IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I. T. A. No. 328/(Asr)/2017
Assessment Year: 2008-09

Harvinder Kaur, 35, Gopal Park, Kapurthala [PAN: AGYPK 8199A] **(Appellant)**	Vs.	Asstt. Commissioner of Income Tax Central Circle-1, Jalandhar **(Respondent)**

Appellant by : Sh. Surinder Mahajan (C.A.)
Respondent by: Sh. Alok Kumar, CIT-DR

Date of Hearing: 20.08.2018
Date of Pronouncement: 29.10.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals), Bathinda ('CIT (A)' for short) dated 06.02.2017, dismissing the assessee's appeal contesting her assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 29.12.2009 for Assessment Year (AY) 2008-09, pursuant to search at her residential premises on 04.03.2008.

2. The appeal raises three grounds, which we shall take up in seriatim. Vide Ground 1 the assessee agitates the disallowance of interest (on loan) in the sum of Rs.1,22,667/-. The same stands disallowed in the absence of the assessee substantiating her claim for the same, stated to be interest on a housing loan (refer

para 7.2 of the assessment order). The same stood confirmed in appeal for essentially the same reason/s, i.e., the assessee failing to state the precise purpose for which the loan was taken and, consequentially, substantiating her stand of the loan being for the purpose of the assessee's business. The relevant part of the impugned order reads as under: (pg. 10)

> 'Substantiating the grievance against addition of interest paid on term loan(s) taken from PNB, the appellant filed copies of balance sheet, (profit) and loss account, copy of computation of income, copy of PNB term loan account, etc. *However, it was nowhere stated in the written submissions the purpose for which such loan was taken*. None of the documents annexed with the written representation could throw light on the purpose of the said term loan taken by the appellant. In such a situation, the allowance of interest becomes doubtful as it is not known whether it is for the purposes of the business of the appellant or not. *The appellant has only referred to various case laws for allowance of the said interest but has stopped short of stating the purpose of the term loan on which interest was paid*. The ground of appeal pertaining to this addition is thus dismissed.' (emphasis, ours)

Aggrieved, the assessee is in appeal.

3. Before us, the ld. counsel, Sh. Mahajan, would, drawing our attention to the balance-sheet as on 31.03.2008, the relevant year-end (PB pgs. 22-23), would submit that it is apparent that the loan under reference is a secured loan *deployed in the assets of the assessee's business,* the current assets (at Rs.119.35 lacs) constituting the bulk of the total assets as per the said balance-sheet (Rs.158.70 lacs). On being enquired about the investment of Rs.2.60 lacs (as on 31.03.2008) which, being in shares and mutual funds, appears to be a personal investment of the assessee, he would submit that the same would of little moment in view of her capital as at the year-end, i.e., Rs.87.64 lacs, so that the same gets funded thereby. The ld. Departmental Representative (DR) would, on the other hand, rely on the orders by the Revenue authorities.

4. We have heard the parties, and perused the material on record.

The disallowance has been made and confirmed on the ground of the assessee failing to disclose, and/or to substantiate, the purpose of the loan, i.e., apart from a cursory mention (in the assessment proceedings), without substantiation, of it being a housing loan – a statement not pursued by the assessee. The assessee's case before us is that this should not be of any consequence in-as-much as, as apparent from the balance-sheet, the funds have been deployed for the assessee's business, and for which Sh. Mahajan would during hearing also take us through the assessee's bank account with PNB, Kapurthala (i.e., as appearing in her books of account) (PB pgs. 28-33), as well as, the interest account (PB pg. 24), showing it to be *qua* a secured term loan availed from PNB. Now, true, if the third asset category, i.e., fixed assets, in the assessee's balance-sheet as on 31.03.2008, outstanding at Rs.36.75 lacs, represents a business asset/s, without doubt, the loan amount on which the interest is being claimed, together with other liabilities (and capital), are presumably invested in the assessee's business during the year (of course, save a nominal sum of Rs.2.60 lacs supra, which would stand appropriated against capital), entitling her to claim deduction u/s. 36(1)(iii). If, however, it is not so, and the same is a personal asset/s, toward which the assessee has obtained a housing loan, even as indicated during the assessment proceedings, the interest thereon could only be allowed u/s. 24(b), and in terms thereof. Why, even if a business asset/s, the interest for the construction period, which appears to be the case from the statement of the term loan (PB pgs. 25-27), as well as the fact that no depreciation (on fixed assets) stands claimed, the interest would, as per *proviso* to section 36(1)(iii), require being capitalized. The assessee has completely failed to come out, much less exhibit, the bare, basic facts of the case, which is unfortunate, much less rebut the clear findings by the Revenue authorities in the matter or show any infirmity therein. The burden to prove his return, and the claims preferred

thereby, it is well settled, is on the assessee [*CIT v. Calcutta Agency Ltd.* [1951] 19 ITR 191 (SC); *CIT v. R. Venkata Swamy Naidu* [1956] 29 ITR 529 (SC)].

There is, accordingly, on the basis of the material on record, nothing amiss in the impugned disallowance. So, however, and only in the interest of justice, we consider it proper to restore the matter back to the file of the AO to allow a final opportunity to the assessee to present her case either u/s. 36(1)(iii) or u/s. 24, or any other for that matter, *qua* interest of Rs.1,22,667/-, and who shall decide per a speaking order after affording a reasonable opportunity to the assessee.

We decide accordingly.

5. The second ground of appeal, which is in respect of an addition for Rs.10,000/-, being FDR found from the assessee's locker during search, was not pressed at the time of hearing. The same is accordingly dismissed as not pressed.

6. The only other issue, pressed per Ground 3, is *qua* charge of interest, upon assessment, u/ss. 234A and 234B of the Act. The assessee's case in this regard is that she was constrained to file the return or deposit the tax as the Revenue did not, despite repeated reminders, furnish the necessary documents enabling her to do so. The return was filed on 18.3.2009, i.e., within a month of the copies of the seized documents being made available to her on 19.2.2009. On being required to show the said request letters/communications, Sh. Mahajan, though did not produce the copies thereof, would refer to his written submissions dated 16.5.2016 before the ld. CIT(A) whereat a reference to these letters – the first of which is dated 08.10.2008 (continuing up to 16.02.2009), stands made. On the Bench observing that the facts, as stated, would need to be verified; there being no finding by the ld. CIT(A), the ld. counsel would state that the matter be remanded to his file in-as-much as he has failed to answer the assessee's Ground 4, challenging the charge of

interest u/ss. 234A and 234B, before him. The parties were at this stage required to address the Bench on the legal competence of the Tribunal, or for that matter the first appellate authority, to adjudicate a grievance *qua* the charge of mandatory interest under the said sections. The parties, on the next date of hearing, made their submissions. While the assessee relies in the main on the decision in *ITO v. Dr. Sameer Kant Agarwal* [2008] 122 ITD 85 (Luck), the ld. DR would on the Board Order dated 26.6.2006 [F. No. 400/129/2002-IT(B)](copy on record) which, it was claimed, stands approved by the Hon'ble Court in *De Souza Hotels Pvt. Ltd. v. CCIT* [2012] 207 Taxman 84 (Bom) (copy on record).

7. We have heard the parties, and perused the material on record.

The first issue that confronts us is as to the legal competence of the tribunal (as an appellate authority under the Act) to adjudicate *qua* the levy of interest u/ss. 234A and 234B, held as compensatory and mandatory by the Apex Court per its constitutional bench decision in *CIT v. Anjum M. H. Ghaswala & Ors.* [2011] 252 ITR 1 (SC). This is as the same is not appealable as held by the Apex Court in *Central Provinces Maganese Ore Co. Ltd. v. CIT* [1986] 160 ITR 961 (SC), unless the assessee denies his liability to interest (under the relevant sections), as in that case he is essentially challenging his assessment, which is (of course) appealable. We are conscious that the assessee's grievance before us is of the ld. CIT(A) having not adjudicated her appeal in-so-far as it relates to the challenge to the levy of interest u/s. 234A/234B, so that the matter be restored to him. The argument, however, presumes that the issue is appealable, so that the matter, having not been adjudicated by the first appellate authority, would warrant being decided by him. The aspect of legal competence is in fact a legal issue, which could be taken up for the first time even directly before this tribunal. In other words, even the limited adjudication, i.e., as to restoration by us, could only be on the premise of the same

being appealable, so that it, remaining to be, requires being adjudicated on merits by the concerned appellate authority. In the facts of the instant case, the assessee, in our view, despite the vehement assertions to the contrary by the ld. counsel before us, does not deny her liability to interest or the applicability of the said interest provisions *per se*. All she says is that the delay in filing the return, which is the default for the charge of interest u/s. 234A, as well as the shortfall in the deposit of advance-tax during the year (i.e., f.y.2007-08), attracting interest u/s. 234B, is due to the unavailability of the relevant material, being in the possession of the Revenue, and made available to her only subsequently, so that the time period following the request by the assessee (being from 09.10.2008 to 18.02.2009), be excluded in reckoning the interest, or that relatable to the said period be not charged to her. The assessee's case, even construed in the broadest sense, does not extend to the denial of the liability to interest *per se*, but is only one of reduction or waiver of interest, so that the issue raised is not appealable. The cited decision in *Dr. Sameer K. Agarwal* (supra) is completely distinguishable on facts. In the facts of that case, the assessee *denied his liability to interest* as there was no mention thereof in the assessment order – clearly, a legal challenge. It was under these circumstances that the tribunal, noting the decision in *Central Provinces Maganese Ore Co. Ltd.* (supra), held that the assessee could appeal against the same, which it, therefore, as an appellant authority under the Act, is competent to adjudicate. The following extract from the decision in *Central Provinces Maganese Ore Co. Ltd.* (supra) would be relevant as well as instructive:

'Interest is levied under section 139(8) or section 215 of the Income-tax Act, 1961, because by reason of the omission or default mentioned in the respective provision, *the Revenue is deprived of the benefit of the tax for the period during which it has remained unpaid.*

The levy of interest is part of the process of assessment. Although sections 143 and 144 do not specifically provide for the levy of interest and the levy is, in fact, attributable to section 139(8) or section 215, it is nevertheless a part of the process of assessing the tax liability of the assessee. Inasmuch as the levy of interest is a part of the process of

assessment, it is open to an assessee to dispute the levy in appeal *provided he limits himself to the ground that he is not liable to the levy at all.* [emphasis, ours]

The interest under reference therein was u/ss. 139(8) and 215. However, as the statute provided for a reduction or waiver in interest thereunder, the Hon'ble Court held that, though not liable to be appealed against, the assessee can move the Commissioner under his revisional jurisdiction, i.e., after exhausting the opportunity before the ITO or, as a case may be, the Inspecting Assistant Commissioner, who were bound to, before imposing the levy there-under, hear the assessee in the matter where he disputes the same, seeking a reduction or waiver therein. What is in dispute is not the levy *per se*, the jurisdictional fact – as, for example, the delay in the filing the return u/s. 139, attracting the levy, being not in dispute. What the assessee contends in such a case, and the question, nevertheless, is as to whether there are circumstances calling for a reduction or waiver in interest, and *qua* there is, clearly, no such legal challenge in the instant case, which the assessee seeks to satisfy the AO (refer pgs. 962, 968 of the decision). There is, clearly, no such legal challenge in the instant case.

On merits, the tribunal, adverting to several decisions, including *Anjum M.H. Ghaswala* (supra) and *CIT v. Upper India Steel Mfg. & Engg. Co. Ltd.* [2004] 279 Taxman 123 (P&H), held that the levy of interest u/ss. 234A, 234B and 234C, is, once the default mentioned in those sections is committed, mandatory, with no discretion left with the AO. The subsequent act of the AO in charging the said interest through demand notice and passing rectification order was therefore valid. The assessee's legal challenge, admissible in appeal, was adjudicated thus.

On merits, the tribunal in *Dr. Sameer K. Agarwal* (supra), after adverting to several decisions, including *Anjum M.H. Ghaswala* (supra) and *CIT v. Upper India Steel Mfg. and Engg. Co. Ltd.* [2004] 141 Taxman 692 (P&H), held that the levy of

interest u/ss. 234A, 234B and 234C, is, once the default mentioned in those sections is committed, mandatory, with no discretion left with the AO. The subsequent act of the AO in charging the said interest through demand notice and passing rectification order was therefore as valid. The assessee's legal challenge, admissible in appeal, was adjudicated thus. Quite, on the contrary, in the present case, as afore-noted, challenge is to the unreasonableness, in the facts and circumstances, of the levy of interest in-as-much as the delay, to whatever extent, *is not attributable to the assessee*. The statute does not directly provide for any reduction, even as it confers, u/s. 119(2), power on the Board to issue directions or instructions to the income-tax authorities for the proper and efficient management of the work of assessment and collection of revenue, as well as for avoiding genuine hardship (even where the time limit under the Act for making an application to any income-tax authority has expired). The said attribution to the Revenue – the assessee admittedly making the request for the first time on 08.10.2008 - the verbal requests, if any, made prior thereto, being unevidenced, it is only the time taken thereafter that could possibly be said to be attributable to the Revenue and, thus, liable to be excluded while reckoning the interest for the period of the delay. Rather, the said attribution, even if total, would not amount to a denial of her liability to interest *per se*, but only a complete reduction or waiver, on facts. That is why we did not qualify the delay, referring it as 'to whatever extent', signifying its irrelevance in-so-far as the denial of liability is concerned, so that a reduction or waiver being justifiable in the total in the facts and circumstances of a case implies just that, i.e., it being justified to, on account of the peculiar facts and circumstances of the case, grant reduction or waiver of interest in full. Put succinctly, the assessee's case, i.e., of it being not justified to charge her interest in the facts and the circumstances of her case, is not a denial of liability to interest *per se* and, therefore, is not appealable. A denial of liability, on the other hand, would

be where any of the prescribed antecedent conditions for the application of the provision/s are not met, viz., the return stands furnished in time or, as the case may be, there is no shortfall, even as explained in *Central Provinces Maganese Ore Co. Ltd.* (supra). The cited decision, rather than being in the assessee's favour, is, on facts and in ratio, in favour of the Revenue. There is, accordingly, no question of remission back to the first appellate authority for an adjudication on merits, which could only be where the levy is appealable.

It would also be relevant here to refer to the Board order dated 26.6.2006 supra, which clarifies the powers of Board reserved u/s. 119(2)(a), authorizing it to issue general or specific instructions relaxing the provisions of various sections, including sections 234A and 234B. Per the said order, the power stands delegated by the Board to the Chief Commissioner of Income Tax (CCIT). The appropriate procedure in the matter, therefore, is for the assessee to move the appropriate authority, seeking relief, which is thus in the administrative domain. We may at this stage also refer to the decision in *De Souza Hotels Pvt. Ltd.* (supra) whereby the Hon'ble Court dismissed the challenge to the *vires* of the said order. In the facts of the case, the assessee, a company in hotel business, had unsuccessful petitioned to the ld. CCIT *qua* interest u/ss. 234B and 234C, seeking the benefit of waiver of interest there-under, citing hardship. The same was denied by the ld. CCIT as the assessee's case did not fall in any of the conditions, (a) to (d), listed at para 2 of the said order, with the condition under clause (d), as to genuine hardship, being in fact applicable only to interest u/s. 234A. The impugned order found approval by the Hon'ble Court, declining interference. Alternatively, it was pleaded that the clause or clauses specified in para 2(a) to 2(d) are arbitrary and, therefore, violative of Article 14 of the Constitution of India (CoI). The argument that clauses (a) to (d) (of para 2 of the CBDT's order supra) covers different class or classes of income, unequally, it was held, is fallacious in-as-much as the same

covers different provisions. There is no question of grouping distinct clauses and treating them equally. The object is to confer discretionary power (on the Board/CCIT) to reduce or waive interest in case of three separate defaults, while an unequal treatment could be faulted only if the different cases are otherwise equal. This was not a case of class legislation, even if delegated. There was, accordingly, no violation of Article 14 of the CoI (para 23). In fact, clause 2(a) of the Board order specifically provides for a situation where the assessee's return is delayed on account of seizure of books of account and other incriminating documents during search – a stand by the assessee, which is stoutly refuted by the Revenue (refer paras 5, 5.1of the assessment order). It is, though, unnecessary for us to travel to the merits of the case, suffice to state that the matter is primarily factual, and disputed. The same however clarifies two things. One, that the matter is primarily factual, so that it would require being factually determined, both as to the period of delay and its' attribution to the Revenue. Two, and more importantly from the stand point of this appeal, the issue is covered squarely by the power conferred on the Board u/s. 119(2) of the Act.

Finally, we may consider the assessee's reliance on the decision in *Parminder Singh v. Asst. CIT,Jalandhar* (in Appeal No. 62/IT/CIT(A)-I/Ldh/2009-10, dated 05.10.2011), stated to be the case of the assessee's husband, where, under similar circumstances, the appeal stands allowed by condoning the delay. The said order, being by the first appellate authority, is firstly, not binding on us, with, rather, our decision being based on well settled principles of law and jurisprudence; in fact admitted to in-as-much as the assessee, even as she seeks to make out a case w.r.t. the letters to the AO, claims that she thus denies the applicability of the relevant provisions, as was indeed the case in *Dr. Sameer K. Aggarwal*, i.e., the decision relied upon (by the assessee), which turned on the facts of the case, with, as afore-noted, its' ratio being neither disputed nor assisting the

assessee's case but, rather, of the Revenue. The said order is, thus, against the decision in *Central Provinces Maganese Ore Co. Ltd.* (supra) as well as, in fact, in *Dr. Sameer K. Aggarwal* (supra), both of which are not referred to therein. The principle involved in the levy of interest, mandatory and compensatory in character, it needs to be appreciated, is of reparation and restitution. The assessee does not deny that the money – for whatever reason, has been withheld from the Revenue, but attributes the delay (in part) to the Revenue. That is, by admission, the assessee's case is of a reduction or waiver of the interest chargeable to her in the facts and circumstances of her case. In fact, this constitutes the other ground/ reason for the inapplicability of this order. That is, the very fact of condonation of delay implies that the provision is, in the facts and circumstances of the case, otherwise applicable, though should not impact the assessee adversely in the facts and circumstances of his case. That the order in *Parminder Singh* (supra) may assist the assessee's case when or if she moves the ld. CCIT u/s. 119(2) is another matter. The Revenue, which was stated to have accepted the said order, may have been constrained u/s. 268A to appeal there-against, so that that by itself has no precedent value. Reference in this context, further, be made to the decision by the Apex Court in *C.K. Gangadharan vs. CIT* [2008] 304 ITR 61 (SC).

We decide accordingly.

8. In the result, the assessee's appeal is partly allowed for statistical purposes.

Order pronounced in the open court on October 29, 2018

Sd/-	Sd/-
(N. K. Choudhry)	(Sanjay Arora)
Judicial Member	Accountant Member

Date: 29.10.2018
/GP/Sr. Ps.

Copy of the order forwarded to:

(1) The Appellant: Harvinder Kaur, 35, Gopal Park, Kapurthala
(2) The Respondent: Asstt. Commissioner of Income

Tax Central Circle-1, Jalandhar
(3) The CIT(Appeals), Bathinda
(4) The CIT concerned
(5) The Sr. DR, I.T.A.T.

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By Order