, however, need not be elaborate. The notice issued may only contain briefly the issues which the assessing officer thinks to be necessary. The reasons assigned therefor need not be detailed ones. But, that would not mean that the principles of justice are not required to be complied with. Only because certain consequences would ensue if the principles of natural justice are required to be complied with, the same by itself would not mean that the court would not insist on complying with the fundamental principles of law. If the principles of natural justice are to be excluded, the Parliament could have said so expressly. The hearing given is only in terms of Section 142 (3) which is limited only to the findings of the special auditor. The order of assessment would be based upon the findings of the special auditor subject of course to its acceptance by the assessing officer. Even at that stage the assessee cannot put forward a case that power under Section 142(2A) of the Act had wrongly been exercised and he has unnecessarily been saddled with a heavy expenditure. An appeal against the order of assessment, as noticed hereinbefore, would not serve any real purpose as the appellate authority would not go into such a question since the direction issued under Section 142(2A) of the Act is not an appellate order.

For the reasons aforementioned, the appeal is allowed. No costs.