* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Reserved on** : 8th August , 2012.
**%** **Date of Decision** : 15th October, 2012.

**+ W P(C) No.1868/2012**

DLF COMMERCIAL PROJECTS CORPORATION & ANR. .... Appellant
Through: Dr.Abhishek Manu Singhvi, Sr.Advocate with Mr.Ajay Vohra, Ms.Kavita Jha, Mr.Amit Sachdeva and Mr.Jaiveer Shergil, Advocates

**VERSUS**

ASSISTANT COMMISSIONER OF INCOME TAX & ORS. …..Respondent
Through: Ms.Suruchi Aggarwal, Advocate

**CORAM:**
**MR. JUSTICE S. RAVINDRA BHAT**
**MR. JUSTICE R.V. EASWAR**

**R.V. EASWAR, J.:**

This is a writ petition filed by DLF Commercial Projects Corporation under Article 226/227 of the Constitution of India in the following circumstances. The petitioner is a partnership firm engaged in the business of construction and sale of real estate. In respect of the assessment year 2009-10, it filed a return of income on 25th September, 2009 declaring a loss of Rs.20,12,82,857/-. A notice under Section 143(2) of the Income Tax Act, 1961 ("Act", for short) was issued by the ACIT, Circle-31(1), New Delhi, who is the first respondent in this petition and in response thereto the petitioner, between 7th September, 2011 and 4th November, 2011, explained its business model, the method of revenue recognition and the arrangement with DLF Land Limited,

another company, for rendering various services in connection with obtaining approvals and licences relating to land development rights. On 21st November, 2011 the first respondent issued a show cause notice under Section 142(2A) of the Act, proposing to refer the accounts of the petitioner for special audit. In this show cause notice, a copy of which has been annexed as Annexure H to the writ petition, the first respondent observed that he noticed certain complexities in the accounts of the petitioner on going through the books of accounts and the audited financial statements which necessitated the reference of the accounts of the petitioner to a special auditor in terms of Section 142(2A) of the Act. In particular, it was stated that the following complexities in the accounts were noted:-

(a) The petitioner had received business advances of Rs.3717.42 crores from one of its partners, that is, M/s DLF Limited on which no interest was paid. This amount was invested in more than hundred companies which were part of the DLF Group of Companies. The petitioner has been used as a conduit to make huge advances to companies of the same group with a view to avoiding the applicability of the provisions of Section 2(22)(e) relating to deemed dividend and Section 40A(2)(b) of the Act.

(b) The petitioner was showing various payments made to companies on account of development rights under the head "stock". No details were available with regard to the quantum of the rights, basis of purchase and sale price or recognition of revenue. This has made the accounts highly complex.

(c) No details were available in the accounts with regard to the deduction of Rs.25.40 crores claimed in the profit and loss account under the head "reimbursement of expenses".

(d) The petitioner in the relevant accounting year was dealing only in the purchase and sale of development rights on behalf of DLF Ltd. However, no revenue is recognized on receipt of the sale consideration, which is given a colour of advances by the petitioner. This is contrary to the significant accounting policy stated to be followed by the petitioner for revenue recognition-i.e., that revenue would be recognized in the financial year in which the agreements of sale are executed.

In view of the above four issues, the Assessing Officer was of the view that the accounts of the petitioner were complex. He, therefore, called upon the petitioner to show cause why the accounts should not be got audited by special auditor under Section 142(2A), as it would be necessary to determine the taxable income for the year.

2. Annexure I to the writ petition is a copy of the petitioner's reply to the show cause notice dated 21st November, 2011. The reply is dated 24th November, 2011 and it runs to about 21 pages (excluding annexures). A perusal of the reply shows that the petitioner had strong objections to the proposal of the first respondent to get the accounts of the petitioner audited by a special auditor. It was pointed out that in the assessment year 2007-08 an addition of Rs.37.4 crores had been made on account of profit and sale of development rights, but it was deleted by the CIT(Appeals) as being without any basis, whose order was confirmed by the Tribunal. It was pointed out that

the petitioner had followed a certain basis of revenue recognition and the facts being the same, the order of the Tribunal should govern the case for the assessment year 2009-10 also. It was claimed that this issue, which was already adjudicated upon by the Tribunal, cannot form the basis for the conclusion that the accounts of the petitioner are complex. It was further pointed out that on 18th November, 2011 the petitioner had produced the books of accounts before the first respondent who had test-checked them but had not raised any queries or explanation thereafter which implied that there was no complexity in the accounts. It was submitted that the petitioner maintained its books of account as per the accounting standards issued by the Institute of Chartered Accountants of India and that the accounts were also audited in terms of Section 44AB.

3. As regards the observation of the first respondent that there was a diversion of the borrowed funds to sister concerns in order to avoid the provisions relating to Section 2(22)(e) and Section 40A(2)(b), the petitioner sought to explain the facts and in particular pointed out that DLF Ltd. is a company in which the public was substantially interested and when advances were made by it to the petitioner-firm, the provisions of Section 2(22)(e) of the Act were not attracted and that in any case, the advances were in the nature of business advances. As regards the applicability of Section 40A(2)(b), the petitioner drew the attention of the Assessing Officer to the tax audit report in which the transactions covered by the Section have been specifically mentioned, without any adverse inferences being drawn.

4. The petitioner also objected to the proposal of the first respondent to consider the question of showing the payments made on account of development rights as its stock as resulting in complexity of the accounts, in the

absence of any details with regard to the quantum of the development rights. It was pointed out that the parawise details with regard to the cost of development rights along with the relevant agreements had been furnished under cover of letters dated 4th and 11th November, 2011. It was claimed that the same method of accounting which was followed by the assessee previously was being continued without any deviation in the relevant previous year and, therefore, no adverse inference can be drawn by merely observing that the accounts involve complexity. There was only a difference of opinion between the assessee and the assessing authority on the question of revenue recognition which was also tested before the appellate authorities.

5. In respect of the reimbursement of Rs.25.40 cores, the petitioner drew the attention of the first respondent to the note filed by it on 4th and 11th November, 2011 along with complete details and invoices on account of service charges and reimbursement of expenses aggregating to Rs.25.40 crores. It was claimed that after the details were submitted, the first respondent had not raised any queries. It was pointed out that the reimbursement of expenses was in pursuance of the services provided by the DLF Land Ltd. under agreements dated 1st April, 2007 and 16th July, 2007 which contemplates the maintenance of books of accounts, secretarial record, filing of various statutory return forms, managing the bank accounts, taking steps for obtaining licences relating to land etc. It was in consideration of such services rendered by DLF Ltd. that the petitioner was liable to pay service charges at 15% of the expenses incurred. It was thus submitted that there was no complexity with respect to this issue.

6. With regard to the revenue recognition on sale of development rights on behalf of DLF Ltd., it was pointed out that the first respondent did not

appreciate or comprehend the nature of the business activities of the petitioner. Strong objection was taken to the observation of the respondent that the petitioner was trying to colour the nature of business receipts by showing them as advances. The petitioner thereafter sought to explain in detail the nature of its activities. It was urged that by no stretch of imagination can the relationship between the petitioner and DLF Ltd. lead to an inference that the accounts maintained by the petitioner were complex, necessitating a special audit under Section 142(2A).

7. In addition to the aforesaid submission the petitioner drew the attention of the first respondent to Circular No. 204 dated 24th July, 1996 issued by the CBDT in connection with the scope of Section 142(2A). It also brought to the notice of the Assessing Officer the instruction No.1076 issued by the CBDT on 12th July, 1977 laying down guidelines for the selection of cases for special audit. The attention of the Assessing Officer was also drawn to several authorities.

8. It appears that after the receipt of the reply of the assessee dated 24th November, 2011, the assessment proceedings went ahead pursuant to the notices issued earlier under Section 143(2) and Section 142(1) of the Act. This is evident from the order sheet notings dated 5th December, 2011, 16th December, 2011 and 19th December, 2011. These order sheet notings were been obtained by the assessee under the Right to Information Act, 2005 by an application made on 20th February, 2012 and is annexed to the writ petition as annexure B. It may be relevant to reproduce the order sheet notings, so far as is necessary for our purpose, as follows:-

*"05.12.2011:* *Present Shri Anil Aggarwal, CA and made submissions. To furnish details regarding reimbursement of expenses to DLF Ltd. U/s 40(a)(ia). Case adjourned to 16th Dec.*

*16.12.2011:* *Attended Shri Anil Aggarwal, CA and submitted details. Case discussed partly. He is required to file the following:-*

- *Details and confirmation of Sundry Creditors amounting to ₹2,14,26,677/- shown in the balance sheet as on 31.03.2009.*

- *Details of unsecured loan amounting to ₹1,11,50,000/- shown in the balance sheet as on 31.03.2009 along with confirmations giving the names and addresses of parties, PAN, amount received/refunded if any and mode of payment etc.*

*Case adjourned to 19th Dec.*

*19.12.2011:* *Attended Shri Anil Aggarwal and submitted details. Case adjourned for 26 Dec.*

*26.12.2011:* *Attended Shri S.K. Sharma on behalf of firm and Shri Anil Aggarwal CA and AR and submitted reply to show cause. To submit details of unsecured loans and sundry creditors. Case adjourned for 28 Dec."*

9. On 16th December, 2011, that is, in the midst of the assessment proceedings and on the day on which the assessee's case was posted for hearing before the first respondent, he submitted a report to the CIT, Delhi-XI, New

Delhi, "through proper channel" with reference to the show cause for proposal for special audit under Section142(2A) in the assessee's case for the assessment year 2009-10. A copy of this report was filed before us on behalf of the Revenue along with copies of other documents from the record. A perusal of the seven pages report shows several aspects. It is first seen that the report has been submitted in response to the letter written by the CIT on 11th November, 2011 (through which proposals for special audit under Section 142(2A) were sought); thereafter it narrates the various developments leading to the issue of the letter 24th November, 2011 by the Assessing Officer. It is stated that the assessee produced the books of accounts on 18th November, 2011 and after verification of the books, a show cause notice dated 21st November, 2011 was issued containing the proposal for special audit and that the assessee-firm was required to furnish its reply by 24th November, 2011. The reply submitted by the assessee is thereafter discussed in considerable detail along with the extracts, wherever necessary, from the reply. The penultimate paragraph of the report is relevant and extracted below:-

> *"The submission of the assessee is being examined with regards to the issues stated in the Show Cause Notice, CBDT Guidelines, provisions of law and judicial decisions relied upon. Further as regards to the issue to business advance received form one of its partner i.e. M/s DLF limited which has further been advanced to Land owning Companies, the same is being examined during the course of assessment proceedings. Similarly regarding the claim of "Reimbursement of expenses" the assessee has submitted that a detailed note along with full details and Invoices on account of Service Charges amounting to ₹ 1.21 Crore and reimbursement of expenses amounting to ₹ 24.19 Crores,*

*aggregation total expenses at Rs 25.40 Crores has been furnished by the assessee which are being examined. The assessee has been asked to file the necessary details which are being verified and examined in the course of the assessment proceedings."*

10. It appears that a hearing took place on 16th December, 2011 pursuant to the hearing notices issued by the Assessing Officer. We have already extracted the order sheet entry dated 16th December, 2011 which shows what actually transpired in the course of the hearing.

11. On 19th December, 2011 a letter was written by the Assessing Officer to the assessee which is marked as Annexure J to the writ petition. The subject matter of the letter, as seen from the letter itself, is-

*"Sub: show cause notice u/s 142(1) w.r.t. Assessment Proceedings u/s 143(3) of the IT Act, 1961 for the A.Y. 2009-10 in the case of M/s DLF Commercial Project Corpn. – regarding-"*

A perusal of the letter shows that the Assessing Officer had gone through the reply of the assessee submitted on 24th November, 2011 and that he desired further clarification from the assessee in respect of the return filed by the assessee. In particular, clarifications in respect of the following points were sought:-

(a) Deduction of Rs.24,19,70,094/- claimed by the assessee on which no tax was deducted at source. The assessee was asked to show cause why the provisions of Section 40(a)(ia) should not be invoked to disallow the deduction claimed.

(b) Service charges were paid by the assessee to the extent of Rs.1,20,98,508/-. The assessee was asked why it should not be disallowed for want of details and documentary evidence.

(c) Sundry credits of Rs.2,14,26,677/- appearing in the balance sheet as on 31st March, 2009. The assessee was asked to show cause why the amount cannot added as income since the assessee failed to furnish confirmation letters.

(d) Unsecured loans of Rs.1,11,50,000/-. The assessee was asked to show cause why in the absence of confirmations which were directed to be filed, the amount cannot be added as unconfirmed loans.

Towards the end of the letter, the Assessing Officer stated as follows:-

> *"In this regard you are given an opportunity to explain your case with all the details and documentary evidences. The date for compliance is fixed for 26.12.2011 at 11.00 A.M. Penalty u.s. 271(1)(b) may be imposed in case of failure to comply. Please note that in case of non-compliance in any manner, the case shall be decided on merits on the basis of material available on records."*

12. On 26th December, 2011 the assessee replied to the above letter of the Assessing Officer and furnished a detailed reply in respect of the points raised in the letter of the Assessing Officer. A copy of this letter is annexed to the writ petition as Annexure K.

13. It is thus seen that upto 26th December, 2011 the assessing proceedings continued without interruption, have been commenced on 23rd August, 2010

when the case was selected under CASS and notice was issued on that day under Section 143(2). The Assessing Officer, however, had issued a show cause notice on 21st November, 2011 under Section 142(2A) for special audit to which, as we have already seen, the assessee replied by letter dated 24th November, 2011 objecting to the proposal to refer the accounts of the assessee to special auditor. We have also seen that on 16th December, 2011 the Assessing Officer had submitted a report to the CIT in which he had narrated the assessee's reply and the various points taken by the assessee and had also intimated the CIT of his intention to proceed with the assessment proceedings and himself examine the points on which special audit was originally proposed by him.

14. Things appear to have taken a new turn after this report was sent by the Assessing Officer to the CIT. We have examined the original files produced before us by the Standing Counsel for the Revenue who has also submitted copies of the relevant communications between the departmental authorities inter se, as also copies of the correspondence between the assessee and the departmental authorities. The chronology of the events which took place from 26th December, 2011 is also interesting. There is a letter written by the ITO (Headquarters) on behalf of the CIT, Delhi-XI on 22nd December, 2011 to the first respondent. This letter refers to the report submitted by the Assessing Officer on 16th December, 2011 which was duly forwarded by the JCIT of the concerned range to the CIT on 19th December, 2011. The letter of the CIT dated 22nd December, 2011 proceeds to issue the following directions to the Assessing Officer:-

*"In this regard, I am directed to request your goodself to kindly submit to this office the relevant folders pertaining to the M/s DLF Commercial Projects Corporation (PAN: AAAAFD2181R) for A.Y. 2009-10 containing all the relevant papers and notices issued so far to the assessee.*

*Further, I am also directed to request your goodself to kindly submit the interim position of the matter and also please intimate if draft orders are ready.*

*Yours faithfully,*

*Encl: As above.*

*(Umesh Kumar)*
*Income-Tax Officer (Hqrs.)*
*Delhi-XI, New Delhi."*

15. On receipt of the above letter, the Assessing Officer responded to the same by a letter dated 26th December, 2011 addressed to the CIT, Delhi-XI, a copy of which has been submitted by the learned Standing Counsel. A perusal of this letter shows that after narrating the chronology of events staring from the requisition of the books of accounts of the assessee on 11th November, 2011 till the submission of the assessee's reply dated 24th November, 2011 to the show cause notice issued under section 142(2A) on 21st November, 2011, the Assessing Officer pertinently wrote as follows:-

*" In view of the submission of the assessee to the issues stated in the Show Cause Notice, the apparent complexities noticed and confronted to the assessee have been answered to by the assessee. Further as regards to the issue of business advance received from one of its partner i.e. M/s DLF limited which has further been advanced to Land Owning Companies*

*on which additions were made in the previous years and the issue being held in favour of the assessee by the ITAT; the same issue does not exist in the A.Y. 2009-10.*

*Regarding the claim of "Reimbursement of expenses" the assessee submitted that a detailed note along with full details and Invoices on account of Service Charges amounting to ₹1.21 Crore and reimbursement of expenses amounting to ₹24.19 Crores, aggregating total expenses at ₹25.40 Cores has duly been furnished during the assessment proceedings. The assessee has been show caused as to why an amount of ₹24,19,70,094/- being reimbursement of expenses to M/s DLF Land Ltd. be not disallowed for non-deduction of TDS under Section 40 (a) (ia) of the Income Tax Act, 1961. Further the assessee has been show caused as to why the service charges of ₹1,20,98,508/- paid to DLF Land Ltd. be not disallowed. The assessee has submitted its reply to the show cause. The same are being examined during the course of assessment proceedings.*

*Similarly with regard to the confirmations of the sundry creditors the assessee has been show caused as to why an amount of ₹2,14,26,677/- not be added to the total income. Also the assessee has been required to show cause as to why a sum of ₹1,11,50,000/- being the unsecured loans outstanding as on 31.03.2009 be not brought to tax for want of confirmations.*

*The assessee has submitted its reply to the show cause. The same are being examined during the course of assessment proceedings. The assessee has been asked to file the necessary details which are being verified and examined and the interest of the revenue is being protected.*

*The draft order is being enclosed for kind perusal. This is for your kind information.*

*Yours faithfully,*

*Encl: As above.*

*(Vikas Singh)*
*Asstt. Commissioner of Income-Tax*
*Circle – 31(1), New Delhi."*

16. Though it has been stated in the above letter of the Assessing Officer, the first respondent herein, that the draft order of assessment was enclosed with the letter, the affidavit filed by the first respondent before us, states that the draft assessment order said to have been enclosed with the letter dated 26th December, 2011 was in fact not so enclosed. This information has also been given to the assessee under the Right to Information Act to a query raised by the assessee. In the reply under the RTI Act it has been stated by the first respondent that "regarding the draft order mentioned in the proposal dated 26th December, 2011 as annexure, please be informed that no draft order was sent with the proposal and the same was inadvertently mentioned in the letter". The assessee had also raised a query under the RTI Act seeking clarification regarding the letter dated 27th December, 2011 written by the Joint Commissioner of Income Tax, Range 31, New Delhi to the CIT, Delhi-II forwarding the report of the Assessing Officer "along with a copy of draft assessment order". To this query also, the reply given to the assessee by letter dated 1st May, 2012 was the same, namely, that no such draft assessment order was placed in the file of ACIT, Circle 31(1). In short, the Revenue has denied that a draft assessment order was enclosed to the report dated 26th December, 2011 submitted by the ACIT to the CIT through proper channel, ie., through the JCIT and has also denied that a copy of the draft assessment order was forwarded by the JCIT to the CIT along with his forwarding letter dated 27th December, 2011 to the CIT concerned. The query raised by the petitioner and

the reply given by the departmental officers under the RTI Act are crucial as we shall presently show.

17. On 27th December, 2011, i.e. one day after he sent a report to the CIT stating that the apparent complexities noticed in the accounts were answered by the assessee and, therefore, the assessment is being proceeded with and further that the assessee had submitted its reply to the various points raised by him which will be examined and the interest of the Revenue would be protected, and to which report a copy of the draft assessment order was stated to be enclosed for the perusal of the CIT, the first respondent sent a letter to the CIT-II, New Delhi (on 27th December, 2011) in F.No.ACIT/CIR.31(1)/2011-12/429, in which he appears to have taken a *volte face* as the following contents of the letter would show:-

> *"To,* *Dated : 27/12/2011*
> *CIT-XI*
> *New Delhi*
>
> *(Through Proper Channel)*
>
> *Sir,*
> *Subject: Proposal for special Audit u/s 142(2A) in the case of DLF Commercial Projects Corporation (PAN:AAAFD2181R) for A.Y. 2009-10- Regarding*
>
> *In connection with the assessment for A.Y. 2009-10 books of Accounts were called for vide order sheet entry dated 11 November 2011.*
>
> *On going through the books of accounts as well as the audited financial results including the balance sheet and the profit and*

*loss account certain complexities have been noted in the accounts of the assessee.*

*The assessee is a partnership firm consisting of two partners namely M/s DLF Limited with 76% profit sharing ratio and M/s DLF Housing and Construction Ltd. with 24% profit sharing ratio. Both the partners are engaged in the activity in the real estate alongwith the partnership firm.*

*The assessee has been show caused on the following points:*

1. *Appliciability of section 40(a)(ia) on reimbursement of expenses to the tune of ₹24,19,740,494/-.*
2. *Applicability of section 40A(2)(a) on service charges to the tune of ₹ 1,20,98,508 paid to DLF Land Ltd. And whether it is wholly and exclusively for the purpose of business*
3. *Genuineness of creditors to the tune of ₹2,14,26,677/-*
4. *Genuineness of unsecured loan to the tune of ₹1,11,50,000/-*

*2. The assessee has submitted his reply vide letter dated 26.12.2011. However the submissions of the reply needs detailed examination in view of the complexity of the accounts.*

*It is therefore proposed that approval for special audit may be accorded in the case on the abovementioned issue (Terms of Reference) or any other issue noticed thereafter.*

*Submitted for kind consideration.*

*Yours sincerely,*

*( Vikas Singh)*
*Asstt. Commissioner of Income Tax,*
*Circle - 31(1), New Delhi."*

The point to be noted is that just the previous day, that is, 26th December, 2011 the first respondent had come to the conclusion that a special audit was not required since the points raised by him in the show cause notice were satisfactorily answered by the petitioner and that the assessment can be proceeded with, subject to the details and clarifications being submitted by the petitioner which will be examined and verified to protect the interest of the Revenue. The draft assessment order would also appear to have been enclosed with the letter dated 26th December, 2011, though it is now denied by the first respondent. The crucial questions which arise are the following:-

1. Was the first respondent satisfied with the reply filed by the assessee-petitioner on 26th December, 2011 to the show cause notice issued under Section 142(2A) and whether his report dated 26.12.2011 be taken as an expression of opinion that there was no need for a special audit?

2. If the answer to the first question is in the affirmative, what is it that happened between 26th December, & 27th December, 2011 which compelled the Assessing Officer to change his mind and come to the conclusion that "certain complexities have been noted in the accounts of the assessee" and, therefore, special audit was required to be carried out?

3. Assuming that it is open to the Assessing Officer to change his mind, was it not incumbent upon him to issue another show cause notice to the petitioner under Section 142(2A) and invite the objections of the petitioner?

4. Was there any application of mind on the part of the CCIT before approving the proposal for special audit sent by the first respondent on 28.12.2011?

5. What would be the impact of the answers to the aforesaid four questions upon the validity of the order passed by the CCIT granting approval for special audit?

18. On the very same day on which the JCIT forwarded the report of the Assessing Officer to the CIT, the CIT wrote a letter to the Chief Commissioner of Income Tax, Delhi-II under the subject "proposal for special audit under Section 142(2A) of the IT Act, 1961-Reg.". In this letter, a copy of which is placed at page 174 of the writ petition, the CIT stated as follows:-

> *"In this Connection, please find enclosed herewith proposals for special Audit u/s 142(2A) of the I.T. Act 1961 as received from the ACIT, Circle-31(1), New delhi vide letter F No ACIT/Circle-31(1)/2011-12/429 dt. 27/12/2011 duly forwarded by Joint CIT, R-31. New Delhi vide F.No. JCIT/E-31/11-12/442 dt. 27.12.2011 in the following case.*

| *S.No.* | *Name of the Assessee* | *A.Y* | *Assessing officer* |
|---|---|---|---|
| *1.* | *M/s DLF Commercial Project Corporation* | *2009-10* | *ACIT, Cir-31(1)* |

> *In this regard, the Name of CA firm that is empanelled for special Audit u/s 142(2A) of the Income-Tax as per the list drawn up by the Office of CCIT (Coordination), New Delhi vide F.No. Addl. CIT(Coord.)/Enpanelment-u/s 142(2A)/2011-12/8263 dt. 13/10/11.2011(Copy Enlosed) as proposed for the purpose of special Audit is as follows.*

1. *M/s Dhanesh Gupta & Co.,*
*1-1/16, Ansari Road, Shanti Mohan House,*
*Daryaganj, New Delhi-110002.*

*The same are hereby forwarded for kind consideration and approval please.*

*Yours faithfully,*

*Encl: As above.*

*(Gopal Kamal)*
*Commissioner of Income Tax*
*Delhi-XI, New Delhi."*

19. Again on the very same day, i.e., 27th December, 2011 the CCIT-II, New Delhi sent a communication to the CIT with the caption "most urgent" and under the subject "proposal for special audit under Section 142(2A) of the IT Act in the case of M/s DLF Commercial Project Corporation-A.Y. 2009-10-Reg.". This letter contained the approval of the CCIT-II for referring the case of the petitioner for special audit under Section 142(2A) to M/s Dhanesh Gupta and Co., CAs. Pursuant to the approval, the first respondent passed the impugned order on 28.12.2011 containing the direction for a special audit on the following four points:-

a. Applicability of Section 40(a) (ia) on reimbursement of expenses to the tune of ₹24,19,70,494/-.

b. Applicability of Section 40A(2) (a) on service charges to the tune of ₹1,20,98,508/- paid to DLF Land Ltd. and whether it is wholly and exclusively for the purpose of business.

c. Genuineness of creditors to the tune of ₹2,14,26,677/-

d. Genuineness of unsecured loan to the tune of ₹2,14,26,677/-.

It is the aforesaid order that is impugned in the writ petition as also the order dated 29.12.2011 passed by the first respondent containing the terms of reference to the special auditor.

20. The relevant statutory provisions governing the special audit are incorporated in Section 142 of the Income Tax Act which is titled "inquiry before assessment". Sub-sections (2A), (2B), (2C), (2D), (3) & (4) are relevant in this behalf. They are 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[7] 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 :*

*[Provided that the Assessing Officer shall not direct the assessee to get the accounts so audited unless the assessee has been given a reasonable opportunity of being heard.]*

*(2B) The provisions of sub-section (2A) 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 (2A) shall be furnished by the assessee to the Assessing Officer within such period as may be specified by the Assessing Officer :*

*Provided that the Assessing Officer may, [suo motu, or 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.*

*(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 XVIID for the recovery of arrears of tax :*

*[Provided that where any direction for audit under sub-section (2A) is issued by the Assessing Officer on or after the 1st day of June, 2007, the expenses of, and incidental to, such audit (including the remuneration of the Accountant) shall be determined by the Chief Commissioner or Commissioner in accordance with such guidelines as may be prescribed and the expenses so determined shall be paid by the Central Government.]*

*(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 (2A) and proposed to be utilised for the purpose of the assessment.*

*(4) The provisions of this section as they stood immediately before their amendment by the Direct Tax Laws (Amendment) Act, 1987 (4 of 1988), shall apply to and in relation to any assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment year and references in this section to the other provisions of this Act shall be construed as references to those provisions as for the time being in force and applicable to the relevant assessment year."*

The relevant principles governing the applicability of the provisions have been set out in the judgment of the Supreme Court in *Sahara India vs. CIT & Anr. (2008) 300 ITR 403*:-

*"... 6. A bare perusal of the provisions of Sub-section (2A) of the Act would show that the opinion of the Assessing Officer that it is necessary to get the accounts of assessee audited by an Accountant has to be formed only by having regard to: (i) the nature and complexity of the accounts of the assessee; and (ii) the interests of the revenue. The word "and" signifies conjunction and not disjunction. In other words, the twin conditions of "nature and complexity of the accounts" and "the interests of the revenue" are the prerequisites for exercise of power under Section 142(2A) of the Act. Undoubtedly, the object behind enacting the said provision is to assist the Assessing Officer in framing a correct and proper assessment based on the accounts maintained by the assessee and when he finds the accounts of the assessee to be complex, in order to protect the interests of the revenue, recourse to the said provision can be had. The word "complexity" used in Section 142(2A) is not defined or explained in the Act. As observed in* ***Swadeshi Cotton MillsCo.Ltd.*** *v. MANU/UP/0236/1987 :* ***C.I.T.****[1988]171ITR634(All) it 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 is 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." Thus, before dubbing the accounts to be complex or difficult to understand, there has to be a genuine and honest attempt on the part of the Assessing Officer to understand accounts maintained by the assessee; appreciate the entries made therein and in the event of any doubt, seek explanation from the assessee. But opinion required to be formed by the Assessing Officer for exercise of power under the said provision must be based on objective criteria and not on the basis of subjective satisfaction. There is no gainsaying that recourse to the said provision cannot be had by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts of an assessee and pass on the buck to the special auditor. Similarly, the requirement of previous approval of the Chief Commissioner or the Commissioner in terms of the said provision being an inbuilt protection against any arbitrary or unjust exercise of power by the Assessing Officer, casts a very heavy duty on the said high ranking authority to see to it that the requirement of the previous approval, envisaged in the Section is not turned into an empty ritual. Needless to emphasise that before granting approval, the Chief Commissioner or the Commissioner, as the case may be, must have before him the material on the basis whereof an opinion in this behalf has been formed by the Assessing Officer. The approval must reflect the application of mind to the facts of the case."*

The Supreme Court also expounded on the requirement of affording an opportunity of being heard to the assessee before special audit is ordered in the following words:-

"*20. Dealing with the question whether the requirement of affording an opportunity of hearing is to be read into Section 142(2A), in* ***Rajesh Kumar*** *(supra) it has been held that prejudice to the assessee is apparent on the face of the said statutory provision. It has been observed that on account of the special audit, the assessee 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 mis-conduct, he may become liable to be proceeded against by a statutory authority under the Chartered Accountants Act, 1949. Besides, the assessee has to pay a hefty amount as fee of the special auditor. Moreover, during the audit of the accounts again by the special auditor, he has to answer a large number of questions. Referring to the decision of this Court in* ***Binapani Dei*** *(supra) wherein it was observed that when by reason of an action on the part of a statutory authority, civil or evil consequences ensue, the principles of natural justice are required to be followed and in such an event, although no express provision is laid down in this behalf, compliance with the principles of natural justice would be implicit, the learned Judges held that by virtue of an order under Section 142(2A) of the Act, the assessee suffers civil consequences and the order passed would be prejudicial to him and, therefore, principles of natural justice must be held to be implicit. The Court has further observed that if the assessee was 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.*

*21. In the light of the aforenoted legal position, we are in respectful agreement with the decision of this Court in* ***Rajesh Kumar*** *(supra) that an order under Section 142(2A) does entail civil consequences. At this juncture, it would be relevant to take note of the insertion of proviso to Section 142(2D) with effect from 1st June, 2007. The proviso provides that the expenses of the auditor appointed in terms of the said provision shall, henceforth, be paid by*

> *the Central Government. In view of the said amendment, it can be argued that the main plank of the judgment in* ***Rajesh Kumar*** *(supra) to the effect that direction under Section 142(2A) entails civil consequences because the assessee has to pay substantial fee to the special auditor is knocked off. True it is that the payment of auditor's fee is a major civil consequence, but it cannot be said to be the sole civil or evil consequence flowing from directions under Section 142(2A). We are convinced that special audit has an altogether different connotation and implications from the audit under Section 44AB. Unlike the compulsory audit under Section 44AB, it is not limited to mere production of the books and vouchers before an auditor and verification thereof. It would involve submission of explanation and clarification which may be required by the special auditor on various issues with relevant data, document etc., which, in the normal course, an assessee is required to explain before the Assessing Officer. therefore, special audit is more or less in the nature of an investigation and in some cases may even turn out to be stigmatic. We are, therefore, of the view that even after the obligation to pay auditor's fees and incidental expenses has been taken over by the Central Government, civil consequences would still ensue on the passing of an order for special audit…."*

21. We must refer to the short affidavit filed by the first respondent as per the directions of this Court issued on 30.3.2012. The Court had directed the filing of an affidavit on oath whether the Assessing Officer had mooted the proposal for the special audit. The affidavit was directed to be filed on or before 10.04.2002. The direction was issued because it was one of the contentions of the petitioner that the Assessing Officer had not mooted any proposal for special audit, but on the contrary had actually dropped the proposal in his report dated 26.12.2011 and that the proposal actually moved from the CIT who had no authority to propose the special

audit. The petitioner had sought to support the allegation on the basis of the report of the Assessing Officer dated 26.12.2011 and the subsequent turn of events on 27.12.2011 when the Assessing Officer had taken a `U' turn and made a proposal for the special audit.

22. In the short affidavit filed by the first respondent it has been stated in para 2 that the proposal for special audit was sent by the Assessing Officer through the JCIT who forwarded the same to the CIT on 27.12.2011. In para 3 of the affidavit it has been stated that the Assessing Officer submitted a proposal to the CIT on 27.12.2011 through the JCIT seeking proposal for referring the case of the petitioner to the special auditor and the CIT forwarded the proposal to the CCIT on the same date i.e. 27.12.2011 along with the copies of the report of the Assessing Officer dated 26.12.2011. What we gather from these two paragraphs in the affidavit is that the first respondent has treated his report dated 26.12.2011 as a proposal for special audit, whereas the contention of the petitioner is that it is not a proposal for conducting special audit but it is actually a report containing reasons why no special audit is necessary and also intimating the CIT of the intention to continue with the assessment proceedings. In fact, the petitioner went so far as to say that the enclosing of the draft assessment order, though denied by the first respondent, to the report clinched the issue in favour of the view that the Assessing Officer did drop the proposal for special audit.

23. The provisions of sub-section (2A) of Section 142 require the Assessing Officer to form an 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 get the accounts audited by a special auditor nominated by the CIT or the CCIT. The proviso makes it incumbent upon the Assessing Officer to give the assessee a reasonable opportunity of being heard before special audit is directed. The direction to conduct special audit has to be, under the sub-section, given with the previous approval of the CIT or CCIT. It is thus the Assessing Officer who is to form the opinion and not for anyone else. The approval to be granted by the CIT or the CCIT, as held by the Supreme Court in the case of **Sahara India (Firm) (supra)** is an inbuilt protection against arbitrary or unjust exercise of power by the Assessing Officer and therefore a heavy duty is cast on the high ranking authority to see that the approval is not granted in a ritualistic manner; he is required to examine the material on the basis of which an opinion for conducting special audit was formed by the Assessing Officer. According to the judgment, the approval must reflect the application of mind to the facts of the case.

24. There is a good deal of force in the contention of the petitioner that there was no proposal initially by the Assessing Officer for special audit and that he did not form any opinion that the accounts of the assessee were complex and a special audit was required to protect the interests of the revenue. This is clear from the report dated 26.12.2011 submitted by

the Assessing Officer to the CIT, the relevant portions from which have been extracted earlier. The Assessing Officer did examine the accounts of the assessee on 18.11.2011. He issued a proposal for special audit under Section 142(2A) on 21.11.2011. The petitioner submitted a detailed reply to the same on 24.11.2011. After considering the reply, the Assessing Officer prepared a report on 16.12.2011. The penultimate paragraph to this report, which has also been extracted by us earlier, gives the impression that it was some kind of an interim report, informing the CIT that the submissions of the petitioner are being examined with regard to the issues raised in the show cause notice, the CBDT guidelines, the provisions of law and the judicial decisions relied upon. It also states that the issue of business advance received by the assessee from DLF Ltd. and in turn advanced to certain land owning companies was being examined in the assessment proceedings. The issue relating to reimbursement of expenses in respect of which the assessee had submitted a detailed note along with invoices for service charges amounting to ₹1.21 crores and reimbursement of expenses amounting to ₹24.19 crores were also stated to be examined during the assessment proceedings. The Assessing Officer also intimated the CIT that the assessee has been asked to file the necessary details which are being verified and examined in the course of the assessment proceedings. That the assessment proceedings were posted on 16.12.2011 is shown by the order sheet entry of that date which has also been extracted earlier. The proceedings were adjourned to 19.12.2011 on which day the assessee appeared through its representative

and submitted some details and the case was again adjourned to 26.12.2011. On 26.12.2011, as the order sheet entry would show, a reply to the show cause notice was filed by the assessee and it was required to submit details of unsecured loans and sundry creditors on 28.12.2011 to which date the proceedings were adjourned.

25. On 26.12.2011, when the assessment proceedings had been adjourned further to 28.12.2011, and on which date certain details were submitted by the petitioner, the Assessing Officer prepared another report to be submitted to the CIT. In this report again the Assessing Officer narrated the reply submitted by the assessee to the show cause notice issued on 21.11.2011 under Section 142(2A) and after considering the same, expressed a clear opinion that "the apparent complexities noticed and confronted to the assessee have been answered to by the assessee". The sequitur of this statement is that the Assessing Officer did not form the opinion that the accounts of the assessee were complex and in order to protect the interests of the revenue, a special audit was required. The Assessing Officer further stated in this report, which is the final report, and which has been extracted by us earlier, that whatever details are required in respect of the issues raised in the show cause notice dated 21.11.2011 were being examined in the assessment proceedings and the assessee has been asked to furnish further details (which is an apparent reference to the hearing posted on 28.11.2011) and further that a draft order has been prepared which is enclosed with the final report for the

perusal of the CIT. It is very difficult to treat this report of the Assessing Officer as a proposal submitted by him to the CIT for special audit of the accounts of the petitioner. On the contrary it contains a clear statement that since the complexities in the accounts have been answered by the petitioner and since the details and material submitted by the petitioner would be examined in the course of the assessment proceedings which were pending on that date, no special audit was required. It is not necessary for us to pronounce finally on the question whether the draft assessment order was enclosed to the report dated 26.12.2011 or not; the preparation of the report itself would indicate the mind of the Assessing Officer and the decision taken by him on that date. There is of course the unanswered question whether the draft assessment order was enclosed to the report or not. Section 114(e) of the Evidence Act would perhaps be applicable to such a case and if it has been stated by the Assessing Officer that the draft order was enclosed to the final report, the presumption would be that it was enclosed and it would be for the revenue authorities to rebut the presumption with strong evidence to show that it was not. The burden was on them. They have merely stated in the reply to the RTI enquiry raised by the petitioner that the draft order was not enclosed with the final report dated 26.12.2011. This is a perfunctory manner of discharging the burden placed on them. If the draft assessment order had not been enclosed with the final report, we presume that there would be some correspondence on record from the office of the CIT drawing the attention of the Assessing Officer to the omission to enclose the draft

order and asking him to send the same forthwith. We were not referred to any such correspondence from the office of the CIT. Moreover, even the forwarding letter of the JCIT refers to draft assessment order being forwarded to CIT along with the report dated 26.12.2011 of the A.O. In these circumstances, we find it difficult to believe that the Assessing Officer would not have enclosed the draft assessment order with his final report. We hasten to clarify that the very contents of the report dated 26.12.2011 are sufficient to show that he had formed an opinion that no special audit was necessary in the petitioner's case. He had said so in as many words in the final report. The appending of the draft assessment order would only be an act in furtherance of that intention or opinion; the non-enclosing of the draft assessment order cannot be taken to mean that no opinion was formed by the Assessing Officer that the special audit was not required in the petitioner's case. The statement of the income tax authorities that the draft assessment order was not enclosed with the final report is, therefore, of no consequence.

26. We must refer to one aspect here. It is perhaps possible to contend that even assuming that in the final report dated 26.12.2011 the first respondent had expressed an opinion that no special audit was necessary, the same not having been communicated to the petitioner, the petitioner cannot rely upon the same. The relevant statutory provisions do not contemplate the communication of the negative opinion formed by the Assessing Officer (that special audit was not required) to the assessee.

However, we are not herein concerned with the question whether such communication was statutorily or even administratively required. The relevant enquiry to be made is only whether the Assessing Officer did form an opinion one way or the other regarding the need for special audit. Once that opinion has been formed and it is part of the record, it binds the Assessing Officer. It is not open to him to deny the fact. Thus the first question posed by us is answered in the affirmative.

27. If our conclusion that the Assessing Officer on 26.12.2011 did form an opinion that no special audit was required in the petitioner's case is correct, there is an end of the matter and the approval granted by the CCIT on 27.12.2011 and communicated to the Assessing Officer through the CIT on 28.12.2011 is without any effect. It is a nullity. However, it is necessary to examine the question whether it is open to the Assessing Officer, having already formed an opinion that no special audit was necessary, and not having communicated the same to the petitioner, to change his mind and form an opinion subsequently that a special audit is necessary having regard to the complexities of the accounts and the protection of the interests of the revenue. We will proceed on the assumption that it is permissible to the Assessing Officer to do so as prospector or guardian of the revenue since protection of the interests of the revenue is one of the two criteria for reference to the special auditor. Even if we assume so in favour of the revenue, in the present case it would be difficult to justify the change of opinion. There are

impediments to accepting the claim that the change of opinion was justified. Firstly, the earlier opinion that no special audit was required was expressed by the Assessing Officer on 26.12.2011. It was by a reasoned report in which the reply of the petitioner to the show cause notice was discussed in detail and an unambiguous opinion was expressed by the Assessing Officer. He had also expressed his view that he would continue with the assessment proceedings and obtain details and clarifications from the assessee pursuant to the notices and queries raised by him earlier. He had expressed very confidently that he is capable of taking care of the interests of the revenue, by examining the issues raised in the show cause notice in the course of the assessment proceedings themselves. In this background, if the revenue wishes to put forth a contention to the effect that there was a change of opinion on the part of the Assessing Officer, that should naturally be supported by very strong evidence or drastic change in the factual or legal position. What we however find is that when on 27.12.2011 the first respondent herein sent a report to the concerned CIT stating that there were complexities in the accounts and the interests of the revenue needed protection and therefore he was submitting a proposal for special audit, he ought to have pointed out to the material or evidence or the compelling circumstances under which he had changed his mind, that too, overnight. The fact that the earlier opinion was changed overnight is a clear pointer to the position that there could have been no such new facts or change in the legal position which could have compelled a change of mind. Moreover, the

Assessing Officer was under a duty to overcome his own reasons given just a day before as to why there was no need for a special audit, which duty he has not been able to discharge. A perusal of the letter dated 27.12.2011 written by the Assessing Officer to the CIT shows that the reasons given by him for a change of mind are very vague and unconvincing. He has merely stated that on going through the books of accounts, the audited financial results and the balance sheet and profit and loss account "certain complexities have been noted in the accounts of the assessee". He has thereafter referred to the four issues on which special audit was required. In the second paragraph of the letter he has referred to the reply submitted by the petitioner on 26.12.2011. Thereafter, it has been stated that "the submissions of the reply needs detailed examination in view of the complexity of the accounts". Apparently, the Assessing Officer was referring to the reply submitted by the petitioner on 26.12.2011 in the course of the assessment proceedings fixed on that date. In this reply the petitioner has submitted its response to the four issues raised by the AO in the course of the assessment proceedings on 19.12.2011. This reply was not in response to the show-cause notice issued under Section 142(2A) on 21.11.2011; in fact it could not have been, because in the said show-cause notice, the AO did not raise the issue of sundry credits and unsecured loans appearing in the balance-sheet. There, he had raised issues which were different, except one issue, which was common to the notice issued on 19.12.2011, which is the issue relating to reimbursement of the expenses amounting to ₹25.40 crores. This consists of the two

amounts of ₹24,19,70,094/- and the service charges of ₹1,20,98,508/-. So far as these amounts were concerned, though they were included in the show-cause notice issued under Section 142(2A) and also in the letter dated 19.12.2011, the show-cause notice stood terminated by the final report submitted by the AO on 26.12.2011. The four issues raised in the letter dated 19.12.2011 were the reimbursement of the expenses of ₹24.19 crores, reimbursement of service charges of ₹1.20 crores, the sundry credits of ₹2.14 crores and unsecured loans of ₹1.11 crores. The letter dated 19.12.2011 was only a letter seeking clarifications from the petitioner on these four points in the course of the assessment proceedings, and cannot be read as, nor was it purported to be, a show-cause notice under Section 142(2A). The result is that in respect of these four points raised in the letter of 19.12.2011, which was replied to by the petitioner on 26.12.2011, there was no opportunity given to the petitioner to show cause as to why special audit shall not be directed. The proviso to Section 142(2A) envisages a show-cause notice wherein it is necessary for the AO to make out a case of complexity of accounts and protection of the interests of the revenue and it should be open to the assessee to show that none of the two criteria is satisfied. That opportunity was not afforded to the petitioner because the AO proceeded to send the proposal for special audit on 27.12.2011 to the CCIT through the CIT concerned, just one day after the petitioner wrote the letter to him in the course of the assessment proceedings. The proposal thus suffers from, and is vitiated by, the lack of opportunity to the petitioner which is statutorily mandated.

28. Further, we are afraid that there are circumstances to indicate that the opinion formed by the Assessing Officer on 27.12.2011 was not his own. Apart from the fact that the opinion was changed overnight, the reasons given for the change of opinion are unconvincing and vague. It merely says that there is complexity in the accounts without demonstrating how. It is also noticed that there was a flurry of activity on 27.12.2011. The Assessing Officer gave reasons as to why he changed his mind; his communication was forwarded to the JCIT who in turn forwarded it to the concerned CIT on the same day i.e. 27.12.2011. On the very same day, the CIT forwarded the proposal to the CCIT. Per se, this may not be a suspicious situation and having regard to the urgency of the matter, it was perhaps expected of the revenue authorities to expedite. However, the CCIT took no time to give his approval to the special audit. He overlooked that no notice had been given by the AO to the petitioner under Section 142(2A) before forwarding the proposal on 27.12.2011. This shows non-application of mind on his part. He approved the proposal on the same day, namely, 27.12.2011. The fact that the CCIT has also approved the proposal on 27.12.2011 itself is borne out by the endorsement made by him on the note put up by the ACIT (Headquarters, CCIT-XI). The signature of the ACIT who put up the note bears the date 27.11.2011 and immediately below the same is the endorsement of the CCIT reading as follows:

*"ACIT Circle 31(1) note & other facts are perused carefully. Note is initialled. This is a fit case for complete audit as per provisions of Section 142(2A) of the IT Act".*

*Sd/-*
*27.12.2011"*

We are also aware that the assessment proceedings were getting barred by time on 31.12.2011. The Assessing Officer had fixed the hearing on 28.12.2011. It was on that day i.e. 28.12.2011 that the approval of the CCIT to the special audit proposal was communicated to him. This extended the period of limitation for completing the assessment. This is an aspect which has to be kept in view.

29. Having regard to the above circumstances, we find it difficult to accede to the proposition that the CCIT could have applied his mind in such a short period of time to the proposal put forward by the Assessing Officer on 27.12.2011; both the proposal and the approval bear the same date. In these circumstances, there could not have been a serious application of mind on the part of the CCIT. It was merely a ritualistic or mechanical approval given by the CCIT. That is contrary to the law laid down by the Supreme Court in Sahara India (Firm) (supra).

30. The petitioner attempted to discredit and impeach the proceedings before the first respondent and the correspondence between the first respondent and the CIT/CCIT on the ground that the records/correspondence had been tampered with to cover up the lapses,

both procedural and substantive, in complying with the strict requirements of Section 142(2A). For instance, the petitioner contends that the initial proposal on 26.12.2011 vide letter No.CIT-XI/Spl. Audit/2011-12/2333, for special audit, had been moved by the CIT and not by the first respondent and does not bear reference to any assessee. In the view we have taken regarding the validity of the direction for special audit for the reasons given earlier, we do not consider it necessary to examine those issues and record our conclusions.

31. In the light of the foregoing, our answer to the other questions posed by us in paragraph 17 (supra) are as follows: -

Question No.2: There is nothing on record to show that there was any fresh development between 26th December and 27th December, 2011 compelling the AO to change his mind and come to the conclusion that "certain complexities have been noted in the accounts of the assessee" and therefore special audit was required to be carried out.

Question No.3: In any event, it was incumbent on the AO to issue another show-cause notice to the petitioner u/s 142 (2A), after he changed his mind and proposed special audit on 27.12.2011, and invite the petitioner's objections.

Question No.4: The record demonstrates no application of mind by the CCIT before granting approval to the proposal for special audit sent by the first respondent to him on 27.12.2011.

Question No.5: The impact of the answer to the above four questions would be that the approval granted by the CCIT on 27.12.2011 for special audit is of no effect and is a nullity.

32. For the above reasons, the direction for special audit issued by the first respondent on 28.12.2011 and the order dated 29.12.2011 containing the terms of reference to the special auditors are hereby quashed as also all further proceedings consequent thereto.

33. The writ petition is accordingly allowed with no order as to costs.

**(R.V. EASWAR)**
**JUDGE**

**(S. RAVINDRA BHAT)**
**JUDGE**

**OCTOBER 15, 2012**
Bisht/mm