2006:DHC:6091-DB

* HIGH COURT OF DELHI : NEW DELHI

WP (C) No.9545 of 2006

Judgment reserved on: May 30, 2006

% Judgment delivered on: October 17, 2006

M/s. Sahara India (Firm)
1, Kapoorthala Complex, Aliganj,
Lucknow. ..... Petitioner

Through Mr. Percy J. Pardiwalla with
Mr. Satyen Sethi, Advs.

versus

1. Commissioner of Income Tax, Delhi
Central-I.

2. Assistant Commissioner of Income Tax
Central Circle-6,
E-2, ARA Centre, Jhandewalan Extn.
New Delhi. ..... Respondents

Through Mr. R.D. Jolly with
Mr. Vishnu Sharma, Advs.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Not ne[illegible]

3. Whether the judgment should be reported in the Digest? Not necessary

MADAN B. LOKUR, J.

For orders, see Writ Petition (Civil) No. 9538 of 2006.

Madan B. Lokur, J

Vipin Sanghi, J

October 17, 2006
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17.10.06

* HIGH COURT OF DELHI : NEW DELHI

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1. WP (C) No.9538 of 2006

M/s. Sahara India Financial Corporation Ltd.
1, Kapoorthala Complex, Aliganj,
Lucknow. ..... Petitioner

Through Mr. Percy J. Pardiwalla with
Mr. Satyen Sethi, Advs.

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2. WP (C) No.9545 of 2006

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HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

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MADAN B. LOKUR, J.

These are two writ petitions raising the same issue and question of law. The challenge in both the petitions is to the similar orders dated 14th March, 2006 passed by Respondent No.2 directing the Petitioners to have special audits conducted under Section 142 (2A) of the Income Tax Act, 1961 relevant for the assessment year 2003-04.

2. We find no merit in any of the writ petitions and, therefore, dismiss them. For convenience, the facts relevant to the WP (C) No.9538 of 2006 of M/s Sahara India Financial Corporation Ltd. are being mentioned.

3. The Petitioner is a residuary non-banking company and is engaged in the business of deposit mobilisation. According to the Petitioner, it follows the mercantile system of accounting and maintains regular books of accounts including a cash book, bank book, journal book, general ledger, debtors ledger, creditors

ledger, etc. It follows the directions issued by the Reserve India from time to time and in accordance therewith it maintains a register of deposits, and investment ledger and stock register of securities. It has its accounts audited from time to time and according to the Petitioner neither its business nor the maintenance of statutory records by it has been adversely commented upon.

4. The Petitioner filed its return of income on 30th November, 2003 declaring a total income of about Rs. 53 crores for the financial year 2002-2003. This was subsequently revised on 31st March, 2005 and the total income was reduced to about Rs. 51 crores. The return was accompanied by a statutory audit report, tax audit report and statement of accounts.

5. During the course of assessment proceedings, commenced pursuant to a notice under Section 143(2) of the Act, an order was passed under Section 127(2) of the Act on 29th July, 2005 whereby jurisdiction over the assessee was transferred from the

Assistant Commissioner of Income Tax in Lucknow to Resp No.2 in Delhi. This order was challenged by the Petitioner before the Lucknow Bench of the Allahabad High Court. It appears that on 28th May, 2005, the High Court stayed the operation of the order transferring jurisdiction to Delhi but ultimately the writ petition was dismissed on 8th February, 2006 and the interim order vacated.

6. As a consequence of the order passed under Section 127(2) of the Act, jurisdiction over the assessee came to be exercised by Respondent No.2. Consequently, on 20th February, 2006, Respondent No.2 issued a notice to the Petitioner requiring it to appear before him on 27th February, 2006.

7. On 27th February, 2006, the Petitioner filed a letter before Respondent No.2 in which it was prayed that the order passed by the Lucknow Bench of the Allahabad High Court was challenged by the Petitioner before the Supreme Court and as such the assessment proceedings may not be taken up till the Supreme

Court renders its decision. On the basis of this letter, Resp
No.2 adjourned further proceedings to 6th March, 2006.

8. It appears that on 3rd March, 2006, the Supreme Court dismissed the petition filed by the Petitioner and, therefore, jurisdiction over the Petitioner is now firmly with the income tax authorities in Delhi.

9. On 6th March, 2006, the scheduled date, the Petitioner appeared before the assessing officer and requested for a fresh hearing in view of the fact that the case has now been transferred to him. On this request, the proceedings were adjourned to 9th March, 2006. On that date, since the Petitioner had not complied with the requirements of answering certain queries that were raised on 6th February, 2006 by the assessing officer in Lucknow, the proceedings were adjourned to 20th March, 2006 when a reply was filed by the Petitioner. In the case of M/s Sahara India (Firm) the proceedings were adjourned to 17th March, 2006.

10. In the meanwhile, on 14th March, 2006, the impugne under Section 142 (2A) of the Act was passed by Respondent No.2 and the Petitioner was asked to have its accounts audited for the assessment year 2003-2004 by M/s Dhanesh Gupta & Company, Chartered Accountants. In the case of M/s Sahara India (Firm), M/s K.G. Somani & Co., Chartered Accountants were appointed to conduct the special audit. It is these orders that are challenged before us.

11. Learned counsel for the Petitioner raised two principal contentions. It was firstly contended that the principles of natural justice have not been complied with inasmuch as the Petitioner was not heard before the order under Section 142 (2A) of the Act was passed and secondly that there was no application of mind by the Assessing Officer before issuing the impugned orders.

12. One of the arguments in support of the second contention was (and it has been stated in para 18 of the writ petition) that the Petitioner understands that the records of its case were

received by Respondent No.2 from Lucknow in the first f of March, 2006. When we put this to learned counsel for the Respondents, he denied it and we recorded his statement on 30th May, 2006 to the effect that the records were received in February, 2006. Learned counsel for the Respondents also placed the record before us and we find that it is recorded therein that the Assessing Officer in Delhi received the case record on 20th February, 2006.

13. The first contention of learned counsel for the Petitioner was that in view of the decision of this Court in *Yum Restaurants India Pvt. Ltd. vs. Commissioner of Income Tax, [2005] 278 ITR 401*, there has to be a purposeful interaction between the Assessee and the Assessing Officer in regard to the nature and complexity of the accounts before an order is passed under Section 142 (2A) of the Act. It was submitted that the principles of natural justice were not followed in as much as there was no interaction between the Petitioner and the Assessing Officer in this case since the records of the case were received by Respondent

No.2 in the first fortnight of March, 2006 and the impugne[d] was issued immediately thereafter on 14th March, 2006. Only one hearing took place on 9th March, 2006 when the matter was adjourned to 20th March, 2006 without any discussion about the complexity of the accounts.

14. While it is true that this Court has held in ***Yum Restaurants*** that there should be a purposeful interaction between the Assessee and the Assessing Officer, the principles of natural justice are not stratified and a lot would depend on the facts of a given case.

15. In ***R.S. Dass vs. Union of India, 1986 Supp. SCC 617***, the Supreme Court observed:

> "It is well established that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case."

16. Similarly, in *Union of India vs. Anand Kumar I* *(1994) 5 SCC 663*, the Supreme Court reiterated that,

> "This Court has repeatedly held that the rules of natural justice cannot be put in a strait-jacket. Applicability of these rules depends upon the facts and circumstances relating to each particular given situation."

17. A few examples would best illustrate the point. It has been held by the Supreme Court in *M/s. Travancore Rayon Ltd. vs. Union of India, (1969) 3 SCC 868* that where complex and difficult questions requiring familiarity with technical problems are raised, an adjudicating authority should grant a personal hearing to a citizen, meaning thereby that in simple cases where the disputes are not complicated, a personal hearing need not necessarily be granted.

18. Similarly, in *Living Media Ltd. vs. Commissioner of Income-tax & Anr., [2002] 255 ITR 268*, a challenge was made to an order passed under Section 142 (2A) of the Act and this

Court noted that the Assessee had filed voluminous running approximately into 500 pages to explain the queries raised by the Assessing Authority. Further details running into about 1000 pages were also filed by the Assessee and this prima facie supported the opinion of the Assessing Authority of the need to have a special audit. An SLP filed against the order passed by this Court was dismissed by the Supreme Court. From a reading of the facts of this case, it appears there was prima facie justification, considering the voluminous records that a special audit was warranted.

19. In *M.C. Mehta vs. Union of India, (1999) 6 SCC 237,* the Supreme Court held,

> "It is, therefore, clear that if on the admitted or indisputable factual position, only one conclusion is possible and permissible, the Court need not issue a writ merely because there is violation of the principles of natural justice."

In coming to this conclusion, the Supreme Court relied, inter

alia, on the following passage from *S.L. Kapoor vs. Jagı*
(1980) 4 SCC 379,

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> "As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

In a rather illuminating passage in *M.C. Mehta*, the Supreme Court observed,

> "We may, however, point out that even in cases where the facts are not all admitted or beyond dispute, there is a considerable unanimity that the courts can, in exercise of their "discretion", refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed."

20. The above decisions have been mentioned only to stress the fact that no hard and fast rule can be laid down which would bind the Assessing Officer in every case regardless of its nature.

21. Looked at in this light, some of the background facts before us and which have been adverted to by the Petitioner in the writ petition itself are quite relevant, one of them being that a special audit was directed in the case of the Petitioner continuously from the assessment year 1994-95 onwards. Then, for the assessment years 1999-2000 to 2001-2002, the Petitioner has already got a special audit conducted. In the case of M/s Sahara India (Firm) also, special audit was directed for the assessment years 1999-2000 to 2001-2002. These averments made by the Petitioner, rather than supporting its case reinforce the view that the accounts of the Petitioner are complex and necessitate a special audit.

22. Our attention has also been drawn to an order passed by the Supreme Court in Civil Appeal No. 1585/2006 in the case of this very Assessee. In that case, the Allahabad High Court had passed an interim order restraining the Assessing Authorities from conducting a special audit (for the assessment year 2002-03, as per the official record). That interim order was challenged by the

Assessing Authorities in the Supreme Court before whom counsel for the Assessee conceded that there was material on the basis of which the special audit could be conducted. Consequently, the Supreme Court quashed the interim order and directed that a special audit be carried out. This, again, lends support to the view that the accounts of the Petitioner are complex. The complexity arises from the nature of the business activities and transactions carried out by the Petitioner, which has remained unchanged over the years.

23. We may also note that a direction to conduct a special audit under Section 142 (2A) of the Act is not a final order and does not determine any right, obligation or liability of any of the parties. As mentioned in ***Yum Restaurants***, it is a step towards completion of the assessment proceedings taken by the Assessing Officer to completely and fully understand the accounts of the Assessee. Viewed in this context, there need not be such a rigid compliance with the principles of natural justice as is sought to be contended by learned counsel for the Petitioner. As long as there is some

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material that stares in the face of the Assessing Officer whic or less compels an order of special audit, he can pass an appropriate order without necessarily having any interaction with the Assessee. If the material before the Assessing Officer is not so obvious as would warrant the passing of an order under Section 142 (2A) of the Act, it is only then that the Assessing Officer would need to have an interaction with the Assessee, as required by *Yum Restaurants*.

24. In so far as the present case is concerned, we are of the view, given the background facts that there was enough material (mentioned above) staring in the face of the Assessing Officer which compelled him to pass an order under Section 142 (2A) of the Act (subject to what we say on merits). Consequently, even if there was no interaction between the Assessing Officer and the Assessee on the complexity of the accounts, the principles of natural justice have not been violated, and even if they have been violated, then on the facts of this case, we are not inclined to interfere. We, therefore, reject the first contention of learned

counsel for the Petitioner.

25. In so far as the second contention is concerned, we find that the hypothesis on which it is based, namely, that the record of the case was received by Respondent No.2 in Delhi only in the first fortnight of March, 2006, is factually incorrect. The fact that the case records were received by Respondent No.2 on 20th February, 2006 is duly recorded in the detailed proposal dated 3rd March, 2000 prepared by the Assistant Commissioner of Income Tax (ACIT) to the Commissioner of Income Tax (CIT). The proposal itself shows that the same has been prepared after perusal of the case records.

26. We have been shown the official file by learned counsel for the Respondents and we find that on merits, the ACIT has done his homework rather well. After he had perused it he prepared a rather detailed proposal running into 15 pages which deals with various aspects of the accounts maintained by the Petitioner. The ACIT notes that during examination of the records, he has found

intermingling of accounts among various units of Sahara. In past years also as well as in this year, without any consideration of the fact that the vouchers of the bills stand in the name of a particular concern of the Sahara group, expenses have been debited in the accounts of another member of this group, even though the expenditure does not pertain to such other member of the group. He also notices that the tax auditor was required to furnish specific information but instead of furnishing the information, vague remarks have been given by the auditor.

27. For instance, in relation to the method of accounting employed in the previous year, the auditor states that mercantile system of accounting is adopted. However, he qualifies the same by stating "expenditure beside contractual are booked and crystallized on its approval by management". Such a system is not permissible under the Income Tax Act. There are various other similar lacunas in the tax audit report and we do not consider it necessary to deal with each one of them at this stage. Suffice it to say that we have gone through the detailed proposal and are

satisfied that there is due application of mind in the form the proposal by the ACIT. The proposal of the ACIT has been duly considered by the Commissioner of Income Tax as is evident from his detailed note. The Commissioner of Income Tax also notes that there is substantial intermingling of accounts with the accounts of other concern of the same group and that the accounts of the petitioner/assessee have been maintained in such a manner that the number of deposits received in the same name, of the same depositor are shown as separate deposits. He also observes that on the tax audit report furnished by the assessee, it is not possible to arrive at the correct income of the assessee and the interest of revenue is not protected by the said report. The business affairs and transactions between the various entities within the group have not been conducted at arm's length.

28. Similarly in the case of M/s Sahara India (Firm), the ACIT has prepared a detailed note running into 22 pages which dealt with various aspects of the accounts maintained by the Petitioner. Among the several factors taken into consideration by the

Assessing Officer were that the statutory audit report file with the return was not complete and reliable; the details that were asked for from the Assessee on an earlier occasion and supplied by the Petitioner were totally unverifiable; the Petitioner had adopted its own system of "crystallization and approval" of expenses which suggested that past liabilities are approved and debited to the profit and loss account contrary to the provisions of the mercantile system of accounting; and when details were called, they were not filed in a proper manner, etc. The proposal given by the Assessing Officer was carefully considered by the Commissioner of Income Tax who noted that there was large scale intermingling of accounts amongst various branches of the Sahara Group of companies and that that intermingling was rather complex since the bills/vouchers stand in the name of one concern of the group while expenses are debited in the account of another concern. The Commissioner also noted that the Petitioner had not strictly followed the mercantile system of accounting. There were various omissions in the tax audit report, vague and incomplete remarks were given therein and the business affairs of the various

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concerns of the group were not conducted in an arms length manner. It was noted that for the assessment year 2001-2002 when a special audit was carried out, various acts of omission and commission on the part of the Assessee came out, which should otherwise have been pointed out by the Tax Auditor. For the current assessment year 2003-2004, the tax audit report also suffered from various lapses and taking all these facts into consideration, he granted approval for getting the accounts of the Assessee audited under Section 142 (2A) of the Act.

29. In exercise of our powers under Article 226 of the Constitution, it is not possible for us to analyse the correctness or otherwise of the reasons given by the statutory authorities for ordering a special audit nor is it possible to substitute our opinion for that of the statutory authorities. All that we are required to consider is whether the decision making process is vitiated in any manner or suffers from non-application of mind. From the facts that we have mentioned above, it appears that the decision taken to order a special audit under Section 142 (2A) of the Act is

unexceptionable, and given the limited scope of our juris

we cannot interfere in the order passed.

30. While dismissing both writ petitions, we make it clear that the time spent in litigation in this Court will not be included for the purposes of the assessment proceedings nor will it be included for completion of the special audit.

31. The Respondents are entitled to costs of Rs.5,000/- for each writ petition.

Madan B. Lokur, J

Vipin Sanghi, J

October 17, 2006
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