

आयकरअपीलीयअधिकरण, अहमदाबाद
**IN THE INCOME TAX APPELLATE TRIBUNAL,
RAJKOT BENCH, RAJKOT
(CONDUCTED THROUGH E-COURT AT AHMEDABAD)
BEFORE SHRI MAHAVIR PRASAD, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

आयकरअपीलसं./ITANo.562/Rjt/2014
निधारणवर्ष/Asstt. Year: 2008-2009

Shri Rahendrasinh P. Jadeja, Pradhuman Villa, Opp. Neel Da Dhaba, Kalawad Road, Rajkot. PAN: ABOPJ5431H	Vs.	D.C.I.T, Central Circle-2, Rajkot.
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(Applicant)		(Respondent)
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Assessee by :	Shri M.J. Ranpura, AR
Revenue by :	Shri JeetendraKumar, CIT. DR

सुनवाईकतिरीख/**Date of Hearing** : 01/01/2019
घोषणाकतिरीख/**Date of Pronouncement**: 01/02/2019

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Commissioner of Income Tax (Appeals) ó IV, Ahmedabad [Ld.CIT(A) in short] vide appeal no.CIT(A)-IV/126R/CC-2/12-14 dated 31/07/2014 arising in the matter of rectification order passed under s.154 of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year (AY) 2008-2009.

2. The assessee has raised as many as four grounds of appeal, but the main issue revolves to the interest charged u/s.234A, 234B, and 234C of the Act, without treating the cash seized as an advance tax liability.

3. Briefly stated facts are that the assessee in an individual and acting as a partner in various firms. The assessee is deriving income under the head Business & profession and other sources. The search and seizure operation u/s 132 of the Act was carried out at the residential premises of the assessee dated 30/05/2017. During the search, certain loose papers and other documents were seized including the cash of Rs. 30,00,000/- found on the day of the search.

3.1 The assessee vide letter dated 29/06/2007 admitted that the undisclosed income of Rs. 1 Cr. The assessee filed his return of income dated 04/02/2009 declaring total income of Rs.1,06,37,200/- and claim the seized cash of Rs. 30,00,000/- as advance tax on account of such undisclosed income. However, the AO in the Assessment Order dated 30/10/2009 framed u/s 143(3) of the Act, did not treat the seized cash as advance tax. Accordingly, the AO charged interest u/s 234A, 234B, and 234C of the Act.

3.2 The assessee subsequently filed a rectification application u/s 154 of the Act dated 17/04/2010 requesting to allow the credit of the seized cash by treating the same as advance tax payment, but the AO did not dispose of the rectification application filed by the assessee.

3.3 In the meantime there was another search carried out at the residential premises of the assessee dated 24/06/2010. Accordingly, the assessee filed his return of income u/s 153A of the Act dated 30/05/2011. The assessee again

claimed the credit of cash seized during the search as on 30/05/2007 as an advance tax payment.

3.4 The AO in the Assessment Order framed u/s 153A r.w.s section 143(3) of the Act, dated 17/01/2013 has given credit of seized cash from the date when the return was filed as a result of the first search, i.e. 04/02/2009. As such the credit for the seized cash was not given by the AO as advance tax payment with effect from 30/05/2007 but from the date when the return was filed by the assessee in consequence to the first search i.e. 04/02/2009. As such the AO treated the seized cash as self assessment tax paid u/s 140A of the Act.

3.5 The assessee again filed a rectification application u/s 154 of the Act, dated 21/02/2013, requesting to rectify the interest charge u/s 234A, 234B and 234C of the Act.

3.6 However, the AO in the rectification application held that the cash seized during the search could not be treated as prepaid taxes. Therefore the seized cash cannot be equated with advance tax liability. As per the AO, the cash seized can be treated as self-assessment tax as claimed in the return of income filed on 04/02/2009. The AO was of the view that the credit for the seized cash cannot be given automatically until and unless the assessee claims it.

4. Aggrieved assessee preferred an appeal to the Ld. CIT (A). The assessee before the Ld.CIT (A) submitted that the cash seized should be treated as advance tax payment from the date when it was seized. The assessee also claims that the interest charged u/s 234A, 234B, and 234C of the

Act is compensatory in nature. Therefore he should be given credit with effect from the day of the seizure of cash.

5. However, the "Ld.CIT (A) disregarded the contention of the assessee by observing that the cash seized as a result of the search can be appropriated against any existing tax liability or the amount of tax liability determined on the completion of the assessment as per the provisions of section 132B of the Act. As there was no tax liability as on the day of the search, therefore the cash seized cannot be treated as an advance tax payment.

6. The assessee has not made any request to adjust the cash seized with the tax liability. Therefore the same cannot be treated as advance tax.

7. Being aggrieved by the order of the Ld.CIT (A) assessee is in appeal before us.

8. The Ld.AR, before us, filed a paper book running from pages 1 to 40 and reiterated the submission as made before the Ld.CIT (A).

9. On the other hand the Ld. DR vehemently supported the order of authorities below.

10. We have heard the rival contentions and perused the materials available on record. In the instant case search and seizure operation was carried out under section 132 of the Act, at the premises of the assessee dated 30th May 2007. During the search, a sum of Rs. 30,00,000/-was found which was seized. The assessee filed its return of income for the year under consideration

dated 4th February 2009, wherein the cash seized by the Revenue was treated as advance tax deposited by him on 30th May 2007.

10.1 However, the AO in the assessment proceedings denied to the seized cash as advance tax liability of the assessee in his order dated 30th October 2009. The assessee subsequently files a rectification application under section 154 of the Act, but the same was not disposed of by the AO.

10.2 Subsequently, there was another search carried out at the residential premises of the assessee under section 132 of the Act, dated 24th June 2010. The assessee filed the return of income under section 153A of the Act on 30th May 2011. The assessee in this return also treated the cash seized by the Revenue for Rs. 30,00,000/- as an advance tax with effect from 30 May 2007. But the AO did not give any credit to the assessee for the cash seized during the search in his order under section 153(A) r.w.s 143(3) of the Act vide dated 17th January 2013.

10.3 The assessee once again moves rectification application under section 154 of the Act with a request to treat the cash seized as advance tax for the year under consideration with effect from 30th May 2007. However, the AO treated the seized cash as self-assessment tax from the date on which the return was filed by the assessee, i.e., 04/02/2009 by observing that the seized cash cannot be treated as advance tax automatically until the assessee claims it. As the assessee claimed the seized cash as advance tax in his return filed on 4 February 2009, the AO treated the seized cash as self-assessment tax with effect from 04/02/2009.

10.4 However, the Ld.CIT (A) directed the AO to treat the seized cash as self-assessment tax with effect from 30th May 2011 when the income tax return was filed in response to the notice issued under section 153A of the Act.

10.5 The 1st controversy before us arises for our adjudication whether the cash seized during the assessment proceedings can be treated as advance tax paid by the assessee.

10.6 The provisions for the adjustment of seized cash against the tax liability are contained under the provisions of section 132B of the Act. As per the provision, the cash seized during the search and seizure operation can be adjusted against the existing tax liability, and the liability of tax determined on the completion of the assessment. Now the question arises for the determination of the existing liability.

10.7 In the instant case, the assessee has admitted undisclosed income of Rs. 1crores vide letter dated 29th June 2007 approximately, within one month of the search date. The same income was also offered to tax in return filed by the assessee dated 4th February 2009. As a result of the admission of undisclosed income and subsequently disclosing the same in the return of income transpires that there was a liability of tax on the assessee. Thus in our considered view, the seized cash can be treated as an advance tax liability. In this regard, we also find support and guidance from the order of this tribunal in the case of Shreeji prints Pvt. Ltd. ITA no 359/AHD/2012 dated 20-04-2012 wherein it was held as under:

“In our opinion, if the assessee has declared income, during the year under consideration in that eventuality he is liable to pay advance tax as per law therefore the A.O. is required to find out whether such liability was existing on

the date of seizure. If such liability is existing then he is empowered to apply/adjust the money seized in discharge of the existing liability even without any written representation from the assessee”.

Thus from the above, it is clear that the cash seized during the search and seizure operation can be treated as advance tax liability in the given facts and circumstances.

10.8 We also note that the judgment of Madhya Pradesh High Court relied on by the Ld. CIT (A) in the case of Ramjilal Jagannath Vs. ACIT reported in 341 ITR 758 is against the assessee. But we find that the Hon'ble Calcutta High Court in similar facts and circumstances allowed the issue in favor of the assessee and against the Revenue in the case of *CIT v. M/s Blb Securities (P) Ltd.* in **GA No. 3245 of 2012** dated 09.01.2013, for the sake of clarity, relevant extract is reproduced below:-

“The Court: The learned ITAT, by its order dated 25th June 2012 upheld the order allowing adjustment of the seized cash against the liability to pay tax which arose on 30th September, 2008.

Mrs. Ghutghutia submitted that under section 132B(i) of the Income Tax act, 1961, the seized cash could be adjusted against an existing liability and could not have been adjusted against a liability which arose subsequent thereto.

We are unable to accept this submission. If the seized cash can be adjusted against an existing liability, there is no reason why the seized cash cannot be adjusted against a liability which arose in future because in that the seized cash would amount to some sort of advance payment. We are as such unable to find any merit in the contention of Mr. Ghutghutia.

Mr. Ghutghutia lastly submitted that if such adjustment is permissible, then interest would be payable by the assessee. But that question was not raised before the learned Tribunal. The learned Tribunal, therefore, had no occasion to express any opinion with regard thereto.

In the facts of the case, it is not possible for us to say that the impugned judgment and order of the learned Tribunal is erroneous in law.”

10.9 It is settled law if there are different rulings of the non-jurisdictional High Court and there is no judgment on the said issue by the Hon'ble

jurisdictional High Court, then the view favoring the assessee will prevail. In this regard, we find support and guidance from the judgment of the Honøble Supreme Court in the case of CIT Vs. Vegetable products Ltd reported in 88 ITR 192 wherein it was held as under:

“if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this Court in several of its decisions. Hence, all that the court has to see is, what is the true effect of the language employed in section 271(1)(a)(i). If court finds that language to be ambiguous or capable of more meanings than one, then the court has to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty”.

10.10 We also note that there was an explanation attached with section 132B which reads as under:

^{673b}[Explanation 2.—*For the removal of doubts, it is hereby declared that the "existing liability" does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII.”*

10.11 It is an undisputed fact that the explanation was brought by the Finance Act 2013 with effect from 1st June 2013. Thus the same cannot be applied to the facts of the case on hand. The Honøble Supreme Court in the case of CIT Vs. Cosmos Builders & promoters Ltd. reported in 76 taxmann.com 377 has held that such an amendment is prospective in nature. Accordingly, it cannot be applied to the case pertaining to the year under consideration.

10.12 In view of the above, we are not inclined to sustain the order of the Ld.CIT (A). Accordingly, we set aside the order of the Ld.CIT (A) and direct the AO to treat the seized cash as an advance tax with effect from 30th May 2007. Hence, the ground of appeal of the assessee is allowed.

10.13 As we have decided the main issue in favor of the assessee, other grounds raised by the assessee do not require any separate adjudication. As such other ground becomes academic, and accordingly we dismiss the same as infructuous.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the Court on 01/02/2019 at Ahmedabad.

**-Sd-
(MAHAVIR PRASAD)
JUDICIAL MEMBER**

**-Sd-
(WASEEM AHMED)
ACCOUNTANTMEMBER**

(True Copy)

Ahmedabad; Dated 01/02/2019

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आदेश का प्रतिलिपि प्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. व्रभागीय प्रत्यक्ष, आयकर अपील अथकरण / DR, ITAT,
6. गार्डफाईल / Guard file.

आदेशानुसार/BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकर अपील अथकरण, अहमदाबाद / ITAT, Ahmedabad