

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 13.05.2010
Judgment Delivered on: 25.05.2010

+ **WP.(C).2560/2008**

DHANESH GUPTA & CO. ... Petitioner

- versus -

COMMISSIONER OF INCOME TAX(C) & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr.U.N.Bachawat, Sr.Advocate, Mr.P.D.Gupta,
Mr.A.K.Tiwari, Mr.JainulAbdin & Mr.Manu K.Giri, Adv.
For the Respondents : Mr.Percy J.Pardiwala, Sr.Advocate, Mr.Satyen Sethi,
and Mr. Arta Tarana Panda, Adv.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

V.K. JAIN, J.

1. The petitioner before this Court is a firm of Chartered Accountants. The Assessing Officer of respondent No.3, Sahara India Financial Corporation Limited, in the course of assessment proceedings, sought approval of respondent No.1, Commissioner of Income Tax, to get the accounts of respondent No.3 audited under Section 142(2A) of Income Tax Act, for the Financial Years 2002-03 and 2003-04. While granting requisite permission, respondent No.2 determined the

fee, payable to the petitioner on the basis of the scale prescribed by the Institute of Chartered Accountants of India (hereinafter called "the Institute") for such work. According to the petitioner, before nominating it as the Special Auditor, respondent No.1 called its Senior Partner, Shri Dhanesh Chand, sought acceptance of the assignment and fixed remuneration at the scale prescribed by the Institute. However, in the Appointment Letters issued to the petitioner there was no mention of the remuneration payable to it. The petitioner, therefore, accepted the assignment, subject to the condition that the remuneration would be paid to it as per the scale prescribed by the Institute. It is also the case of the petitioner that soon after receipt of the acceptance letter sent by it, a meeting of respondents 1 to 3 was convened in the Chamber of respondent No.1 which was attended by one Shri R.S. Dubey, on behalf of respondent No.3, and the remuneration, payable to the petitioner at the scale prescribed by the institute was fixed in that meeting. The petitioner completed the assignment for the Financial Year 2002-03 and raised a bill of Rs.49,94,419/-, based upon the scale prescribed by the Institute. The bill was duly paid by respondent No.3 and the petitioner also paid the service tax,

which it had recovered from respondent No.3 in respect of that bill. The petitioner was, thereafter, asked to give justification for the bill raised by it. The petitioner furnished justification stating therein that the fee was to be charged as per the scale approved by the Institute and that the Commissioner of Income Tax had also confirmed payment of fee at that scale. A meeting was then held in the office of respondent No.1 on 10th April, 2007, which was attended by Shri K.G.Somani, Special Auditor of Sahara India, and Mr.R.K.Nahata, Special Auditor of Sahara Airlines Limited, who had no concern with the audit of respondent No.3 Sahara India Financial Corporation Limited. Respondent No.1 left the meeting at about 1.00 p.m. saying that the meeting should continue in his presence. In the meeting Mr.Somani and Mr.Nahata, who were the Special Auditors for Sahara India and Sahara Airlines Limited respectively, agreed to accept fee of Rs.20 lakhs each for each financial year that were assigned to them for special audit. The representative of the petitioner, however, did not agree to that figure. However, in the minutes drawn by the, Additional Commissioner of Income Tax, it was mentioned that the petitioner had also agreed to fee of Rs.20 lakhs for each financial year. Since the petitioner was practicing in taxation,

he could not refuse to sign the minutes drawn up by the Additional Commissioner, though he had not agreed to accept fee of Rs.20 lakhs for each financial year. The petitioner, thereafter, wrote a letter to respondent No.1 informing him that its representative Shri Dhanesh Chander was not comfortable with the figures mentioned in the minutes. The petitioner, however, did not commence work for the Financial Year 2003-04 awaiting response to the letter sent by him to respondent No.1. He, however, was called by respondent No.2, the Assessing Officer of respondent No.3 and asked to start the work since he had already written to the Department about the fee that would be acceptable to him. The petitioner, thereafter, completed the assignment in respect of the financial year 2003-04 and submitted a bill for Rs.44,69,447/- for that year.

2. Vide order dated 26.07.2007, respondent No.1 determined the remuneration of the petitioner for the financial year 2002-03 at Rs.20 lakhs. A similar order was passed by him on 18.09.2007 in respect of financial year 2003-04. Consequent to the aforesaid orders being passed by respondent No.1, respondent No.3 demanded refund of Rs.8,80,995/- from the petitioner. Since respondent No.1, despite request of the petitioner, has not recalled the orders passed by him fixing the

remuneration at Rs.20 lakhs each for the financial year 2002-03 and 2003-04, the petitioner is seeking quashing of those orders and payment of the balance amount to him, along with interest thereon. He is also seeking a direction to respondent No.1 to take steps in terms of Section141(2D) of the Act in case of default by respondent No.3 in making payment to the petitioner.

3. The petition has been contested by the respondents. Respondents No.1 & 2 in an affidavit filed by Shri Rajesh Kumar, Assistant Commissioner of Income Tax have stated that the impugned order was passed in the presence of the representative of the petitioner who had consented to the same and the petitioner, is, therefore, estopped from challenging the said order. They have denied that respondent No.1 had fixed the remuneration payable to the petitioner at the scale prescribed by the Institute, before nominating it as the Special Auditor. It has also been claimed that the order was passed by respondent No.1 having regard to the scale of fee prescribed by the Institute in this regard.

4. In their counter-affidavit filed through one Mr.J.B.Roy, respondent No.3 has stated that the noting made by respondent No.1 in the order-sheet cannot be construed as

fixation of remuneration payable to the Special Auditor. As regards the meeting alleged to have taken place in the office of respondent No.1 shortly after acceptance of assignment by the petitioner, it has been stated that in the meeting Mr.R.S.Dubey was only introduced to Mr.Dinesh Chand, partner of the petitioner firm and the remuneration was not discussed. Respondent No.3 has denied any kind of pressure on the petitioner in agreeing to the fee of Rs.20 lakhs in the meeting held on 12.04.2007. Admitting payment of Rs.48,80,995/- to the petitioner, the respondent No.3 has claimed that it was entitled to refund of the excess payment made by it to the petitioner.

5. Section 142(2D) of the Act provides that 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 of Income Tax, which determination shall be final, and shall be paid by the assessee and in default, such payment shall be recoverable from the assessee in the manner provided in Chapter XVII-D for the recovery of the tax.

6. Admittedly, the special audit of respondent No.3 was directed under Section 142(2A) of the Act. Logically, the

remuneration payable to the Special Auditor or at least the parameters on which such remuneration is to be determined need to be fixed before the audit is assigned to him. The auditor, to whom the work is assigned, is not under any obligation to accept the assignment and is very much at liberty, while making offer for appointing him as Special Auditor or while accepting the assignment, to insist upon payment of such fee as he may deem adequate for the work assigned to him. Therefore, necessarily he needs to know, what will be paid to him for the work proposed to be assigned to him. If the remuneration demanded by the person proposed to be appointed as Special Auditor is not acceptable to the Chief Commissioner or the Commissioner, as the case may be, he may not assign the work to him. But it would be difficult to accept that the special audit can be assigned to a person without fixing either the remuneration or the norms on which the remuneration is to be calculated after the work is completed and conveying the same to him. Taking such a view would amount to giving an arbitrary power to the Chief Commissioner or the Commissioner, as the case may be, to fix any fee which he may decide to fix irrespective of the quantum of the work and the scale on which the remuneration is to be

determined taking the quantum of work into consideration. This, to our mind is not the scheme of Section 142(2D) of the Act.

7. It is not in dispute that while granting approval to the Assessing Officer for conducting special audit for respondent No.3 for the assessment year 2003-04, Mr.S.Pradhan Commissioner of Income Tax, (Central)-1, New Delhi, had, in the file of the department, directed that the charges of the audit would be based on the guidelines of the ICAI with regard to the audit. Admittedly, a similar direction was given by him on 26.12.2009 while granting approval for special audit in respect of the assessment year 2004-05.

8. It was not disputed before us by respondents No.1 & 2 that the petitioner had conveyed formal acceptance to its appointment as Special Auditor for the Financial Year 2002-2003 vide letter dated 20.03.2006 which was duly received in the office of Assistant Commissioner of Income Tax, (Central)-1 on 21.03.2006. Similarly, formal acceptance for the appointment as Special Auditor for the Financial Year 2003-04 was conveyed to the Commissioner vide letter dated 29.12.2006 which was received in the office of Deputy Commissioner of Income Tax, Central Circle-6 on 03.01.2007.

Admittedly, the petitioner submitted its bill amounting to Rs.49,44,419/- in respect of the special audit for the Financial Year 2002-03. Admittedly, on being asked to justify the amount claimed in the bill, the petitioner wrote a letter dated 03.04.2007 to Deputy Commissioner of Income Tax Central Circle-6 stating therein that the scale of fee for the audit work was discussed with him, CIT (Central)-I, Additional CIT and Mr.R.S.Dubey where it was confirmed by the CIT that the fee would be in accordance with the scale prescribed by the Institute and the same was duly informed to Mr.R.S.Dubey in that meeting. It was clarified that the fee had been charged accordingly on the basis of that scale.

9. In case the remuneration of the petitioner had not been fixed as per the scales of the Institute, respondents No.1 & 2 would have withdrawn the assignment from the petitioner when it wrote the letters dated 20.03.2006 and 29.12.2006 stating therein that their fee for the assignment shall be in accordance with the scale of fee prescribed by the Institute. Alternatively, respondents No.1 & 2 would have written back to the petitioner informing it that no decision had been taken in respect of the remuneration payable to it and that it will have to accept such remuneration as may be fixed by the Chief

Commissioner/Commissioner after the audit had been completed. The failure of respondents No.1 & 2 to take either of these courses of action clearly shows that the Commissioner had actually taken a decision to pay the remuneration at the scale prescribed by the Institute as he had noted in the file of the department and that precisely was the reason that the department did not raise any objection to the stipulation contained in the acceptance letter sent by the petitioner to the department. The case of respondent No.3 in this regard is that the decision of the Commissioner, to fix remuneration of the petitioner at the scale prescribed by the Institute, was not conveyed to it. The scheme of the Act, in our view, does not envisage any consent being obtained from the assessee in respect of the remuneration payable to the Special Auditor nor does it envisage any consultation with him before determining the said remuneration. The decision of the Chief Commissioner/Commissioner, with respect to the remuneration payable to the Special Auditor is final and binding upon the assessee.

10. The case of the petitioner in this regard is that in a meeting, held in the chamber of respondent No.1, Mr. R.S. Dubey, representative of respondent No.3 was informed not

only of the appointment of the petitioner as Special Auditor, but also that the remuneration will be payable to it, at the scale prescribed by the Institute. Respondent No.3 has not filed the affidavit of Shri R.S. Dubey to controvert the averment made by the petitioner in this regard. This averment has not been made for the first time in the writ petition. As noted earlier in its letter dated 03rd April, 2007, the petitioner specifically averred that in the meeting held in the office of respondent No.1, Mr R.S. Dubey was informed that the fee would be paid to it in accordance with the scale prescribed by the Institute. No other officer of respondent No.3 can be in a position to deny this factual averment made by the petitioner. Respondents 1 and 2 have also not filed an affidavit of any officer present in that meeting to controvert this averment. In its counter-affidavit, respondent No.3 has not disputed the meeting, claimed by the petitioner. The plea taken by respondent No.3 in this regard is that in the meeting, Mr R.S. Dubey was only introduced to Mr. Dinesh Chander Gupta, partner of the petitioner and that the issue of remuneration was not discussed in that meeting. Considering that the factum of such a meeting having taken place has been admitted by respondent No.3, no affidavit of Mr. R.S. Dubey

has been filed in reply to the averments made by the petitioner and this averment also finds mention in the letter written by the petitioner to the Department on 03rd April, 2007, we are of the view that Respondent No.3 was, in fact, informed through Mr. R.S. Dubey that the remuneration payable to the petitioner would be calculated in terms of the scale approved by the Institute in this regard. That, to our minds, was the reason why respondent No.3 paid the bill raised by the petitioner in respect of Special Auditor for the financial year 2002-03, without making any deduction and without lodging any protest. Once respondent No.1 had decided to fix remuneration of the petitioner at the scale approved by the institute or had agreed to the demand of the petitioner for payment of remuneration to be calculated on that scale, it was not open to respondent No.1 to fix remuneration of the petitioner at an amount lower than the minimum amount, calculated in terms of the scale approved by the Institute for this purpose. During the course of the arguments, we were informed that the scale, approved by the Institute for such work w.e.f. 12th May, 2006, envisages payment (i) to the Principal between Rs 2250/- to Rs 4500/- per hour, (ii) to Qualified Assistants between Rs 1125/- to Rs 2250/- per hour and (iii) to Semi Qualified/other

Assistants Rs 375/- to 750/- per hour. While determining remuneration of the petitioner, respondent No.1 could have adopted any rate per hour between the lower slab and the higher slab, but he could not have fixed any remuneration lower than that calculated on the basis of the lower slab.

11. The main contention of the respondents is that in the meeting held on 10th April, 2007, the petitioner had agreed to accept the fee at Rs 20 lakhs per year. A perusal of the minutes of that meeting would show that it was a joint meeting to consider remuneration of the Special Auditors for three assesseees, namely, Sahara India (Firm), Sahara Airlines Limited and respondent No.3 Sahara India Financial Corporation Limited and the Special Auditors, appointed for all the three companies, were present in the meeting. As per the minutes of the meeting, after taking into consideration various factors, including the guidelines, issued by the Institute relating to fee structure, payment made by the assessee for the regular audit under Section 44(AB) or statutory orders, nature of the work and fee paid in the past, the fee of Rs 20 lakhs for each year was mutually agreed upon and Mr. R.S. Dubey gave his consent for that fee. What these minutes imply is that the amount of Rs 20 lakhs for each year was mutually agreed

between the petitioner and the assessee. The case of the petitioner is that no such consent was actually given by its representative Mr. Dinesh Chand Gupta who attended the meeting on its behalf and that Mr. Gupta, who is a Chartered Accountant, had to sign the minutes at the request of those who attended the meeting. As noted earlier, the petitioner wrote a letter dated 11th April, 2007 to respondent No.1, informing him that the fee, based on minimum scale approved by the institute, would be around Rs 35 lakhs and there was no question of accepting the fee below Rs 30 lakhs. It was further stated in the letter that the average of audit fee paid by the assessee-company to its Statutory Auditors during the financial years 2002-03 and 2003-04 was Rs 30,59,125/- and they were agreeable that for the special audit done by them, the fee should not be less than Rs 30 lakhs for each of the two years. The respondents 1 and 2 have not filed affidavits of any of the officers, who were present in the meeting held on 10th April, 2007. Respondent No.3 has also not filed the affidavit of Mr R.S. Dubey, who attended the meeting on its behalf. Hence, the averment of the petitioner in this regard, which is supported by an affidavit of Mr Dinesh Chander Gupta, who was present in the meeting on behalf of the petitioner firm,

remains un rebutted. Moreover, despite the petitioner's letter dated 11th April, 2007, which was received in the office of the Deputy Commissioner of Income Tax, Central Circle-6, New Delhi on 20th April, 2007 on account of Commissioner of Income Tax, Central-I having left for Orissa in the meanwhile, no communication was sent to the petitioner, by respondents 1 and 2, disputing the averment made in the letter dated 11th April, 2007. Admittedly, the audit work for the financial year 2003-04 was completed by the petitioner, after it had delivered the letter dated 11th April, 2007 in the office of Deputy Commissioner, Central Circle -6, New Delhi. No attempt was made by respondents 1 and 2 to withdraw the work for the financial year 2003-04 from the petitioner, despite its taking a categorical stand that its representative had not given consent to accept remuneration at Rs 20 lakhs per year and that the minimum fee, acceptable to it, would be Rs 30 lakhs per year. We, therefore, see no reason to reject the plea taken by the petitioner in this regard.

12. The impugned orders dated 26.07.2007 for the financial year 2002-03 and dated 18.09.2007 for the financial year 2003-04 were passed by respondent No.1 much after the letter dated 11th April, 2007 had been received by the

Department from the petitioner. Presuming that the petitioner had consented to respondent No.3, to accept remuneration at Rs 20 lakhs each year, that consent was withdrawn by it much before the orders in question were passed by respondent No.1. Once the letter dated 11th April, 2007, denying the alleged mutual consent, was received by the Department, it was not permissible for respondent No.1 to act upon that consent/mutual agreement for the purpose of determining the remuneration in exercise of his power under Section 142(2D) of the Act. He, in that case, was required to determine the remuneration of the petitioner in terms of the scale approved by the institute for such work, in view of the decision already taken by him, while approving special audit of respondent No.3 and appointing the petitioner to undertake the special audit. He could, at best, have fixed the charges at Rs 30 lakhs per year in case the charges, if calculated on the basis of the scale approved by the institute, came to more than Rs 30 lakhs per year.

13. A perusal of the impugned orders dated 26.07.2007 and 18.09.2007 would show that it does not disclose any basis for fixing the remuneration of the petitioner at Rs 20 lakhs per year, except noting that in the meeting held on 10th April,

2007, the fee was mutually agreed at Rs 20 lakhs per year. Strangely, there is no reference to the letter of the petitioner dated 11th April, 2007 in these orders. We fail to appreciate how respondent No.1 could have relied upon the minutes of the meeting dated 10th April, 2007, without even adverting to the averment made in that letter. Since the impugned orders 26.07.2007 and 18.09.2007 do not give any indication of the norm or scale, adopted by respondent No.1 in determining the remuneration payable to the petitioner, there is no escape from the conclusion that neither did he apply his mind at all to the scale approved by the Institute for such audit nor did he adopt any other formula or criteria for fixing the remuneration. The Commissioner of Income Tax simply adopted the sum alleged to have been mutually agreed in the meeting held on 10th April, 2007 which indicates lack of application of mind on his part in determining the remuneration payable to the petitioner. The Commissioner of Income Tax did not give any reason for deviating from the norm fixed by him while granting approval for special audit and appointing the petitioner as the Special Auditor to undertake special audit for the financial year 2002-03 and 2003-04. The order passed by him does not indicate how many persons were deputed by the petitioner to carry out

the audit, whether they were Principals, Qualified Assistants or Semi Qualified/other Assistants, how many hours of work were put in by the persons engaged in the special audit and what were the scales fixed by the Institute for such work.

14. The Commissioner of Income Tax, while determining remuneration under Section 142(2D) of the Act could not have abdicated his duty to determine the remuneration payable to the Special Auditors, simply by accepting an amount mutually agreed between the Auditor and assessee. Under the Scheme of the Act, the assessee has no role to play in determination of the remuneration by the Commissioner of Income Tax and it has to pay, to the Special Auditor, whatever amount is determined by the Commissioner. Hence, the mutual agreement between the Auditor and the assessee in no case could have been the sole basis of the order passed by him. Of course, there could be no objection to the Commissioner accepting any amount agreed to by the Special Auditor, in case the amount otherwise determined by him was found to be higher than the amount agreed to by the Auditor. But, before doing that he must apply his mind to all the factors and determine the amount which in his opinion should be paid to the Auditor.

15. For the reasons given in the preceding paragraphs, the impugned orders 26.07.2007 and 18.09.2007 passed by respondent No.1 are hereby quashed. Respondent No.1 is directed to re-determine the remuneration of the petitioner on the basis of the scale approved by the Institute for the nature of the work carried out by the petitioner. If, however, the remuneration, payable to the petitioner in terms of the scale approved by the Institute, is found to be more than Rs 30 lakhs either for the year 2002-03 or for the year 2003-04 or for both, the remuneration will be restricted to Rs 30 lakhs for the year(s) for which it is found to be more than Rs 30 lakhs. The remuneration will be re-determined within six weeks from the date of receipt of this order by respondent No.1. The writ petition stands disposed of accordingly. The parties shall bear their own costs.

(V.K. JAIN)
JUDGE

(BADAR DURREZ AHMED)
JUDGE

MAY 25, 2010
bg/rs/sn