

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA

BEFORE SHRI A. T. VARKEY, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./ITA No.76/Kol/2017

(निर्धारणवर्ष / Assessment Year: 2012-13)

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| ACIT, CC-1(1), Kolkata Aaykar Bhawan Poorva, 110, Shantipally, 3 rd Floor, Kolkata – 700 107. | Vs. | Shri Rakesh Agarwal 5/2/V, Panditiya Road, 110, Shantipally, 3 rd Floor, Kolkata – 700 107. |
| स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : ACZPA 0446 K | | |
| (Appellant) | .. | (Respondent) |

Appellant by : Shri G. Hangshing, CIT

Respondent by : Shri N. Sheth

सुनवाईकीतारीख/ **Date of Hearing** : **16/04/2018**

घोषणाकीतारीख/**Date of Pronouncement** : **30/05/2018**

आदेश / ORDER

Per Dr. A. L. Saini:

The captioned appeal filed by the Revenue, pertaining to Assessment Year 2012-13, is directed against an order passed by the Ld. Commissioner of Income Tax (Appeals)-20, Kolkata in appeal No.733/CIT(A)-20/CC-1(1)/14-15, dated 25.10.2016, which in turn arises out of an assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), dated 31.03.2014.

2. The Grievances raised by the Revenue are as follows:

"1) That the CIT(A) erred in law as well as facts and circumstances of the case in holding that the cash seized during the course of search should be adjusted against the tax liability from 'date of application' i.e. on 10.04.2012 considering that income tax does not provide for adjustment of seized cash before determination tax liability and cannot be adjusted against advance tax as per explanation 2 to section 132B.

2) *The appellant craves the leave to make any addition, alteration and modification etc of ground or grounds on or before the date of hearing of the appeal."*

3. The brief facts qua the issue are that a search and seizure operation was conducted under the provisions of section 132 of the Income Tax Act on 17.01.2012 and cash to the tune of Rs. 1,83,45,000/-, was seized by the search party from the assessee`s residence and office premises. During the rectification proceedings under section 154 of the Act, the Assessing Officer has given credit of seized cash to the tune of Rs.1,75,00,000/- out of total cash seized during the course of search and seizure of Rs.1,83,45,000/-, thereby omitting to give credit of the balance amount of Rs.8,45,000/- (that is, Rs.1,83,45,000 - Rs.1,75,00,000).The assessee submitted a request Letter on 10/04/2012 to DGIT (Inv) to treat seized cash of Rs. 1,83,45,000/- as Advance Tax for A.Y 2012-13.The Return of Income was filed by assessee on 31/01/2013,wherein he took the credit of seized cash. The assessing officer passed the assessment order u/s 143(3), on dated 31/03/2014, wherein credit of seized cash was not provided to the assessee.

The assessee filed a rectification application on dated 05/05/2014, under section 154 of the Act requesting the assessing officer to give tax credit of the seized cash amounting Rs.1,83,45,000/-. Based on the rectification application filed by the assessee, the rectification order was passed by the assessing officer on 01/09/2014, wherein the tax credit of Rs. 1,75,00,000/- was given from 23/03/2013 instead of 10/04/2012, and tax credit of Rs. 8,45,000(that is, Rs.1,83,45,000 - Rs.1,75,00,000) was denied.

Again, a rectification petition under section 154 of the Act, was filed by assessee on 23/09/2014 requesting the AO to provide balance credit of Rs. 8,45,000/- and reduce Interest. The assessing officer again passed the

rectification order U/s 154 of the Act, on dated 23/09/2014 and denied the balance tax Credit of Rs. 8,45,000/-.

4. Aggrieved by the stand of the Assessing Officer,(against Rectification order dated 23/09/2014),assessee carried the matter in appeal before the CIT(A), who allowed the balance tax Credit of Rs. 8,45,000/-. The Revenue is not satisfied with the order of Id CIT(A) and is in further appeal before this Tribunal.

5. The Id. DR for the Revenue has submitted before us that Id. CIT(A) erred in holding that the cash seized during the course of search & seizure, should be adjusted against the tax liability from 'date of application' i.e. on 10.04.2012. The Income Tax Act does not provide for adjustment of seized cash before determination tax liability and cannot be adjusted against advance tax as per explanation 2 to section 132B of the Act. The Id. DR further stated that the assessee's request to adjust the seized cash, towards his advance tax liability, from the 'date of application i.e. on 10.04.2012' should not be entertained, as the provisions of section 132B of the Act, does not speak about and does not give the guidance that the Department should adjust the seized cash towards the advance tax liability of the assessee from the 'date of application' itself.

6. Learned counsel for the assessee begins by pointing out that the assessee had already submitted a letter on dated 10.04.2012 to the Id. DGIT(Investigation), Kolkata with a request to treat the cash so seized during the course of search & seizure operation,towards his liability to pay advance tax for the Assessment Year 2012-13. The Id. counsel submitted that in accordance with the provisions of Clause (i) of Section 132B of the I.T. Act, 1961,the adjustment of seized cash with the existing tax liability is permitted and for that the assessee submitted a letter on 10.04.2012 to the

Id. DGIT(Investigation), Kolkata with a request to treat the cash so seized during the course of search & seizure operation,towards his advance tax liability, for the Assessment Year 2012-13. The assessee has mentioned in the said letter that the total cash seized should be adjusted towards his advance tax liability to avoid unnecessary demand and interest due thereon. The Id. Counsel further submitted that it was clear from the letter submitted by the assessee to the Income Tax Authority regarding adjustment of the entire seized cash amounting to Rs.1,83,45,000/- and therefore, it should have been adjusted against the tax dues with effect from the 'date of application'.

7. We have given a careful consideration to the rival submissions and perused the materials available on record, we note that the cash was seized during the course of search and the return of income was filed by the assessee taking credit of seized cash, so the liability to deposit the advance tax could have been adjusted against the seized amount. The advance tax liability in respect of the assessment year 2012-13, the cash was already available in the P.D. account maintained by the department but the assessing officer has not accepted the request made by the assessee, vide letter dated 10.04.2012 for the adjustment of advance tax against the seized cash to the tune of Rs.8,45,000/- whereas the seized cash to the extent of Rs. 1,75,00,000/- has been adjusted by the assessing officer against the liability of the assessee towards liability for payment of advance tax. It seems to us that the assessing officer has accepted the request of the assessee partly to adjust the part amount out of total cash seized to the tune of Rs.1,83,45,000/-, which is acceptable but the question arises that when the amount of Rs. 1,75,00,000/- has been adjusted by the assessing officer against the liability of the assessee towards payment of advance tax, then why the balance amount of

Rs.8,45,000/- (Rs.1,83,45,000/- - Rs.1,75,00,000/-) should not be adjusted? The characteristic and nature of both the amounts (that is, Rs.1,75,00,000 and Rs.8,45,000) are same. We note that assessee wrote a letter dated 10.04.2012 to DGIT(Investigation), Kolkata, for the adjustment of cash seized during the course of search and seizure operation towards his liability to pay advance tax. However, the Assessing Officer has adjusted on Rs.1,75,00,000/- and balance cash seized to the tune of Rs.8,45,000/- (Rs.1,83,45,000/- - Rs.1,75,00,000/-) has not been adjusted. We note that Rs.1,75,00,000/- was seized from the resident of the assessee and Rs.8,45,000/- seized from the office premises of the assessee. It is abundantly clear that the letter was written by the assessee to the Income Tax Authorities dated 10.04.2012, requesting for adjustment of the entire seized amount of Rs.1,83,45,000/-, towards advance tax liability of the assessee, therefore, the assessing officer should have been adjusted the entire seized cash against tax due with effect from the date of said application.

As per the provisions of Clause (i) of Section 132B of the I.T. Act, 1961, which clearly provides for the adjustment of seized cash with the existing tax liability and the Assessing Officer has only given the tax credit of the seized cash amounting to Rs.1,75,00,000/- and refused to give tax credit for Rs.8,45,000/-, which is not justifiable. The assessing officer ought to have adjusted Rs.8,45,000/- against the tax liability of the assessee and for that we rely on the judgment of Hon'ble Allahabad High Court in the case of CIT vs. Sunil Chandra Gupta [2016] 76 taxmann.com 372 (Allahabad) wherein it was held as follows:

"6. We heard both the parties at length and carefully gone through the materials available on records from which it appears that, during the search, a huge cash was recovered. The assessee, while making statement under Section-134 of the Income Tax Act, offered to pay the tax on an undisclosed income of Rs. 10 Crore for which the tax would come to approve Rs. 3 Crore but the cash amount of Rs. 43,13,600/- was already available with the department which was deposited in the P.D. account. The assessee made a number of request from time to time for the adjustment of the cash seized against the liability of the advance tax, but the

department neither replied nor adjusted the said amount. No doubt that before the due date, the cash was available with the department. The same could have been adjusted against the advance tax. The return was filed on or before the due date so the interest for default in furnishing the return of income under Section-234A was not desirable. Similarly, the interest for default in payment of advance tax is also not leviable under Section-234B for the reason that assessee had already made a request for adjustment of the amount against the advance tax which was already in the custody of the department.

Similarly, Section-234C is not attracted as there was no deferment. It may be mentioned that Hon'ble Punjab & Haryana High Court, in the case of IT vs. Ashok Kumar 334 ITR 355 (P.&H.) observed that the assessee was entitled to adjustment of seized cash against the advance tax liability and therefore, no interest could be charged under Section-234A,B,C especially when the department had not responded to the assessee's request for the adjustment of the cash seized against the advance tax liability."

8. We note that the facts of the assessee's case under consideration are similar to the facts narrated in the judgment of Hon'ble Allahabad High Court in the case of Sunil Chandra Gupta (Supra). We note that the Department seized the cash to the tune of Rs.1,83,45,000/- and deposited it in the P.D. Account of the company. The assessee made a request in writing dated 10.04.2012 for the adjustment of the cash seized against the liability of advance tax but the Department neither replied nor adjusted the said amount of Rs.8,45,000/-. The amount of Rs.8,45,000/-, no doubt, it was available with the Department, and the same could have been adjusted against the advance tax, therefore, the interest for default in payment of advance tax is not leviable u/s 234B for the reason that assessee had already made a request for adjustment of the amount against the advance tax which was already in the custody of the Department. Similarly, interest under section 234C is not attracted as there was no deferment. Therefore, we are of the view that the assessee is entitled to adjustment of the seized cash against advance tax liability, therefore, no interest should be charged u/s 234A, 234B, and 234C of the Act, especially when the Department has the assessee's money in the P.D. account.

Considering the facts and case law narrated above, it seems to us that we cannot disturb the findings of the Commissioner of Income Tax (Appeals), therefore, the appeal of the Revenue must be dismissed.

9. In the result, the appeal filed by Revenue is dismissed.

Order is pronounced in the open court on 30.05.2018.

Sd/-
(A. T. VARKEY)

न्यायिकसदस्य / JUDICIAL MEMBER

कोलकाता /Kolkata;

दिनांक/ Date:30/05/2018

(RS, SPS)

Sd/-
(A. L. SAINI)

लेखासदस्य / ACCOUNTANT MEMBER

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant- ACIT, Central Circle-1(1), Kolkata
2. प्रत्यर्थी/ The Respondent- Shri Rakesh Agarwal
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, कोलकाता/ DR, ITAT, Kolkata
6. गार्डफाईल / Guard file.
सत्यापितप्रति

True Copy

By Order

Senior Private Secretary,
Head of Office/D.D.O,
I.T.A.T, Kolkata Benches,
Kolkata.