

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

Decided on: 08.04.2019

+ **W.P.(C) 592/2019 & C.M. APPL.2622/2019**

NATIONAL PROJECTS CONSTRUCTION CORPORATION
LIMITED (NPCC)Petitioner

Through : Mr. Tarun Gulati, Mr.
Yashwant Singh and Ms. Sparsh Bhargava,
Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ANR.

...Respondents

Through : Mr. Ruchir Bhatia, Sr. Standing
Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

MR. JUSTICE S. RAVINDRA BHAT

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1. In the present writ petition, the validity of an order under Section 142(2A) of the Income Tax Act (hereafter referred to as "Act") issued by the Assessing Officer (hereafter referred to as "AO") on behalf of the respondent (hereafter referred to as "Revenue") has been challenged. The petitioner, a Public Sector Undertaking (PSU) and hereafter called "NPCC", urges various grounds, including non-application of mind and unfairness by the AO.

2. The NPCC filed its return for Assessment Year (AY) 2016-17 on 16.10.2016 declaring a total income of ₹18,02,20,380/-. Later, it revised its

return on 29.03.2018 to reflect the correct TDS credit available based upon the AS-22 receipts. The return was selected for scrutiny and the notice was issued on 07.09.2018 by the Revenue. The NPCC was asked to produce the documents it relied upon in respect of its returns. It submitted – on 20.09.2018 computation of income and audit financials in respect of return of income. Another notice calling for information was issued by the Revenue on 29.09.2018. The NPCC uploaded the information and documents, in the Revenue’s web-portal – in response to this notice (of 29.09.2018) on 21.11.2018. A week later, i.e. on 28.11.2018, the Revenue called for particulars with respect to the following four items:

“a. Furnish in the prescribed manner details of Party wise work done along with PAN details and ledger of the parties.

b. Provide details of other expenses along with bills and vouchers of the expenses and its applicability towards the business to the tune of Rs.100.75 crore.

c. Provide partywise details of the long term advances shown at note no. 10 and 11 of the balance sheet.

d. And, provide justification and details of huge increase in cash and cash equivalent along with evidences.”

3. The NPCC contends that when it was in the process of collecting relevant information from the concerned zonal officer, another notice was issued on 04.12.2018 electronically by the Revenue outlining the ten key points and calling for information which included evidence regarding adverse comments given by the auditor; party-wise details of the liabilities showing in the balance sheet under the head trade-payables, security deposits, advances from project authorities, interest accrued and due on

advances from project authorities along with respective ledger accounts of parties and their confirmation; copy of sales tax/VAT returns for the year with details of the sales tax payment; project-wise details of entire works undertaken during the year with separate profit and loss accounts of each projects; write-ups of the *modus operandi* of business and comments on method of accounting of receipts and expenses. The petitioner submits that it could furnish the information on 11.12.2018. According to NPCC, the queries were satisfactorily replied.

4. On 18.12.2018, a Show Cause Notice (SCN) was issued by the Revenue proposing a special audit, under Section 142 (2A), stating as follows:

“a. The NPCCC had not replied to the adverse comments of the auditors satisfactorily and thus the issues and apprehensions raised by the auditors remained unsatisfied.

b. Submissions of ledger confirmation of parties with their copy of ITR, audit report, B/S, P/L pertaining to liabilities shown in the balance sheet under the head trade-payable, security deposit advances from project authorities along with respective ledger account of parties and their confirmation remained unattended/un-addressed.

c. The NPCC had not provided project wise details of entire work undertaken during the year.

d. That despite of huge turnover in the last five years, the Net profit figure is going down.

e. Further it was also alleged that details of the liabilities as on 31.03.2016 were also not produced.”

5. The notice also stated as follows:

“In view of the abovementioned facts it is clear that the assessee has not disclosed its true nature of transactions with various zonal offices who have subcontracted the construction also pointed out by the auditor of the assessee. It is important to mention here that the documentary evidences relating the income and expenditure are not produced by the assessee nor any bills or vouchers were produced by it. Therefore, in view of the discrepancies pointed out by the statutory auditor of the assessee company itself in his audit report viz-a-viz noticed from the part details submitted by your AR during the assessment proceedings during the year under consideration, and in view of complexities involved in your books of accounts, nature of transactions and complexities involved in the business affairs, you are required to show cause as why your accounts should not be get audited by an accountant nominated by the Department as per provisions of section 142(2A) of the Income Tax Act, 1961 and why such accountant not be asked to furnish the report such audit in the prescribed form duly signed and verified by him, in the interest of revenue.

Your reply in the matter must be reached to the undersigned on or before 21.02.2018 failing which, it shall be construed that you have no objection to the proposed audit of your books of accounts by an accountant so nominated by the Department as per the provisions of the section 142(2A) of the Income Tax Act, 1961.”

6. A reply to the SCN was given by the NPCC on 21.12.2018. The reply stated that adverse comments of the auditor were general and it did not impact the profitability of the assessee and moreover it relied upon the report of the CAG on financial statements and audit report of the auditors for AY 2015-16 expressing satisfaction. With respect to the adverse comments, specifically the assessee relied upon a chart. With respect to the query regarding the head trade-payables, security deposits and advances from

project authorities, it was stated that the relevant material was already furnished but the copy of the ITR, audit report, balance sheet and P&L Account of the parties were not available with it. It was further explained that as far as the copy of sub-contractor and evidences for the competitive bidding for selection of sub-contractor was concerned, the record was very voluminous and difficult to arrange. Regarding long term liabilities, current liabilities and other liabilities, the NPCC submitted that the liabilities as shown in the balance sheet are the cumulative figures of current as well as the past many years, some of which were disputed and arbitration cases are going on. It was stated that the balances shown in liabilities are identified and unit/party wise detail was attached along with reply to the SCN. Regarding cessation of liabilities, it was explained that such a decision was taken consciously by the management. Furthermore, the NPCC further submitted that:

“It is further submitted that

- *The assessee company is a Government Company with 98.89% with Central Government and rest with State Governments.*
- *Directors of the company are appointed by Government of India and there is no motive to escape the income as all ultimately belongs to Govt. of India.*
- *The statutory audit is being done by the auditor appointed by CAG as per the provisions of the Section 139 of the Companies Act, 2013.*
- *Once the statutory audit is done, the Financial Statement along with Audit report of the Statutory Auditors have to be submitted before C&AG for Audit of the Financial Statements U/s 143(6)(a) of The Companies Act, 2013 and comments of C&AG has to be placed before AGM.*

- *The assessee company was assessed U/s 143(3) continuously for last 15 years and disclosing the true income in their return.*
- *The assessee company was a Sick Public Sector Undertaking within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) since 1980 till 2013. Even huge brought forwarded losses have been lapsed as there were on profit in the company for a long time.*
- *If you go through the 'Computation of Income' of the assessee, you'll find each and every small disallowance has been added back to calculate the Taxable Income of the assessee."*

7. Further replies were issued by the NPCC in the form of submissions on 26.12.2018 and 27.12.2018. On 28.12.2018, the AO passed an order directing special audit under Section 142(2A) of the Act.

8. The NPCC questions that order. Mr. Tarun Gulati, learned counsel argued that the AO without considering the NPCC's submissions passed the impugned order. He urges that the impugned order of special audit is based on inaccurate assumptions. Furthermore, serious exception is taken with respect to the procedure adopted and the denial of principles of natural justice.

9. Learned counsel urged that the impugned order was passed as a mere pretence with an intent to extend the limitation period for completing assessment proceedings since the issue was getting time-barred. The NPCC urges that special audit of accounts of NPCC can be ordered having regard to the nature and complexity of accounts, volume of accounts, doubts about the correctness of accounts or multiplicity of transactions in the accounts. Safeguard in the form of approval by the Principal Commissioner is also required.

10. Learned counsel submits that the mere fact there are numerous documents involved, would neither make them complex nor voluminous so as to justify the special audit. Likewise multiple transactions *per se* cannot be the basis of invoking the power to direct the special audit. It is urged that the special audit is an aid to assessment proceedings. It is also contested that no evidence was submitted to verify the liabilities shown in the balance sheets. Learned counsel urged that unit-wise details of trade payables security deposits and advance was submitted to the Revenue on 11.12.2018 and further details of advances unit-wise travel expenses details of advertising bills exceeding ₹1 crore etc. were furnished. The employee benefit expenses with names of employees, their relevant particulars etc. were furnished on 26.12.2018.

11. After the filing of the petition, the NPCC filed and relied upon an additional affidavit dated 01.02.2018, which *inter alia* reads as follows :

“2. That the Petitioner has challenged the Impugned Order signed on 28.12.2018 directing to get its books of account audited by a Special Auditor in terms of Section 142(2A) of the Income Tax Act, 1961 by way of the Writ Petition (C) No.592 of 2019. It is submitted that in addition to the pleadings already made in the Writ Petition, the Petitioner would like to bring to the notice of the court that it was only on 29.12.2018 that the Petitioner received an email from the Respondent No.1 intimating the authorisation for conduction of Special Audit u/s 142(2A) of the Income Tax Act, 1961. However, it is pertinent to note that a copy of the Impugned Order was not attached to the said email. Further, the Petitioner was merely sent a document attached to the mail highlighting 10 points and requesting to furnish details/evidences pertaining to the same. A copy of the email dated 29.12.2018 along with the attached document attached its annexed hereto and marked as

Annexure-1.

3. *Further, it was only at 1:16 P.M. on the 31.12.2018 (the very date on which the limitation to culminate the assessment proceedings in the Petitioner's case was expiring) that the Petitioner received another mail wherein a copy of the Impugned Order was attached. However, it is also pointed out that the Annexure A referred to in the order was not a part of the attachment received. A Copy of the email dated 31.12.2018 along with the attachment is annexed hereto and marked as Annexure-2. Further, the screenshot on the Department's e-filing portal reflecting the dates in the matter is annexed hereto and marked as Annexure-3."*

12. The Revenue's position is that the impugned order is justified. It refutes allegations relating to unfair procedure, and points out that the order directing special audit was admittedly received by the assessee on 31.12.2018. It is submitted that apart from the procedural fairness, on the merits the order cannot be questioned, because it was made in *bona fide* exercise of power. The replies to queries such as detailed party wise particulars, travel particulars details (and not mere particulars, unit wise) were not furnished. Mr. Ruchir Bhatia, learned counsel for the Revenue also urged that the mere circumstance that NPCC's returns for a number of years were framed after scrutiny, or that it was a public sector unit of the Central Government, did not in any manner deflect from the fact that its returns had to be tested in the light of actual evidence. Mr. Bhatia denied allegations of denial of natural justice and submitted that though there may be a dispute with respect to the receipt of the annexure to the order (outlining the terms of reference to the special auditor) even then, assuming the petitioner were correct, it could always have approached

the Revenue and obtained a copy of it. Counsel also produced the original file and submitted it for consideration of the court.

13. This Court has considered the original file which discloses that after receipt of SCN on 18.12.2018, reply was filed on 25.12.2018; the petitioner's representative approached the AO and submitted voluminous documents manually, in terms of a previous letter of the same day. The AO had proposed audit by letter of 25.12.2018 which was forwarded by the Additional Commissioner to the concerned Principal Commissioner. On 26.12.2018, the Principal Commissioner, by separate letter addressed to the Additional Commissioner granted approval which was then forwarded to the AO. The Court also noticed that the letter addressed by the AO seeking permission dated 24.12.2018 is a detailed one outlining and reproducing the reasons and particulars contained which were eventually contained in the final order.

14. This Court also had the benefit of considering the notesheet and copies of the final order which are on the record. It is evident that the final order was issued and received on 28.12.2018 by the concerned Chartered Accountant, who had to conduct the special audit; the endorsement of the petitioner's representative dated 28.12.2018. The file contains a photocopy of the order [under Section 142(2A)] signed by the petitioner's representative dated 25.12.2018 and a second copy of the order – containing the final order, with an endorsement of the special auditor's/CA firm designated for special audit. There is another second copy of the terms of reference along with that order – that too contains the endorsement of the said CA firm. Given all these circumstances, it

appears that the petitioner's complaint with respect to non-furnishing of terms of reference is merited. At the same time, this doubt cannot be used entirely to invalidate the order under Section 142(2A). The reason is that the petitioner became aware that the order was made on 28.12.2018; copy was received by its representative subsequently. The letters on record addressed by the petitioner's representative CA firm – the earliest of which is dated 04.01.2019 nowhere reflect a complaint that the annexure to the order containing the terms of reference was withheld. On the other hand, requests for inspection were made of the assessment file and certain other documents. Those letters significantly do not contain any grievance in that regard. Even otherwise, having received a copy on 31.12.2018, the petitioner could easily have sought to obtain a copy of the terms of reference.

15. As far as the merits of the order is concerned, this Court notices that to say that a special audit was needed, the AO has given several reasons. The first one is that several anomalies were noted in the books of accounts which led to questionnaires eliciting information. According to the AO, on examination of details, it was felt that the accounts were complex, for several reasons, It was stated that the company repeatedly reported losses for a long time in its core activity, i.e. construction business and stated that it was a sick company and had regained its net worth in 2012-13; and NPCC also stated that the market conditions were depressing and by way of comparison refers to the performance of the Engineering Projects India (EPI). The AO noticed that the income had not been reported by the assessee and it was only carrying losses and that

if any positive result in the P&L account existed it was on account of income from other sources. With respect to the company being sick, it was reasoned that there was nothing on record that showed heavy losses on account of huge burden of liabilities of earlier years. It was further noticed that that performance of EPI on the one hand compared to that of the NPCC was not justified since the bills of income etc. of EPI were not known.

16. The AO *inter alia* stated in the order that:

“9.3 Huge trade liabilities shown in the balance sheet:

<u>S.No</u>	<u>Particulars</u>	<u>Amount</u>
1	Long term liabilities	8,69,55,84,34 5/-
2	Current liabilities	7,00,35,77,99 0/-
3	Other current liabilities	43,38,14,031/-

During the course of assessment the assessee neither produce any cogent evidences to explain these liabilities nor the confirmation along with relevant details were furnished. So the identity and genuineness of these liabilities was not ascertained. The auditor of the assessee company had also made certain adverse comments regarding these liabilities and had pointed out the systemic defect in ascertaining of these liabilities. Further the auditor has also pointed out the pendency of certain court cases against these liabilities. But no details were furnished. So the assessee was vide the show cause u/s 142(2A) was asked to furnish the details with explanation. In response to the query the assessee vide his reply dated 21.12.2018 stated as under :-

"With reference to the query no. 3 of the questionnaire dated 04.12. 2018, it is submitted that unitwise detail of Trade Payable, Security Deposit and Advance from Project Authority were submitted as Annexure-3 on 11.12.2018, however the copy of the JTR, Audit Report, Balance Sheet, Profit & Loss Account of the parties are normally not available with the assessee.

As far as copy of sub-contractor and evidences for the competitive bidding for selection of subcontractor is concerned in this regard it is submitted that the record is so voluminous therefore it is quite difficult to arrange the same within the lime allowed by AO i.e. 2 days. The copy of contract agreements with some sub-contractors are attached herewith for your kind reference.

In reference to the selection of sub-contractor is concerned it is submitted that the assessee is following the guidelines issued by CPWD for selection of the sub-contractors as well as the instructions issued by the vigilance in respect of award of the work to sub-contractors. Please find attached herewith as (annexure-5) the sample for notice Inviting Tender (NIT) for your kind reference.

In reference to the Long Term Liabilities, current Liabilities and other current liabilities are concerned in this regard it is submitted that the liabilities as shown in the Balance Sheet are the cumulative figures of current as well as past many years, some of them are disputed and arbitration cases are going on. Similarly there are some amount recoverable from them but adjustment cannot be carried out because of the court cases are going on. The balances shown in liabilities are identified and unit/party wise detail is attached herewith as (Annexure-6) for your kind reference please.

It is further submitted that the assessee company is regularly writing back the liabilities when it is established that it is no more payable as all and no further litigation is pending. The liabilities written back during the year under consideration is Rs. 2,06,0,57251- and the same has been shown under head of other income (Note 17 to the financial statement) in profit and

loss account and the same has also been taxed during the year under consideration.

The assessee company submission on this account is perused and found untenable as it has not submitted any evidence so as to verify the genuineness of these liabilities. Furthermore it will not out of place to mention that the onus was on the assessee to furnish the evidence relating to identity and genuineness of these transactions. Furthermore, the assessee could have justified the genuineness of these liabilities by furnishing the evidences relating the payments of these liabilities in the subsequent years. Not only it should establish the identity and genuineness of these transactions.

9.4 Adverse comments of the auditor in the audit report :-

The auditors had made certain adverse comments in the audit report regarding various aspect of account of the assessee company. The assessee vide show cause letter dated 18.12.2018 was asked to furnish replies/comments adverse comments.

In response to the query the assessee in its submission dated 21.12.2018 gave vague comments such as

i) Reconciliation of accounts is a continuous process and the company calls a remittance reconciliation meet every year to reconcile the balance.

ii) The company has the proper system of intra/inter zone/unit reconciliation. Intra/Inter unit reconciliation is being done at corporate office yearly. The instance quoted in the para pertains to F. Y 2012-13. Necessary corrective action has already been taken in earlier years. The copy of the JE has already been submitted as annexure-4 in our reply dated 11.12.2018. There is no impact on the profitability of the current year.

iii) The point does not pertains to the F. Y 2015-16, therefore no impact on the profitability of the company for the year under consideration.

iv) The amount of 14.22 lakhs is recoverable from previous Statutory Auditors of the Company. Neither having impact on the P&L Account nor pertains to the year under consideration.

On perusal of the above reply it can be seen that no specific reply with documentary evidences has been furnished by the assessee on these comments of auditor.

9.4 Other issues as submitted by the assessee in its submission dated 21.12.2018.

- *The assessee company is a Govt. Company with 98.89% with Central Govt. and rest with State Govt.*
- *Directors of the company are appointed by Govt. of India and there is no motive to escape the income as all ultimately belongs to Govt. of India.*
- *The statutory audit is being done by the auditor appointed by CAG as per the provisions of the section 139 of the Companies Act, 2013.*
- *Once the statutory audit is done, the Financial Statement along with Audit report of the Statutory Auditors have to be submitted before C&AG for Audit of the Financial Statements u/s 143(6) (a) of the Companies Act, 2013 and comments of C&AG has to be placed before AGM*
- *The assessee company was assessed u/s 143(3) continuously for last 15 years and disclosing the true income in their return.*
- *The assessee company was a Sick Public Sector Undertaking within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA.) since 1980 till 2013. Even huge brought forwarded losses have been lapsed as there were on profit in the company for a long time.*
- *If you go through the 'Computation of Income' of the assessee, you will find each and every small disallowance has been added back to calculate the Taxable Income of the assessee.*

The assesses above mentioned submission does not find merit on the simple ground that each assessment year is a separate assessment year and the assessment proceeding has nothing to do with the past assessment years unless or until the transaction related to past year has an impact on the transactions and business affairs of the current year.

10. Further it is held by judicial authorities all over the country that assessing officer is duty bound to determine the correct income/loss of each assessment year of an assessee. The

purpose of direction for special audit is to ensure that a correct assessment order is passed so that revenue is not deprived of its dues. The direction to the Assessee for compulsory audit of accounts u/s 142(2A) of the Income Tax Act does not affect the Assessee's right especially in view of the fact that cost of audit is not payable by the Assessee but by the department and therefore, assessee's interest are not affected in any way except to the extent of correct determination of taxable income ..

11. In view of the above discussed facts the statutory provisions with regard to ordering of special audit is satisfied in this case in view of the basic two ingredients i) Nature and complexity of accounts, its voluminous and multiplicity of transactions ii) Interest of the revenue for forming an opinion for the purpose of special audit u/s 142(2A) is satisfied in this case.

17. Sections 142(2A) to (2D), 142(3) and 142(4) are relevant with respect to what considerations weighed while directing special audit in the provision titled “*Inquiry before Assessment*”. The guiding principles regarding conduct of special audit and the nature of orders to be made were dealt with by the judgments of the Supreme Court in *Sahara India (Firm), Lucknow v. Commissioner of Income Tax* 2008 (300) ITR 403 (SC). The Court had underlined that the opinion required to be formed must be based on objective criteria and ought not to be subjective satisfaction. It was also stated that the AO cannot merely shift his responsibility of scrutinizing account and pass the buck to the special auditor. The Supreme Court further emphasized that before concluding the accounts that are complex or difficult to understand there should be a genuine attempt on part of the AO to understand the accounts maintained by the assessee appreciating the entries made and in the event of doubt seek explanation. In the present case, the nature of proceedings which

culminated in the passing of the order under Section 142(2A), to this Court's mind, do not show any unfairness; they in fact highlight that the AO started the enquiry to understand the claims of the assessee as far back as in September. In fact, the notice seeking detailed facts issued in late September 2018 could be replied with the relevant details only after two months, i.e. 21.11.2018 by the NPCC. Thereafter too, on not less than three occasions, the AO called for further details. The process of receiving these details continued – even after the issuance of the SCN on 18.12.2018. The last of these documents was in fact given on 21.11.2018. In these circumstances, it cannot be said that there was no genuine attempt on part of the AO to understand the nature of the assessee's business; its method of accounting or to understand the nuances of its books or documents. So far as the reasons given by the AO are concerned, this Court is of the opinion that the NPCC's argument that the conclusion amounts to mere pretence is unwarranted. The extract of the order (para 9.3 to para 11) clearly reflect the AO's reasoning. The inability of the assessee to provide particulars with respect to various units (in regard to each of which it had claimed substantial deductions by way of expenses) as well as the adverse remarks made by the NPCC's auditor do amount to voluminous evidence which also present complexity of the accounts that needed a close scrutiny.

18. For the above reasons, this Court is of the opinion that there is no merit in the writ petition. Furthermore, a perusal of the original file produced by the Revenue would disclose that even as late as in the third week of January, the special auditor designated by the AO, was

repeatedly calling for details; the AO had sought for the order to be kept in abeyance. Eventually, this Court had stayed the direction to conduct special audit. In these circumstances, the time during which the present writ petition was pending, i.e. 17.01.2019 till today shall be excluded for the purpose of computing the period of limitation to carry on and conclude the special audit. The writ petition is, therefore, dismissed. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

APRIL 8, 2019

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