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

Reserved on: 9th May, 2023

Date of decision: 6th July, 2023

\+ **W.P.(C) 13754/2019 and CM APPL. 55377/2019, 23859/2021, 42231/2021**

PR. COMMISSIONER OF INCOME TAX
…..Petitioner Through: Mr. Ruchir Bhatia, Sr. Standing Counsel, Mr. Shlok Chandra, Jr. Standing Counsel with Mr. Keshav Garg, Advocate, (9810371417)

versus

MICRO AND SMALL ENTERPRISE FACILITATION COUNCIL AND ANR. …..
Respondents

Through: Mr. Jitendra Kumar Singh, Advocate for R-2. (M- 9911354578)
Mr. S.B. Gupta in person.

WITH

\+ **W.P.(C) 16294/2022 and CM APPL. 50997/2022, 54199/2022, 1336/2023**

PR. COMMISSIONER OF INCOME TAX CENTRAL-1.. Petitioner Through: Mr. Ruchir Bhatia, Sr. Standing Counsel, Mr. Shlok Chandra, Jr. Standing Counsel with Mr. Keshav Garg, Advocate,

versus

MICRO AND SMALL ENTERPRISE FACILITATION COUNCIL& ANR. ….. Respondents

Through: Mr Avishkar Singhvi Advocate with Mr Naved and Mr Vivek Kumar Advocates for R-1 (M: 9910691270).
Mr. Jitendra Kumar Singh, Adv. for R-2.
Mr. S.B. Gupta in person.

CORAM:

JUSTICE PRATHIBA M. SINGH
JUDGMENT

Prathiba M. Singh, J.

Background

1. Both the present petitions raise interesting legal issues relating to the interplay between the Income Tax Act, 1961 (hereinafter 'IT Act') and the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter 'MSMED Act') relating to fee payable to CA Firms, for Special Audits directed under Section 142(2A) of the IT Act.

2. The Petitioner i.e., the Principal Commissioner of Income Tax, Central-1, has filed the present writ petitions challenging the directions for reference to arbitration passed by the Respondent No. 1 i.e., the Micro & Small Enterprise Facilitation Council (*hereinafter 'MSEFC'*) - an authority established under Section 20 of the MSMED Act. Respondent No. 2 i.e., M/s SBG & Co. is a partnership firm of Chartered Accountants (*hereinafter 'CA Firm'*) of which Mr. S.B. Gupta is a Partner. The said CA Firm is also registered as a `Micro Enterprise' under the provisions of the MSMED Act.

3. The CA Firm, being on the panel of the Income Tax Department (*hereinafter 'IT Department'*), was nominated as a Special Auditor by the IT Department in four cases for carrying out Special Audit in terms of Section 142(2A) of the IT Act.

4. After the completion of the said Special Audit assignments and the submission of the final audit reports, the CA Firm raised four invoices in respect of the said audits. The grievance of the Special Auditor- CA Firm is that *qua* the invoices raised, the full payment has not been

made. Further, in respect of one of the assignments the payment has not been received at all.

5. Under such circumstances, the CA Firm invoked the provisions of the MSMED Act and approached the MSEFC by way of references under Section 18 of the Act.

6. Pursuant to the said references, the matter was thereafter referred to the Delhi International Arbitration Centre (*hereinafter 'DIAC'*) by the MSEFC vide the impugned reference orders and a retired judge of the Supreme Court was appointed as the Arbitrator in ***W.P.(C) No. 16294/2022.*** However, in ***W.P.(C) No. 13754/2019***, the ld. Arbitrator was yet to be appointed.

7. The IT Department has preferred the present two writ petitions, challenging the impugned reference orders passed by the MSEFC on the ground that the MSEFC under the MSMED Act lacks jurisdiction to deal with claims raised by Special Auditors under Section 142(2A) in respect of the fee payable in terms of Section 142(2D) of the IT Act.

Brief Facts

8. The facts in the two writ petitions are set out below.

W.P(C). 13754/2019

9. On 21st / 22nd March 2013, the IT Department passed an order under Section 142(2A) of the IT Act, directing the Assessee i.e., M/s Sahara India (Firm), to get its accounts audited by the CA Firm, which was nominated as the Special Auditor, for the assessment year 2010-11. The Special Audit was to be conducted within a period of 60 days.

10. Thereafter, M/s Sahara India (Firm) filed ***W.P.(C) No. 3273/2013*** titled

'Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Delhi (Central)-1, New Delhi & Others' before this Court, challenging the nomination of the Special Auditor by the IT Department.

11. In ***W.P.(C) No. 3273/2013,*** an interim order dated 24th May 2013 was passed, directing that no assessment order by the IT Department would be passed in the said case. It was, however, directed that the Special Audit may continue. It was further directed that while the Special Audit may be carried on, the Special Audit report shall not be served upon M/s Sahara India (Firm).

12. In the meantime, the IT Department extended the period of Special Audit by a total period of 180 days in terms of Section 142(2C) of the IT Act. A further extension of 45 days was granted vide order dated 4th October 2013 passed in ***W.P.(C) No. 3273/2013*** titled '***Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Delhi (Central)-1, New Delhi & Others'***.

13. Pursuant to the aforementioned extensions, the CA Firm carried out the Special Audit of M/s Sahara India (Firm).

14. Thereafter, the IT Department requested the CA Firm to not submit the Special Audit report to M/s Sahara India (Firm) in terms of the directions by the order dated 24th May 2013 passed in ***W.P.(C) No. 3273/2013*** titled

'Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Delhi (Central)-1, New Delhi & Others'.

15. The CA Firm, through letter dated 18th November 2013, sought clarification regarding the submission of the Special Audit report to

M/s Sahara India (Firm) upon completion of the Special Audit. It also submitted Fee Bill No. 43 dated 14th November 2013, for an amount of Rs.

1,11,37,500/- (exclusive of Service Tax) and Rs.1,25,14,095/- (inclusive of Service Tax) to the IT Department along with the timesheet in respect of the said Special Audit assignment.

16. On 5th September 2016, ***W.P.(C) No. 3273/2013*** titled ***'Sahara India (Firm), Lucknow v. Commissioner of Income Tax, Delhi (Central)-1, New***

Delhi & Others' was disposed of.

17. In 2018, having not received the payment of its fee bill, the CA Firm filed a writ petition being ***W.P.(C) No. 1773/2018*** titled ***'M/s SBG & Co. vs.***

The Union of India & Ors.' before this Court, regarding the payment of its fees.

18. ***W.P.(C) No. 1773/2018***, was disposed of vide order dated 26th February 2018, with a direction that the writ petition would be treated as a representation to the Competent Authority i.e., the IT Department in this case, which would inform the CA Firm about their decision on the fee within a period of eight weeks.

19. However, no such decision was made by the Competent Authority within the said period. Consequently, the CA Firm filed a contempt petition being ***CONT.CAS(C) 456/2018*** titled ***'SBG & Company v. B K S Pandya'*** before this Court. Further, an application was moved seeking extension of time to comply with the said order.

20. Finally, after various communications and submissions between the IT Department and the CA Firm, on 10th /11th July 2018, the IT Department passed the order under Section 142(2D) of the IT Act, determining the fee of the CA Firm at Rs. 33,84,000/-.

21. On 11th July 2018, an order was passed disposing of the application seeking extension of time, moved in ***W.P(C) 1773/2018*** recording the submission by the IT Department that the amount payable had been determined and the same would be credited to the CA Firm within one week.

22. However, the payment of the fee in terms of the abovementioned order dated 11th July 2018 was not credited by the IT Department to the CA Firm within the one-week period.

23. On 1st September 2018, the IT Department paid the amount of Rs.35,93,808/- (Rs. 33,84,000/- plus GST @ 18% i.e., Rs. 6,09,120/- less TDS @ 10% of Rs. 3,99,312/-) as determined under Section 142(2D) of the IT Act. The receipt of the said payment was acknowledged by the CA Firm in its letter dated 4th September 2018. However, the CA Firm considered the said payment as a part-payment towards its total fee amount and sought the payment of the balance amount along with interest in terms of the provisions of the MSMED Act. Thus, the CA Firm was aggrieved by the amount of fee as determined and paid by the IT Department in terms of Section 142(2D) of the IT Act.

24. As a result, on 16th November 2018, the CA Firm filed a reference under Section 18 of the MSMED Act before the MSEFC for the recovery of the balance amount of fee along with interest as provided under Section 15 and Section 16 of the MSMED Act.

25. Thereafter, the MSEFC initiated conciliation proceedings between the CA Firm and the IT Department. Despite a number of meetings being held for conciliation between the parties, conciliation proceedings between the parties failed and were accordingly terminated. It may be pertinent to note that the IT Department raised objections over the applicability of Section 16 of the MSMED Act to payments pursuant to order under Section 142(2D) of the IT Act, as recorded in the minutes of the joint meeting held on 20th December 2018.Further, in its written submissions before the MSEFC, the IT Department challenged the jurisdiction of the MSEFC.

26. Finally, on 19th September 2019, the MSEFC passed the impugned reference order, whereby the MSEFC referred the case to the DIAC under Section 18(3) of the MSMED Act for initiating arbitration proceedings.

27. The DIAC thereafter, issued letter dated 28th September 2019 informing the CA Firm and the IT Department of the impugned reference and the details regarding the arbitration proceedings, such as filing of statement of claims as also other formalities pertaining to the arbitration proceedings.

28. In response to the same, while the CA Firm filed its statement of claim with DIAC, the IT Department vide letter dated 19th November 2019,

challenged the jurisdiction of DIAC in terms of Section 293 of the IT Act.

Further, it sought minimum 7 days' time to file the statement of claims and to suggest the names of Arbitrators. The IT Department, vide letter dated 12th December 2019, also informed the DIAC that it was in the process of filing a writ petition and requested that the proceedings be kept in abeyance till the outcome of the writ petition.

29. Thereafter, the IT Department filed the present writ petition.

30. Vide order dated 23rd December 2019, this Court stayed the impugned order dated 19th September 2019 along with the proceedings emanating therefrom.

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31. This petition deals with the Special Audit of three entities, in respect of which the CA Firm was nominated as a Special Auditor by the IT Department under Section 142(2A) of the IT Act. The three entities are: - (i) M/s Sahara India Financial Corporation Limited (*hereinafter 'SIFCL'*)

(ii) M/s Reverse Logistics Company Private Limited (*hereinafter 'Reverse'*)

(iii) M/s Oracle India Private Limited (*hereinafter 'Oracle'*)

32. In the case of Oracle, nomination letter dated 29th December 2011, was issued by the IT Department regarding the nomination of the CA Firm as Special Auditor of Oracle, for the assessment year 2008-09. The Special Audit report was to be submitted within a period of 90 days. Subsequently, vide letter dated 30th March 2018, the IT Department requested the CA Firm

to commence the Special Audit after 1st April 2018, in compliance with the order dated 13th March 2018 passed by this Court in ***ITA No. 1110/2012***. 33. In the case of SIFCL, the IT Department nominated the CA Firm as the Special Auditor on 24th March 2014 vide order under Section 142(2A) of the IT Act, directing the SIFL to get its accounts audited by the CA Firm for the assessment 2011-12. The Special Audit report was to be submitted within a period of 60 days.

34. In the case of Reverse, nomination letter dated 26th December 2017, was issued by the IT Department regarding the nomination of the CA Firm as Special Auditor of Reverse, for assessment year 2015-16. The Special Audit report was to be submitted within a period of 90 days.

35. The Special Audits were concluded in respect of all three entities despite some extensions in the audit period and the Special Audit reports were also prepared and provided to the Assessee-entities by the CA Firm. 36. Consequently, the CA Firm sent letters to the IT Department dated 3rd December 2014, 20th June 2018 and 19th December 2018 regarding the payment of fees for the Special Audits of SIFCL, Reverse and Oracle, respectively, along with the respective invoices. The details of the invoices are set out as under: -

(i) SIFCL-Invoice No. 21 dated 3rd December 2014 for Rs. 1,56,91,605/- (exclusive of Service Tax) and Rs. 1,76,31,088/- (inclusive of Service Tax)

(ii) Reverse-Invoice No. 75 dated 20th June 2018 for Rs. 1,96,12,500/- (exclusive of GST) and Rs. 2,31,42,750/- (inclusive of GST)

(iii) Oracle- Invoice No. 23 dated 19th December 2018 for Rs. 2,01,45,000/- (exclusive of GST) and Rs. 2,37,71,100 /- (inclusive of GST)

37. On 12th July 2019 and 19th July 2019, the IT Department passed orders under Section 142(2D) of the IT Act, determining the remuneration of the CA Firm with respect to the Special Audits of Oracle and Reverse, respectively. The amounts determined under Section 142(2D) of the IT Act by the IT Department are set out below.

(i) Oracle at Rs. 67,50,000/- (exclusive of GST) i.e., Rs. 79,65,000/- (inclusive of GST

(ii) Reverse at Rs. 60,90,000/- (exclusive of GST) i.e., Rs. 71,86,200/- (inclusive of GST)

38. However, at this stage, no remuneration was determined by the IT Department with respect to the Special Audit of SIFCL.

39. The IT Department, thereafter, released the following payments: -

(i) Reverse- Rs. 64,55,400/- (Rs.60,90,000/- plus GST @ 18% i.e., Rs.10,96,200/- less IT TDS of Rs. 6,09,000/- less GST TDS of Rs. 1,21,800/-)

(ii) Oracle-Rs.71,55,000/-(Rs.67,50,000/- plus GST@18% i.e., 12,15,000/- less ITTDS of Rs.6,75,000/- less GST TDS of Rs.1,35,000/-).

40. The said payments were treated a part-payment of the total fee amount. The CA Firm sought the payment of the balance amounts along with interest in terms of the provisions of the MSMED Act. Thus, the CA Firm was aggrieved by the amount of fee as determined and paid by the IT Department in terms of Section 142(2D) of the IT Act.

41. Resultantly, the CA Firm filed 3 references before the MSEFC in the year 2020, regarding the disputed fee amounts.

42. In response to the references filed by the CA Firm, the MSEFC initiated conciliation proceedings between the CA Firm and the IT Department. A number of meetings were held for conciliation between the parties. As is evident from a perusal of the minutes of the conciliation meetings, the CA Firm filed declaration under Section 76(d) of the Arbitration & Conciliation Act, 1996 thereby terminating the conciliation proceedings. Accordingly, the conciliation proceedings were terminated by the MSEFC in all the three cases.

43. Finally, on 10th December 2021, the MSEFC passed the impugned reference orders in all the three cases, whereby it referred the cases to the DIAC under Section 18(3) of the MSMED Act for initiating arbitration proceedings. The details of the impugned reference orders dated 10th December 2021 regarding all the three entities are set out below.

(i) Reference No. F.14(510)/DC/C/HQ/MSEFC/Delhi Central/2020-

21/8693 with respect to the Special Audit of SIFCL

(ii) Reference No. F.14(510)/DC/C/HQ/MSEFC/Delhi Central/2020-21/8697 with respect to the Special Audit of Oracle

(iii) Reference No. F.14(510)/DC/C/HQ/MSEFC/Delhi Central/2020-21/8688 with respect to the Special Audit of Reverse.

44. In terms of the aforementioned impugned reference orders, the DIAC issued letters in all the three cases to the CA Firm and the IT Department intimating them about the impugned references and the details regarding the arbitration proceedings, such as filing of statement of claims as also other formalities pertaining to the arbitration proceedings.

45. In response thereto, the CA Firm filed its statement of claims in the arbitration proceedings regarding all the three entities.

46. On 7th July 2022, the Ld. Sole Arbitrator, passed a combined order in the arbitration proceedings in all the three cases, whereby last opportunity was granted to the IT Department to appear in the proceedings as also to file its Statement of Defense and other relevant documents on or before 22nd July 2022, else it would be proceeded against *ex-parte*.

47. Thereafter, the ld. Arbitrator passed further orders dated 8th September 2022 and 12th October 2022 in the said arbitration proceedings.

48. Aggrieved by the impugned reference orders dated 10th December 2021 and the proceedings emanating therefrom, the IT Department filed the present petition.

49. Vide order dated 25th November 2022, this Court stayed the impugned reference orders dated 10th December 2021 along with the proceedings emanating therefrom.

50. It is of import to note that during the course of the proceedings in the present petitions, the IT Department passed an order dated 8th May 2023 under Section 142(2D) of the IT Act with respect to the Special Audit of SIFCL determining the remuneration at Rs. 15,25,000/- which it submitted before the Court.

Submissions

Submissions by the Petitioner

51. On behalf of the Petitioner, Mr. Ruchir Bhatia, ld. Counsel has made the following submissions:

A. That the role of the Special Auditor under Section 142(2A) of the IT Act is determined by the Principal Chief Commissioner or the Chief Commissioner or other similarly placed senior officials of the Income Tax Department. The remuneration is also to be fixed by the senior officials of the IT Department after taking into consideration the nature of the assignment, the kind of work done and the total time that is reasonably to be spent.

B. That the Special Auditor appointed under Section 142(2A) of the IT Act, in fact, steps into the shoes of the Assessing Officer and has a

very important responsibility which he has to discharge. The functions of the Special Auditor have been considered in various judicial decisions, which would show the special character of his responsibility.

C. That the Special Audit assignment is in the nature of a ***'statutory obligation'***. The responsibility being given to the Special Auditor is not a contractual relationship. The conduct of Special Audit is a statutory duty cast upon the Special Auditor and there is a statutory determination of the fee in terms of the provisions of the IT Act. There is no contractual relationship between the IT Department and the Special Auditor.

D. That ***'Pratius Merchants P. Ltd. v. DCIT (2018) 404 ITR 474 (Guj)' and 'DLF Ltd. v. Additional Commissioner of Income Tax (2014) 366 ITR 390 (Del.)'*** are relied upon to argue that the purpose of a Special Audit is to ***facilitate*** the Assessing Officer in the completion of the assessment proceedings and to arrive at the correct taxable income. The assignment, being 'statutory' in nature, the only remedy is under the Income Tax Act, 1961 or by way of a writ petition. Such an audit can never be described as a 'commercial contract' or an 'agreement' where the word 'consideration' is used.

E. That the applicability of the MSMED Act, requires the existence of a buyer and supplier relationship and agreement between the parties. Reference is made to Section 2(d) as also Section 15 and Section 24 of the MSMED Act in this regard. As per his submission, there is no

'consideration' which is paid in terms of the Indian Contract Act,1872 and therefore, it cannot be held that the relationship is a contractual relationship. On the other hand, in fact, it is a relationship where the assignment has been given to the statutorily appointed Special Auditor, which would directly be under the supervision of the Chief Commissioner, Income Tax. Owing to the specialized nature of the assignment, the provisions of the MSMED Act cannot be invoked.

F. That reference is also then made to the statement of claims filed by the CA Firm before the DIAC wherein it is clearly alleged that the consideration determined is palpably incorrect, which therefore takes it into the jurisdiction of the IT Act and not under the MSMED Act.

G. That Section 24 of the MSMED Act would not be applicable and would not be attracted in this case inasmuch as the Act itself would apply only if the conditions under Section 15 and the definition of

'buyer' under Section 2(d) of the MSMED Act are satisfied. The Petitioner/IT Department cannot be termed as a 'buyer' within the meaning of the MSMED Act as there is no 'consideration' which has been paid. There is also no agreement but a 'nomination' which has been made by the IT Department. Since the MSMED Act itself is not attracted in the present case, Section 24 of the said Act would have no application.

H. That there is no conflict between Section 18 and Section 24 of the MSMED Act and the provisions of the IT Act.

I. That insofar as Section 24 of the MSMED Act is concerned, reliance is placed on Section 293 of the IT Act to argue that none of

the orders made under the IT Act can be agitated by way of a civil suit in a civil court. Since arbitral proceedings are in the nature of civil proceedings, Section 293 of the IT Act would be a complete bar for the MSEFC to exercise jurisdiction in the present case. Reliance was placed on '***Commissioner of Income Tax v. Parmeshwari Devi Sultania (1998) 97 Taxmann 269 (SC)'*** and '***Sunil Vasudeva v. Sunder Gupta (2019) 110 Taxmann.com 298 (SC)'.***

J. That it is a settled position that arbitration proceedings are akin to civil proceedings and hence the provisions of Section 293 of the IT Act are squarely applicable in this case.

K. That as per the statement of claims filed by the CA Firm before the DIAC wherein it is clearly alleged that the consideration determined is palpably incorrect, which therefore takes it into the jurisdiction of the IT Act and not under the MSMED Act.

L. That insofar as ***W.P.(C) 13754/2019*** is concerned, it is submitted that the CA Firm was well aware that the appointments under Section 142(2A) of the IT Act can only be challenged by way of writ petitions in this Court. In fact, when there was delay in the passing of the orders under Section 142(2D) of the IT Act, the CA Firm itself had invoked Article 226 of the Constitution of India. Mr. Bhatia, cited the judgments in '***P.N. Mishra v. Union of India (2005) 272 ITR 482 (Del)' and 'Dhanesh Gupta and Co. v. CIT (2010) 327 ITR 246 (Del)'*** as also the writ filed by the Respondent himself, being ***WP(C)***

1773/2018 titled ***'SBG & Co. v UOI & Ors',*** to argue that it is usual for CA Firms to raise challenges to proceedings under Section 142 of the IT Act by way of a writ petition, which are entertained by the Court.

M. That the earlier writ petition filed by the CA Firm in 2018 i.e., ***W.P(C) 1773/2018*** titled ***'SBG & Co. Chartered Accountants through its Partner v. The Union of India & Ors.'*** the CA Firm took a specific plea that there is no alternate efficacious remedy except to file a writ petition at the stage when the Commissioner of Income Tax had not taken any decision on the CA Firms' fee payable under Section 142(2D) of the IT Act.

N. That relying upon paragraph 14 as also upon the plea in the said writ petition it was further argued that as per the guidelines envisaged in the proviso to Section 142(2D) of the IT Act as laid down in Rule 14B of the IT Rules, there was a duty to determine the fee upon the IT Department.

O. That, overall, there are four Special Audit assignments in which the CA Firm was nominated by the IT Department. In respect of all the four assignments, the IT Department has made its determination regarding the amounts. The only option/remedy available to the Respondent- CA Firm is a challenge through a writ petition. However, the Respondents have not challenged the same by way of a writ petition.

P. That there has been no delay by the IT Department in approaching this Hon'ble court by way of the present writ petitions.

Further, it is submitted that the proceedings before an authority lacking inherent jurisdiction are nullity and thus, *void ab initio.*

52. On 17th March 2023, the Court directed both the parties to bring their respective computations of the amounts paid/payable for their perusal. On the next date i.e., 16th March 2023, Respondent No. 2/CA Firm handed over the computation of the amounts paid and payable as directed by the Court.

53. Mr. Bhatia, then handed over the tabulated details of the amounts determined and paid to the CA Firm under Section 142(2D) of the IT Act regarding the four Special Audit assignments.

54. Order dated 8th May 2023 passed by the IT Department, was also placed before this Court, in respect of the final assignment in respect of which the fee was yet to be determined, determining the remuneration under Section 142(2D) of the IT Act at Rs. 15,25,000/-.

Submissions by Respondent No. 2

55. On the other hand, on behalf of the Respondent No.2- CA Firm, Mr. S.B. Gupta, appearing in person, raised the following contentions:

A. That where there is a relationship of 'buyer' and 'supplier' and there is 'consideration' involved under an agreement /contract, the MSMED Act would be attracted. Reference is made to Section 18(1) as also Section 2(n) and 2(d) of the MSMED Act to argue that in terms of the definitions of 'buyer' and 'supplier', respectively, the Respondent CA Firm is the 'supplier', and the IT Department is the 'buyer' of the Special Audit 'services' supplied by the former to the

latter in terms of an 'agreement/contract'. Thus, all the necessary trappings of a commercial contract exist in this regard. The exact nature of the appointment is also clearly prescribed in the nomination letter. Thus, the MSMED Act would be applicable.

B. That, even if there is no agreement under the MSMED Act, the existence of an agreement cannot be considered a pre-condition.

Reliance is placed upon the Supreme Court's decision in ***'Gujarat State Civil Supplies Corporation'*** as also on ***'Principal Chief Engineer vs. Manibhai & Bros.'***, of the Gujarat High Court, which was thereafter upheld by the Supreme Court.

C. That in terms of the procedure for the appointment of a Special Auditor under Section 142(2A) of the IT Act, it is the discretion of the CA Firm so appointed to accept or decline such offer before the nomination of the CA Firm by the IT Department. He relies upon '***Dhanesh Gupta & Co. vs. CIT [327 ITR 246]'*** in support of this submission.

D. That the reports which were submitted by the CA Firm, were fully accepted by the IT Department and no deficiencies were raised. All the Special Audit assignments were also carried out on time. Since there exists a promise to pay, the word 'remuneration' as used in

Section 142(2D) of the IT Act would have to be deemed to be 'consideration'.

E. That in terms of Section 142(2D) of the IT Act is concerned, the determination by the IT Department shall be final and the expenses including the fees are to be paid by the Assessee. However, as per the

proviso inserted with effect from 1st June 2007, the phrase relating to finality of determination was conspicuously missing. In respect of the assignments given after 1st June 2007, the payment of fee is to be made by the Central Government. The Commissioner, IT Department is thus stated to be an interested party subject to bias. If such finality was read into the proviso, it would be unconstitutional and violative of Article 14. Reliance is also placed on the salutary principle of natural justice that no man can be a judge in his own cause to argue that the IT Department cannot be judging its own case as to whether the determination is final. Reliance is placed upon two decisions of the ld. Supreme Court in ***'J. Mohapatra & Co and Anr. v. State of Orissa & Anr. [Civil Appeal No. 6814/1981]'*** as also ***'Union of India & Anr v. Tulsiram Patel & Ors. [Civil Appeal No. 6814/1981]'***.

F. That in terms of Section 293 of the IT Act, it is only the availment of a remedy before the Civil Court which is barred. Reliance is placed upon the Gujarat High Court Judgment which has also been upheld by the Suprem Court in ***'Principal Chief Engineer v. Manibhai and Brothers (Sleeper)[FA No. 637 of 2016]'*** to argue that the MSEFC is not a judicial authority let alone a civil court.

G. That the appointment under Section 142(2A) of the IT Act is not a statutory appointment since it fastens the duty upon the Assessee to get its accounts audited from the nominated CA concern. It does not cast any obligation on the CA firm to compulsorily carry out the audit.

H. That insofar as Section 24 and Section 18 of the MSMED Act are concerned, both the provisions make it clear that they are

notwithstanding any other law for time being in force. As long as the buyer-supplier relationship is established, the dispute relates to the recovery of amounts and the supplier is within the jurisdiction of the MSEFC, the jurisdiction of the MSEFC cannot be excluded. Further, these *non-obstante* provisions of the MSMED Act have an overriding effect as compared to Section 293 and Section 142(2D) which are merely normal provisions of the IT Act.

I. That insofar as the role of the Petitioner is concerned, the Special Act would be the MSMED Act and not the Income Tax Act. Reliance is placed upon ***GE T&D India Ltd. v. Reliable Engineering*** as also ***Insurance Corporation of India v. D J Bhadur*** in support of this submission.

J. That even if the IT Act and the MSMED Act are both treated as special statutes, the MSMED Act is of 2006 and thus being a later enactment than the Income Tax Act, the provisions of the MSMED Act would prevail. Reliance is placed upon ***'Gujarat State Civil Supplies Corporation v. Mahakali Foods Pvt. Ltd.'*** in support of this submission.

K. That the since the dispute is about the quantum of money payable and the facts would have to be gone into, civil proceedings would have to be initiated. He relies upon ***'State of UP. & Ors. v. Bridge & Roof Co. (India) Ltd. [Civil Appeal no. 10774/1996]*** in support of this submission.

L. That the order passed in the earlier writ petition being ***WP(C) 1773/2018*** filed by the Respondent, the issue was not decided on

merits. Thus, the bar of res-judicata would not be applicable in the case of ***WP(C) 13754/2019.***Reliance is placed upon ***'Workmen vs. Board of Trustees of Cochin Port 1978 AIR 1283', 'Gulabchand Chhotalal vs. State of Bombay 1965 AIR 1153' and 'ITC vs. CCE & Anr' 2004 Scale 540*** .

M. That the Petitioner has filed the present writ petition in a *malafide* manner.

N. That the Respondent has computed the fee as approved in '***Rakesh Raj & Associates vs. CIT[WP(C) No. 1230/2015] and Dhanesh Gupta & Co. vs. CIT [2010]327 ITR 246 (Del).*** Further, the objection is irrelevant as the issue in the present case relates to the jurisdiction of the MSEFC over the dispute and not the quantum of fee payable.

O. It is specifically submitted, that the Petitioner, by its own admission has accepted that there lies no remedy in the IT Act against the order under Section 142(2D) of the same, and thus the Respondent cannot be left remediless and would be entitled to explore alternate remedies that it may be eligible for.

P. That the present petitions are not maintainable on account of non-maintainability of writ jurisdiction during arbitral proceedings. Further as the jurisdiction of the MSEFC over the dispute was not challenged before the MSEFC the writ jurisdiction is not maintainable.

He relies upon the decision in ***'BHEL v. MSEFC [W.P.(C)***

10886/2016]', wherein the ld. Single Judge of this Court has held that if the jurisdiction is not challenged before the MSEFC, the same cannot be raised in a writ petition.

Analysis & Findings

Maintainability

56. Insofar as the maintainability of the present writ petitions is concerned, though, this Court is exercising jurisdiction under Article 227 of the Constitution of India, in view of the decision in ***Surender Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors', [2021 SCC OnLine Del 3708: (2021) 279 DLT 636***] the position that emerges is that if there is complete lack of jurisdiction in the arbitral tribunal, a writ petition would be entertainable under exceptional circumstances. The relevant part of the said judgement is set out as under:

> *"**Maintainability***
> *18. Dealing with the first aspect, the law is well settled that Arbitral tribunals are a species of tribunals over which the High Court exercises writ jurisdiction. Challenge to an order of an arbitral tribunal can be raised by way of a writ petition. In Union of India v. R. Gandhi, President Madras Bar Association (supra) the Supreme Court observed on the question as to what constitutes 'Courts' and 'Tribunals' as under: "38. The term 'Courts' refers to places where justice is administered or refers to Judges who exercise judicial functions. Courts are established by the state for administration of justice that is for exercise of the judicial power of the state to maintain and uphold the rights, to punish wrongs and to adjudicate upon disputes. Tribunals on the other hand are special*

alternative institutional mechanisms, usually brought into existence by or under a statute to decide disputes arising with reference to that particular statute, or to determine controversies arising out of any administrative law. Courts refer to Civil Courts, Criminal Courts and High Courts. Tribunals can be either private Tribunals (Arbitral Tribunals), or Tribunals constituted under the Constitution (Speaker or the Chairman acting under Para 6(1) of the Tenth Schedule) or Tribunals authorized by the Constitution (Administrative Tribunals under Article 323A and Tribunals for other matters under Article 323B) or Statutory Tribunals which are created under a statute (Motor Accident Claims Tribunal, Debt Recovery Tribunals and consumer fora). Some Tribunals are manned exclusively by Judicial Officers (Rent Tribunals, Motor Accidents Claims Tribunal, Labour Courts and Industrial Tribunals). Other statutory Tribunals have Judicial and Technical Members (Administrative Tribunals, TDSAT, Competition Appellate Tribunal, Consumer fora, Cyber Appellate Tribunal, etc).”

19. Similar observations were made by the Supreme Court in SREI Infrastructure Finance Limited (supra) as under:

“14. Arbitration is a quasi judicial proceeding, equitable in nature or character which differs from a litigation in a Court. The power and functions of arbitral tribunal are statutorily regulated. The tribunals are special arbitration with institutional mechanism brought into existence by or under statute to decide dispute arising with reference to that particular statute or to determine controversy referred to it. The tribunal may be a statutory tribunal or tribunal constituted under the provisions of the Constitution of India. Section 9 of the Civil Procedure Code vests into the Civil Court jurisdiction to entertain

and determine any civil dispute. The constitution of tribunals has been with intent and purpose to take out different categories of litigation into the special tribunal for speedy and effective determination of disputes in the interest of the society. Whenever, by a legislative enactment jurisdiction exercised by ordinary civil court is transferred or entrusted to tribunals such tribunals are entrusted with statutory power. The arbitral tribunals in the statute of 1996 are no different, they decide the lis between the parties, follows Rules and procedure conforming to the principle of natural justice, the adjudication has finality subject to remedy provided under the 1996 Act. Section 8 of the 1996 Act obliges a judicial authority in a matter which is a subject of an agreement to refer the parties to arbitration. The reference to arbitral tribunal thus can be made by judicial authority or an arbitrator can be appointed in accordance with the arbitration agreement under Section 11 of the 1996 Act."

*20. Thus, the Supreme Court held that arbitral tribunals are private tribunals unlike those tribunals set up under the statute or specialized tribunals under the Constitution of India. Thus, a Petition under Article 227 challenging orders of an Arbitral Tribunal would be maintainable. ...***Scope and Extent of interference**

21.Coming now to the question as to what would be the scope of interference under Article 226/227 against orders passed by the Arbitral Tribunals, though a number of judgements have been cited by both parties, recent decisions of the Supreme court
and of this Court have settled the issue

....

25. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including

> *orders passed under Section 16 of the Act. (i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be maintainable; (ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision; (iii) For interference under Article 226/227, there have to be `exceptional circumstances';*
>
> *(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;*
>
> *(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face*
>
> *(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process; (vii) Excessive judicial interference in the arbitral process is not encouraged; (viii) It is prudent not to exercise jurisdiction under Article 226/227; (ix) The power should be exercised in `exceptional rarity' or if there is `bad faith' which is shown; (x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided.;"*

57. Thus, even while applying the strict test for entertaining of writ petitions in arbitral proceedings, a case where the MSMED Act may itself not be applicable, would constitute an exceptional circumstance. Thus, the issue as to whether the MSEFC had jurisdiction ought to be considered at the threshold itself inasmuch as, if the provisions of the MSMED Act, 2006 have no application, the Petitioner cannot be subjected to the lengthy arbitral proceedings under the said Act which also entails various other consequences including extremely high rates of interest under Section 16 of the Act. In

order to avoid further complications and delay in adjudication by the competent forum, the question as to jurisdiction thus deserves to be considered at this stage itself.

58. The genesis of these two writ petitions are four nominations by the Income Tax Department of the Respondent No. 2 – SBG & Co., a CA firm, for conducting the Special Audit of four entities under Section 142(2A) of the IT Act.

59. In terms of the nomination letters issued to the CA Firm, Special Audit was to be conducted by the CA Firm and a report was to be submitted within the period prescribed by the IT Department. The nomination letters do not give any details as to the monetary payments to be made to the CA Firm. Clearly, the same were to be governed by the provisions of the IT Act and the Rules thereunder.

60. The CA Firm completed the Special Audit in all four cases and submitted its reports. No grievance has been raised in terms of the contents of the reports themselves. Disputes have, however, arisen in respect of the quantum payable by the IT Department to the CA Firm. The details of the amounts claimed and paid as also the outstanding amounts is set out in the table below:

S. No.	Name of Entity	Date of Appointment	Amount claimed by special auditor as per Bill	Amount determined and paid to special auditor u/s 142(2D)	Amount outstanding
1.	Sahara India (Firm)	22.3.2013	Rs.1,25,14,095/-	Rs.39,93,120/-	Rs.85,20,975/-
2.	Reverse Logistics Company P. Ltd.	26.12.2017	Rs.2,31,42,750/-	Rs.71,86,200/-	Rs.1,59,56,550/-

3.	Oracle India P. Ltd.	30.3. 2018	Rs.2,37,71,100/-	Rs.79,65,000/-	Rs.1,58,06,100/-
4.	Sahara India Financial Corporation Ltd.	24.3. 2014	Rs.1,76,31,088/-	Rs. 15,25,000/-	Rs.1,61,06,088/-
	Total		**Rs. 7,70,59,033/-**	**Rs. 2,06,69,320/-**	**Rs.5,63,89,713/-**

61. As per the table set out above after adjusting the amounts paid, the total amount outstanding as per the CA Firm is liable to be paid by the Department. In order to recover the outstanding amounts, the CA Firm approached the MSEFC under the MSMED Act, which in turn referred the disputes to the DIAC for arbitration.

62. In the first case i.e., ***W.P.(C) 13754/2019***, the arbitration proceedings were stayed vide order dated 23rd December 2019. The order dated 23rd December 2019 passed in ***W.P.(C) 13754/2019*** is set out below:

> *" Issue notice. Notice is accepted by Mr. Ramesh Singh, leamed standing counsel on behalf of respondent no. 1. Let notice be issued to the remaining respondents to be served through all modes. Counter affidavit be filed within a period of four weeks. Rejoinder, if any, be filed within a period of two weeks thereafter.*
>
> *The Income Tax Department has filed the present petition impugning the order dated 19.09.2019 passed by the Micro and Small Enterprises Facilitation Council, New Delhi (hereinafter referred to as the 'MSME Council) whereby the matter has been referred to arbitration before the Delhi International Arbitration Centre (DIAC). The case of the petitioner is that Respondent no. 2, a firm of Chartered Accountant who is on the panel of the Income Tax Department, was appointed as a special auditor for the Income Tax*

Department for carrying out special audit of Sahara India (Firm). The Respondent no. 2 carried out the audit and since its statutory fee under Section 142(2D) was not paid, it was constrained to file a WP (C)1773/2018 titled M/s S.B.G. & Co. vs. The Union of India & Ors. before this Court for seeking directions to the Petitioner for the payment of its dues. The said petition was disposed of with directions that the writ petition be treated as a representation to the Competent Authority who would examine and inform the petitioner about their decision on the fee within a period of eight weeks of receipt of the order. In compliance of directions issued by this Court, the Respondent No. 2 has been paid fees of Rs.33,84,000/- on 01.09.2018. Subsequently, Respondent no. 2 has filed a claim before the MSME Council for recovery of the amount of Rs.1,11,37,500/- along with interest at the rate and in the manner as per the provisions of sections 15 and 16 of the Micro, Small & Medium Enterprises Development Act, 2006. In the said proceedings, an attempt was made by the Council to conciliate between the parties under Section 18 of the Act. However, there was no favourable outcome and as a result, the Council has now issued a reference under Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (MSMED Act) vide order dated 19.09.2019, impugned in the present petition.

Mr. Bhatia, leamed standing counsel for Petitioner, submits that the impugned order dated 19.09.2019 of Respondent no. 1 is without jurisdiction. He submits that the fee paid to the Respondent no. 2 is within the statutory scheme provided in the Income Tax Act. He further refers to Section 293 of the Income Tax Act which provides that no suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act. He submits that once the Respondent no. 2 has been paid the statutory fee, if there is any grievance in relation thereto, the remedy would lie under the provisions of the

Income Tax Act itself and Respondent no. 2 could not have invoked the jurisdiction of the MSME Council. He further submits that even otherwise since Respondent no. 2 had on the first instance approached this Court and directions were passed and the payment has been made in terms thereof, no further action can lie. Mr. Ramesh Singh, Standing Counsel for Respondent no. 1 submits that the jurisdiction of the MSME Council is de hors the provisions of the Income Tax Act. He also relied upon Section 24 of the MSMED Act, 2006 to argue that the provisions in Sections 15 to 23 shall have effect notwithstanding the provisions of the Income Tax Act. He also refers to the decision of the Division Bench of this Court in LPA 91/2019 titled M/s Bharat Heavy Electricals Ltd vs. Micro and Small Enterprises & Anr. This issue would require consideration. I am of the prima facie view that once Respondent no.2 has been paid its statutory audit fees, in terms of the orders passed by this Court, the jurisdiction of MSME Council could not have been invoked.

In view of the above, till the next date of hearing, the order dated 19.09.2019 and the proceedings emanating therefrom shall remain stayed. List on 21st April 2020"

63. However, in the second case i.e., ***W.P.(C) 16294/2022***, the Sole Arbitrator was appointed and thereafter the arbitration proceedings were stayed vide order dated 25th November 2022. The said order dated 25th November 2022 in ***W.P.(C) 16294/2022*** is set out below:

"***CM APPL. 50998/2022 (for exemption)*** *Allowed, subject to all just exceptions.*

The application shall stand disposed of

W.P.(C)16294/2022 & CM APPL. 50997/2022 (Interim Stay)

1. *Notice. Although the second respondent is stated to have been placed on advance notice, none has appeared on its behalf when the matter was called. Consequently, let learned counsel for the petitioner take steps for service upon the said respondent through all permissible modes including via approved courier service. The said respondent may also file its reply within a period of six weeks from today. The petitioner shall have four weeks thereafter to file a rejoinder.*

2. *Prima facie, and for the reasons which stand recorded in the order of the Court passed in W.P.(C) 13754/2019, the Court finds itself unable to sustain the impugned order passed by the Micro Small & Medium Enterprises Facilitation Council ["MSME Council"]. Matter requires consideration.*

3. *Till the next date of listing, there shall be stay of all further proceedings initiated pursuant to the impugned order dated 10 December 2021 passed by the Micro & Small Enterprises Facilitation Council.*

4. *Let the matter be called again on 03.05.2023."*

64. In effect, therefore, the arbitration proceedings in both petitions have remained stayed till date.

65. The issues raised are three-fold.

- That the MSMED Act has no applicability in the present case as there is no relationship of buyer and seller between the parties.
- Second, that Section 293 of the IT Act bars any other proceedings in respect of any orders passed under the said Act.
- In addition, the Respondent no.2 has raised issues relating to Maintainability, apart from addressing the merits**.**

Scheme of the MSMED Act

66. The MSMED Act has been enacted for the purpose of facilitating the promotion and development of Micro, Small and Medium Enterprises. It is also meant to enhance the competitiveness of such enterprises.

67. A perusal of the Statement of Objects and Reasons (SOAR) of the MSMED Act would reveal that the purpose of bringing out this enactment as set out in the Objects and Reasons is as under:

> *"STATEMENT OF OBJECTS AND REASONS*
> *Small scale industry is at present defined by notification under section 11B of the Industries (Development and Regulation) Act, 1951. Section 29B of the Act provides for notifying reservation of items for exclusive manufacture in the small-scale industry sector. Except for these two provisions, there exists no legal framework for this dynamic and vibrant sector of the country's economy. Many Expert Groups or Committees appointed by the Government from time to time as well as the small-scale industry sector itself have emphasised the need for a comprehensive Central enactment to provide an appropriate legal framework for the sector to facilitate its growth and development. Emergence of a large services sector assisting the small-scale industry in the last two decades also warrants a composite view of the sector, encompassing both industrial units and related service entities. The world over, the emphasis has now been shifted from "industries" to "enterprises". Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalisation area. Thus, as in most*

developed and many developing countries, it is necessary that in India too, the concerns of the entire small and medium enterprises sector are addressed and the sector is provided with a single legal framework. As of now, the medium industry or enterprise is not even defined in any law. 2. In view of the above-mentioned circumstances, the Bill aims at facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises and seeks to—

(a) provide for statutory definitions of "small enterprise" and "medium enterprise".

(b) provide for the establishment of a National Small and Medium Enterprises Board, a high-level forum consisting of stakeholders for participative review of and making recommendations on the policies and programmes for the development of small and medium enterprises.

(c) provide for classification of small and medium enterprises on the basis of investment in plant and machinery, or equipment and establishment of an Advisory Committee to recommend on the related matter.

(d) empower the Central Government to notify programmes, guidelines or instructions for facilitating the promotion and development and enhancing the competitiveness of small and medium enterprises.

(e) empower the State Governments to specify, by notification, that provisions of the labour laws specified in clause 9(2) will not apply to small and medium enterprises employing up to fifty employees with a view to facilitating the graduation of small enterprises to medium enterprises;

(f) make provisions for ensuring timely and smooth flow of credit to small and medium enterprises to minimise the incidence of sickness among and enhancing the competitiveness of such enterprises, in

accordance with the guidelines or instructions of the Reserve Bank of India.

(g) empower the Central and State Governments to notify preference policies in respect of procurement of goods and services, produced and provided by small enterprises, by the Ministries, departments and public sector enterprises.

(h) empowering the Central Government to create a Fund or Funds for facilitating promotion and development and enhancing the competitiveness of small enterprises and medium enterprises.

(i) empower to prescribe harmonised, simpler and streamlined procedures for inspection of small and medium enterprises under the labour laws enumerated in clause 15, having regard to the need to promote selfregulation or self-certification by such enterprises.

(j) prescribe for maintenance of records and filing of returns by small and medium enterprises with a view to reduce the multiplicity of often-overlapping types of returns to be filed;

(k) Make further improvements in the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 and making that enactment a part of the proposed legislation and to repeal that enactment.

3. The Bill seeks to achieve the above objects."

68. The above SOAR would show that the entire focus of the legislation was to enact a law to support small-scale industries engaged in the manufacturing sector and extending the said support in a comprehensive manner to the services sector. It is of specific relevance to point out that insofar as Chapter V of the MSMED Act relating to delayed payments is concerned, the same was based on the provisions of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993

(hereinafter, 'Delayed Payments Act, 1993').

69. The Delayed Payments Act, 1993 was meant to create a statutory liability upon the 'buyers' to make payments to 'suppliers' under the said Act. The Delayed Payments Act, 1993 was considered in the decision of the Hon'ble Supreme Court in ***Shanti Conductors Pvt. Ltd. & Anr. etc. v. Assam State Electricity Board & Ors. etc. (2019) 19 SCC 529***. The said judgment deals with the incidence of payments, however, in the process it discusses the provisions of Delayed Payments Act, 1993. The relevant portion of the judgment is set out below:

> *"28. Before we consider the issues which have arisen in these appeals it is necessary to notice the provisions of the Act, 1993. In the Parliament, the Government of India made a policy statement on small scale industries. It was also announced that suitable legislation would be brought to ensure prompt payment of money by buyers to the small industrial units. An Ordinance, namely, the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Ordinance, 1992 was promulgated by the President on 23.09.1993. To replace the Ordinance, The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 was introduced in the Parliament. The Statement of Objects and Reasons of the Act throws considerable light on the prevalent situation and the remedially measures which was sought in the legislation. In the Statement of Objects and reasons following was observed:*
>
> *"2. Inadequate working capital in a small scale or an ancillary industrial undertakings causes serious and endemic problems affecting the health of such undertaking. Industries in this sector have also been demanding that adequate measures be taken in this regard. The Small Scale Industries Board, which is an*

apex advisory body on policies relating to small scale industrial units with representatives from all the States, governmental bodies and the industrial sector, also expressed this view. It was, therefore, felt that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payments of interest on the outstanding money, in case of default, should be made. The buyers, if required under law to pay interest, would refrain from withholding payments to small scale and ancillary industrial undertakings."

……..

30. Sections 3 to 6 of the Act, 1993 are as follows:

"Section 3. Liability of buyer to make payment.- Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day: Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed one hundred and twenty days from the day of acceptance or the day of deemed acceptance. Section 4.Date from which and rate at which interest is payable.- Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at one and half time of prime Lending Rate charged by the State Bank of India. Explanation.- For the purposes of this section," Prime Lending Rate" means the Prime Lending Rate of the State Bank of India which is available to the best borrowers of the bank.

Section 5. Liability of buyer to pay compound interest.- Notwithstanding anything

contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly interests) at the rate mentioned in section 4 on the amount due to the supplier. Section 6. Recovery of amount due.-

(1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.

(2) Notwithstanding anything contained in sub- section (1), any party to a dispute may make a reference to the Industry Faciliation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub- section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of section 7 of that Act.

31. Section 3 creates a statutory liability of buyer to make payment. The statutory liability is to the effect that where any supplier supplies any goods to any buyer, the buyer shall make payment, therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. The statutory liability has been fastened on the buyer to make payment in the following manner:

(i)on or before the date agreed upon between him and on the supplier in writing, or

(ii) where there is no agreement in this behalf before the appointed day.

32. 'Appointed day' as defined in Section 2(b) means the day following immediately after the expiry of the period of thirty days from the day of acceptance or the day of deemed acceptance of any goods or any

services by a buyer from a supplier. Thus, statutory liability to make payment accrues to buyer as per Section 3, it is relevant to notice the event contemplated under Section 3 is "where any supplier supplies any goods or renders any services to any buyer". The incidence of liability is supply of goods or rendering any service. The Act is clearly prospective in nature and shall govern the incidence of supply and rendering service which happens after enforcement of the Act i.e. 23.09.1992.

33. The second part of Section 3 is "buyer shall make payment". Obviously, question of payment shall arise only after supply of goods or rendering any service. Thus, by virtue of Section 3, both the incidents i.e. supply or service on the one hand and payment on the other has to be after the enforcement of Act, 1993. Statutory provision of Section 3 further creates statutory liability to make payment on the agreed day in writing between the buyers and the supplier and if there is no agreement then before appointed day. The fact that agreement in writing between buyer and supplier for supply and payment is prior to the enforcement of the Act is neither relevant nor material, what is material is that supply and services had to be after the enforcement of the Act, only then the liability of payment shall accrue.

34. We have already noticed that the purpose and object of legislation was prompt payments of money by buyer which has been statutorily ensured in Act, 1993 by containing mandatory provisions of payment of interest.

35. Section 4 which deals with date from which and rate at which interest is payable. The liability to make payment of the amount to the supplier only arises when any buyer fails to make payment as required under Section 3."

Thus, even under the Delayed Payments Act, 1993 the provisions were for the benefit of *Suppliers and Buyers* were expected to make prompt payments, failing which, notwithstanding any agreement, buyers were saddled with the liability of higher rates of interest.

70. Coming to the MSMED Act, Chapter V of the Act specifically deals with delayed payments to 'suppliers' who are Micro and Small Enterprises. Chapter V comprising of Section 15 to Section 25 is clear in its title which reads as under:

> ***'CHAPTER V: DELAYED PAYMENTS TO MICRO AND SMALL ENTERPRISES'***

71. Chapter V of the MSMED Act specifically deals with delayed payments *to Suppliers* who are Micro and Small Enterprises. Sections 15 to 18 deal with payments including the liability to pay higher interest as discussed below.

72. In order to facilitate and ensure that the Micro and Small enterprises do not unnecessarily struggle to recover payments which are due to them, special provisions have been made in Sections 15 to 18 of the MSMED Act. For the said provisions to be applicable, the amount ought to be due and payable by a Buyer to a Supplier.

73. The definition of buyer under Section 2(d) of the MSMED Act reads as under: -

> "***Section 2(d)***- *"buyer" means whoever buys any goods or receives any services from a supplier for consideration."*

74. The definition of supplier under Section 2(n) of the MSMED Act reads as under: -

> *"**Section 2(n)**- "supplier" means a micro or small enterprise, which has filed a memorandum with the authority referred to in sub-section (1) of section 8, and includes, -*
>
> *(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956;*
>
> *(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956;*
>
> *(iii) any company, co-operative society, trust or a body, by whatever name called, registered or constituted under any law for the time being in force and engaged in selling goods produced by micro or small enterprises and rendering services which are provided by such enterprises;"*

75. Section 15 of the MSMED Act provides that if any 'supplier' i.e., a Micro or Small enterprise supplies any goods or renders services to a 'buyer' the payment for the same shall be made as agreed between the parties. As per the said section the maximum period for payment to 'Supplier', cannot exceed 45 days, as stipulated therein. In case of delay in payments, Section 16 provides for interest at a rate much higher than that provided by banks.

Further, Section 17 of the MSMED Act, stipulates that the 'Buyer' would be liable to pay the interest in terms of Section 16. The said provisions read as under:

"Section 15: Liability of buyer to make payment.

Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day:
Provided that in no case the period agreed upon between the supplier and the buyer in writing shall exceed forty-five days from the day of acceptance or the day of deemed acceptance.

Section 16: Date from which and rate at which interest is payable.
Where any buyer fails to make payment of the amount to the supplier, as required under section 15, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay compound interest with monthly rests to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at three times of the bank rate notified by the Reserve Bank.

Section 17: Recovery of amount due.
For any goods supplied or services rendered by the supplier, the buyer shall be liable to pay the amount with interest thereon as provided under section 16."

76. A perusal of Section 16 of the MSMED Act makes it clear that the provision contemplates the following:

(i) payment of compound interest;

(ii) with monthly rests;

(iii) at three times the bank rate.

77. In case of disputes regarding the payments arising out of an agreement between the parties, the MSMED Act also provides for reference to the MSEFC under Section 18. The same reads as under:

> *"**Section 18: Reference to Micro and Small Enterprises Facilitation Council.***
>
> *(1) Notwithstanding anything contained in any other law for the time being in force, any party to a dispute may, with regard to any amount due under section 17, make a reference to the Micro and Small Enterprises Facilitation Council.*
>
> *(2) On receipt of a reference under sub-section (1), the Council shall either itself conduct conciliation in the matter or seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre, for conducting conciliation and the provisions of sections 65 to 81 of the Arbitration and Conciliation Act, 1996 shall apply to such a dispute as if the conciliation was initiated under Part III of that Act.*
>
> *(3) Where the conciliation initiated under subsection (2) is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution services for such arbitration and the provisions of the Arbitration and Conciliation Act, 1996 shall then apply to the dispute as if the arbitration was in pursuance of an arbitration agreement referred to in sub-section(1) of section 7 of that Act.*
>
> *(4) Notwithstanding anything contained in any other law for the time being in force, the Micro and Small Enterprises Facilitation Council or the centre providing alternate dispute resolution services shall have jurisdiction to act as an Arbitrator or Conciliator under*

this section in a dispute between the supplier located within its jurisdiction and a buyer located anywhere in India.

(5) Every reference made under this section shall be decided within a period of ninety days from the date of making such a reference."

78. Section 24 of the MSMED Act provides that the said Act would have overriding effect over the MSMED Act. The said provision is set out below.

*"**Section 24: Overriding Effect**-The provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."*

79. A reading of the aforesaid sections makes it clear that Sections 15 to 18 of the Act are inter-linked with each other and are also linked to the title of the chapter i.e., Chapter V: Delayed Payments to Micro and Small Enterprises. The benefit of interest to the Suppliers which are Micro/Small Enterprises under Section 16, is substantial. Further, as per Section 16 and 17 of the MSMED Act the liability thereto is upon the 'buyer' to release payments to the 'supplier' as also to pay interest in case of failure to make timely payment. The overriding effect of the same is envisaged in Section 24 of the Act.

Special Audit under Section 142(2A) of the IT Act

80. Under the IT Act, an Assessee has to file returns as specified in the Act and the Rules. The said returns ought to be verified as provided for in Section 140 of the IT Act. The Assessee may also make self -assessment under the

provisions of Section 140A of the IT Act. Thereafter, the IT Department is to undertake assessment of the tax payable.

81. Under Section 142 of the IT Act, the IT Department may, undertake an enquiry for the purpose of making the assessment. For the said purpose, the IT Department may call for the return of income in respect of which the Assessee is assessable, the production of any documents, accounts or information and a statement in respect of the assets and liabilities of the Assessee. For the purpose of obtaining full information with respect to the income or loss of any person, the Assessing Officer (*'AO'*) can, under Section 142(2), make such enquiry as considered necessary.

82. In the process of making such enquiry in order to carry out the assessment proceedings, Section 142(2A) of the IT Act, contemplates the nomination of an accountant by the Commissioner or by other high-ranking officials of the IT Department, in a situation where the AO is of the opinion that owing to the volume, nature and complexity of accounts, doubt regarding the correctness of the accounts, specialized nature of the business activity etc. of the Assessee and in the interest of Revenue, an audit of the accounts of the Assessee is required. The said provision is relevant and is set out below:

> *"**Section 142 (2A)** If, at any stage of the proceedings before him, the Assessing Officer having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts multiplicity of transactions in the accounts or specialised nature of business activity 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 Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or*

Commissioner, direct the assessee to get either or both of the following namely:-

(i) to get the accounts audited by an accountant, as defined in the Explanation below sub-section (2) of section 288 nominated by the Principal Chief Commissioner or Chief Commissioner or Principal/ Commissioner or Commissioner in this behalf and to furnish a report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars, as may be prescribed and such other particulars as the Assessing Officer may require;

(ii) to get the inventory valued by a cost accountant, nominated by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in this behalf and to furnish a report of such inventory valuation in the prescribed form duly signed and verified by such cost 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 or inventory so valued 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 or inventory valuation under sub-section (2A) (including the remuneration of the accountant or the cost accountant, as the case may be) shall be determined by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner* ***(which determination shall be final)*** *and paid by the assessee and in default of such payment, shall be recoverable from the assessee in the manner provided in Chapter XVII-D for the recovery of arrears of tax :*

Provided *that where any direction for audit or inventory valuation 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 or inventory valuation (including the remuneration of the accountant or the cost accountant, as the case may be) shall be determined by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner in accordance with such guidelines as may be prescribed and the expenses so determined shall be paid by the Central Government."*

83. A perusal of the above provisions would show that in the process of making an enquiry for the purposes of carrying out an assessment, the Commissioner/other officials of the IT Department are permitted to seek the assistance of Chartered Accountants, who are registered with the Institute under Section 2(1)(b) of the Chartered Accountants Act, 1949.

84. In terms of Section 142(2D) of the IT Act, such accountant, who may be engaged for the purpose of audit, is to be paid "remuneration". The said remuneration is to be determined by the Commissioner or the Principal

Commissioner, Chief Commissioner or the Principal Chief Commissioner. Upon being determined, the said remuneration, shall be final.

85. In respect of Special Audits directed prior to 1st June, 2007 the remuneration is recoverable from the Assessee but, after the enactment of the Proviso to Section 142(2D) i.e., with effect from 1st June, 2007, the remuneration is to be paid by the Central Government.

86. Rule 14B of the IT Rules provides the guidelines for the manner in which the remuneration for Special audits is to be determined. The said Rule reads as under:

> "***14B.-Guidelines for the purposes of determining expenses for audit-*** *(1) Every Chief Commissioner shall maintain a panel of accountants, out of the persons referred to in the Explanation to sub-section (2) of section 288, for the purposes of sub-section (2A) of section 142.*
>
> *(2) Where the Assessing Officer directs for audit under sub-section (2A) of section 142 on or after the 1st day of June, 2007, the expenses of, and incidental to, audit (including the remuneration of the Accountant, qualified Assistants, semi-qualified and other Assistants who may be engaged by such Accountant) shall not be less than rupees three thousand seven hundred and fifty and not more than rupees seven thousand and five hundred for every hour of the period as specified by the Assessing Officer under sub-section (2C) of section 142.*
>
> *(3) The period referred to in sub-rule (2) shall be specified in terms of the number of hours required for completing the report.*
>
> *(4) The Accountant referred to in sub-section (2A) of section 142 shall maintain a time-sheet and shall*

submit it to the Chief Commissioner or Commissioner, along with the bill.

(5) ***The Chief Commissioner or the Commissioner shall ensure that the number of hours claimed for billing purposes is commensurate with the size and quality of the report submitted by the Accountant.*****"**

87. A combined reading of Section 142(2A) to 142(2D) of the IT Act as also Rule 14B of the IT Rules would show that a panel of accountants is maintained by the IT Department. The empaneled accountants are fully aware of the nature of the assignment when the nomination is made. Such accountants are also aware of the finality which is attached to the determination of the remuneration under Section 142(2D) of the IT Act.

88. The IT Department usually calls for Expressions of Interest (*'EOIs'*) from the accountants. Upon the submission of the EOI, the nomination is effected. The accountant is under no obligation to accept the nomination as held in '***Dhanesh Gupta and Co v. Commissioner of Income Tax and Ors [2010] 327 ITR 246(Del)'.*** The relevant extract of the said judgment is set out below:

"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."*

89. The hourly rates are prescribed under Rule 14B (2). Rule 14B (5) of the IT Rules also specifies clearly that the number of hours claimed have to be commensurate with the size and quality of the report. Thus, the scheme of the Act and the Rules entails the following steps: -

(i) Submission of Expression of Interest

(ii) Nomination by the Department

(iii) Conduct of Special Audit

(iv) Submission of report

(v) Determination of remuneration payable (vi) The payment of remuneration.

90. The nature of Special Audit under Section 142(2A) of the IT Act has been clearly explained in '***Pratius Merchants Pvt. Ltd. v. Deputy***

Commissioner of Income Tax, [2018] 404 ITR 474 (Guj)' and in '***DLF Ltd.***

v. Additional Commissioner of Income Tax, (2014) 366 ITR 390 (Del)'.

The relevant portion of ***Pratius Merchants Pvt. Ltd. (supra)*** reads:

> "*6.1 At this stage, it is required to be noted that section 142(2A) of the Income-tax Act has been amended with effect from June 1, 2013 and it provides that if at any stage of the proceedings before him, the Assessing Officer, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about the correctness of the accounts, multiplicity of transactions in the accounts or specialised business activity 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 Principal Chief Commissioner or Chief Commissioner...., direct the assessee to get the accounts audited by an accountant, nominated by the Principal Chief Commissioner or Chief Commissioner in this behalf. It also further provides 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. As per section 142(2A) of the Income-tax Act, 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. Section 142(2C) of the Income-tax Act provides that 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. Section 142(2D) of the Income-tax Act (as amended) also provide that the expenses of, and incidental to, such audit shall be paid by the Central Government. As per sub-section (3) of section 142, the assessee shall 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 subsection (2A) and proposed to be utilised for the purposes of the assessment. Thus, from the aforesaid provision, it appears that the object and purpose of special audit is as such to facilitate the Assessing Officer to arrive at correct taxable income and for which the Assessing Officer is authorized to direct the assessee to get the books of account audited by an accountant authorized by the Assessing Officer, in case, the Assessing Officer is of the opinion that books of account are complex in nature and there are multiplicity of transactions, for which, accounts are required to be audited through the special auditor. As observed hereinabove and even as per sub-section (3) of section 142 ample opportunity shall be available to the assessee to make submission/comments on the report of the special auditor and therefore, there shall not be any prejudice caused to the assessee if the accounts are ordered to be audited through the special auditor under section 142(2A) of the Income-tax Act. With this, challenge to the impugned order is required to be considered.

6.2 Identical question came to be considered by the Delhi High Court in the case of DLF Ltd. (supra). In the said decision, the Delhi High Court has considered the scope, ambit and powers of the Assessing Officer while passing order under section 142(2A) of the Income-tax Act. In the said decision, it is observed that section 142(2A) of the Income-tax Act is an enabling provision to help and assist the Assessing Officer to complete the scrutiny assessment with the assistance of an accountant. In paras 10, 11, 26 and 27, the Delhi High Court has observed as under (page 398 of 366 ITR):

> *"The aforesaid rulings when appraised and reflected, state that while examining the question of complexity in accounts, we have to*

apply the test of 'reasonable man' by replacing the word and qualities of a reasonable man, with the word and qualities of a reasonably competent Assessing Officer. The question of complexity of accounts has to be judged applying the yardstick or test; whether the accounts would be complex and difficult to understand to a normal Assessing Officer who has the basic understanding of accounts etc., without the aid, assistance and help of a special auditor. Thus, due regard has to be given to the nature and character of transactions, method of accounting, whether actuarial were adopted for making entries, basis and effect thereof, etc., though mere volume of entries might not be a justification by themselves as volume and complexity are somewhat different. Accounts should be intricate and difficult to understand. Every scrutiny assessment entails investigation and verification of the books of account, genuineness of the transactions or entries reflected in the books, computation of income etc. It is an exercise which demands expertise and a degree of skill to understand the accounts and decipher whether true and full income has been disclosed; whether there has been jugglery in the accounts or camouflage has been adopted. No undesirable assumptions should be made and a return filed is presumed to be correct but a deep and in depth scrutiny depending upon the facts may be warranted. Section 142(2A) is an enabling provision to help and assist the Assessing Officer to complete scrutiny assessment with the help of assistance of an accountant.

There has been substantial expansion of scope and ambit of special audit under section

142(2A) of the Act with effect from June 1, 2013. The amended section has been widened to include volume of accounts, doubts about correctness of accounts, multiplicity of transactions in the accounts or specialised nature of business activity of an assessee. These amendments by Finance Act, 2013 with effect from June 1, 2013, substitute the words 'nature and complexity of accounts of the assessee'. We are not concerned with the said amendment in the present case as the impugned order in question directing special audit was passed on March 25, 2013, before the amendments became effective. We are, therefore, primarily concerned with whether or not keeping in view the nature and complexity of accounts and the interest of Revenue direction for special audit is justified for the reasons set out in the order dated March 25, 2013. (We have not examined the constitutional validity of the amended provisions and we express no opinion on the said aspect)…

Powers under section 142(2A) have to be exercised in terms of the legislative provisions. The object and purpose behind the legislation is to facilitate investigation and proper determination of the tax liability. The importance and relevancy of the legislation cannot be underestimated and it is a power available with the Assessing Officer to aid and assist him. Accounts should be accurate and provide real time record of the financial transactions of the assessee. Preparation of accounts is the work of the accountant on the payrolls or employed by the assessee. In order to ensure reliability and accuracy, enterprises resort to internal audit and an external audit

> *which can be a statutory audit. Internal audits are normally conducted in house generally by acquainted or qualified accountants. Statutory audit is compulsory under the Companies Act, 1956 or when stipulated by the Act and accounts have to be audited by a qualified Chartered Accountant."*

91. A perusal of the decision extracted above shows that the purpose of Special Audit is for helping and assisting the AO. It is also for the purpose of facilitating the assessment and for proper determination of the tax liability after arriving at a correct taxable income. In effect, therefore, the Special Audit is made for and on behalf of the AO owing to the complexity of the transactions and such other factors as are set out under Section 142(2A) of the IT Act.

92. After completion of the Special Audit, the Chief Commissioner or the Commissioner plays a very crucial role in the determination of remuneration. Rule 14B (5) stipulates that the number of hours claimed by the accountant for billing purposes has to be commensurate with the size and quality of the report submitted by the accountant. This provision clearly shows that the invoice, which may be raised by the accountant, is not to be straightaway accepted. The Chief Commissioner or the Commissioner is required to assess various factors, including: –

(i) The nature of the work assigned to the accountant

(ii) The quantum of work

(iii) The duration of the work

(iv) The quality of the report

(v) Whether the hours claimed are exaggerated or commensurate or suitable, bearing in mind the above factors.

93. The accountant has also to submit the timesheet, which may or may not be fully accepted by the IT Department.

94. Thus, the determination of the remuneration is a task, which is of a specialized nature, which only the Income Tax Department would be able to undertake. The same is evident from the orders which have been passed in the present two writ petitions itself, where the IT Department, after considering comparable assignments, has concluded that the amounts claimed by the CA Firm were highly exaggerated and were not commensurate.

95. At the time when the nomination is made, the finality attached to the determination of the remuneration by the Commissioner or Chief Commissioner is well within the knowledge of the accountant/CA Firm.

96. The nature of the Audit and the manner in which remuneration is to be determined would require domain expertise and knowledge which the MSEFC cannot possess. Moreover, the function which is in effect delegated to the Audit firm is one which is exercised under the Income Tax Act and would be purely governed by the said statute. Payment of remuneration is also based on the factors prescribed in the Rules as discussed above.

97. The nature of the assessment is not commercial but is a statutory nomination for the assistance of the AO and in effect the IT Department. The IT Department cannot be termed as a 'buyer' when

it is nominating the accountant for conducting a Special Audit and neither can the CA Firm be termed as a 'supplier'. The remuneration payable to the accountant cannot also be termed as 'consideration' as the Special Audit is a statutory duty being performed by the accountant for and on behalf of the AO.

98. The invocation of the provisions of the MSMED Act under such circumstances, in respect of Special Audit remuneration under Section 142(2D) of the IT Act, would, therefore, not be tenable and is completely misplaced.

99. The MSMED Act has no applicability to the nature of the assignment which has been given to the Respondent/CA Firm. The CA Firm may be registered as a Micro or Small enterprise and may be entitled to invocation of the jurisdiction of the MSMED Act for other purposes. Insofar as the assignment is one which is emanating from a statute i.e., under Section 142(2A) of the IT Act, the determination of the remuneration is solely the prerogative of the Commissioner or the Chief Commissioner.

100. The same would not be liable to be called into question either in a civil court or in a commercial suit or civil suit as one of recovery of money. The nomination as a Special Auditor for the conduct of Special Audit is governed purely by the provisions of the Income Tax Act and Rules. This would, however, not bar the remedy of filing of a writ petition.

101. The present is a case where there is a clear lack of jurisdiction in the MSEFC, which even failed to consider as to whether the MSMED Act would itself be applicable or not.

102. Insofar as Audits under Section 142(2A) are concerned, the IT Act would have to be reckoned as the Special Act and the MSMED Act as the general Act dealing with MSME disputes. Thus, in the facts and circumstances as discussed above, the Income Tax Act would thus prevail over the provisions of the MSMED Act.

103. In view of the fact that the MSMED Act would have no applicability, the impugned references by the MSEFC, of the claims raised by the Respondent/CA Firm to arbitration are not sustainable. The same are, accordingly, set aside. The remedies of the CA Firm, if any, to challenge the orders passed by the IT Department in respect of determination of remuneration, are left open.

104. The present petitions, along with all pending applications, are allowed and disposed of in the above terms.

PRATHIBA M. SINGH
JUDGE JULY

06, 2023/*dk/rp*