

आयकर अपीलिय अधिकरण] पुणे न्यायपीठ "ए" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE

BEFORE SHRI ANIL CHATURVEDI, AM AND
SHRI PARTHA SARATHI CHAUDHURY, JM

आयकर अपील सं / ITA No.185/PUN/2017

निर्धारण वर्ष / Assessment Year : 2006-07

Ramchandra Dada Shinde,
Ashirwad, Bharati Nagar,
Paud Road, Kothrud,
Pune - 411 029.

..... अपीलार्थी /
Appellant

PAN : ADFPS8569L.

बनाम v/s

The Dy.Commissioner of Income-Tax,
Circle - 1(1), Pune.

..... प्रत्यर्थी /
Respondent

Assessee by : Shri Nikhil Pathak.

Revenue by : Shri Rajesh Gawali.

सुनवाई की तारीख / Date of Hearing : 24.06.2019	घोषणा की तारीख / Date of Pronouncement: 28.06.2019
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आदेश / ORDER

PER ANIL CHATURVEDI, AM :

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (A) - 3, Pune dated 10.10.2016 for the assessment year 2006-07.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is an individual and stated to be an employee of Bharathi Vidyapeeth Bhavan. A search and seizure action u/s 132 of the Act was conducted on 20.07.2005 at the office premises of Bharathi Vidyapeeth

Bhavan and the residential premises of the assessee. During the course of search, cash was found in the cupboard of assessee's cabin to the extent of Rs.3,14,83,870/- and it was seized by the Department. Thereafter, notice u/s 153A of the Act was issued and in response to which the assessee filed return of income on 30.04.2007 declaring total income of Rs.1,26,75,650/-. Thereafter, assessment was framed u/s 153A(b) r.w.s. 143(3) of the Act vide order dt.28.12.2007 wherein the addition of Rs.1.25 crore offered by the assessee in the return of income was made on protective basis and the said addition was also made on substantive basis in the hands of Bharathi Vidyapeeth Bhavan. Apart from the aforesaid, addition of Rs.3.14 crore (rounded off) was made on protective basis in the hands of the assessee apart from and also made other additions whereby the total income was determined at Rs.13,88,81,370/-.

When the matter was carried in second appeal, the Tribunal deleted the addition of Rs.1.25 crore for A.Y. 2005-06 made in the hands of Bharathi Vidyapeeth Bhavan on substantive basis but the addition was upheld in the hands of assessee which was earlier made by the AO on protective basis. AO while giving the effect to the order of ITAT passed on 04.01.2014 levied interest u/s 234B and 220(2) of the Act and raised a total demand of Rs.2,35,11,090/-. It is assessee's contention that while filing the return of income, assessee had requested to adjust the cash seized during the search against the tax liability. It is assessee's contention that the credit of taxes paid were not given and interest was computed u/s 234A, 234B, 234C, as well as interest u/s 220(1) of the Act. Aggrieved by the order of AO, assessee carried the matter before

Ld.CIT(A), who vide order dt.10.10.2016 (in appeal No.PN/CIT(A)-3/Cir-1(1), Pn/469/2014-15) granted partial relief to the assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us and has raised the following grounds :

“1. The learned CIT(A) erred in confirming the levy of interest u/s 234A on the ground the same was mandatory provision without appreciating that the assessee had paid the entire tax liability for the relevant year before the due date of filing the return u/s 139(1) and therefore, there was no question of levy of any interest u/s 234A.

2. The learned CIT(A) erred in confirming the levy of interest u/s 2348 without appreciating that the cash of Rs.3,14,83,870/- was seized from the assessee on 20.07.2005 which was much higher than the tax liability for this year and accordingly, no interest u/s 2348 was leviable.

3. The learned CIT(A) erred in confirming the levy of interest u/s 234C without appreciating that the assessee had paid the entire tax liability for this year in the form of seizure of cash on 20.07.2005 i.e. before the first installment of advance tax and hence, question of levy of interest u/s 234C simply did not arise.

4. The learned CIT(A) failed to appreciate that the cash seized of Rs. 3,14,83,870/- was much higher than the tax liability of the assessee for this year and the said cash should have been adjusted against the tax liability of the assessee and therefore, no interest u/s 234A, 2348 and 234C was leviable.

5. The learned CIT(A) erred in confirming the levy of interest u/s 220(2) without appreciating that the assessee had already paid the entire tax liability on account of seizure of cash and hence, the question of levying interest u/s 220(2) simply did not arise and the same should be deleted.”

3. All the grounds being inter-connected are considered together.

4. Before us, Ld.A.R. reiterated the submissions made before AO and Ld.CIT(A) and submitted that the cash of Rs.3.14 crore was seized on 20.07.2005 i.e., before the due date of filing the income tax return u/s 139(1) of the Act and since the cash seized was prior to the date of filing of return, no interest can be levied. He further submitted that for A.Y. 2005-06 also assessee vide letter dt.15.05.2006 had requested that the seized

cash of Rs.3.14 crore be considered against the payment of “self assessment tax” or “advance tax” for A.Y. 2005-06 and 2006-07 and he submitted that while deciding the issue in A.Y. 2005-06, Ld.CIT(A) has granted relief to the assessee by holding that interest u/s 234B of the Act be charged from 01.04.2005 upto 15.05.2006 only and not upto the date of assessment because the ‘advance tax’ can be deemed to have been paid on 15.05.2006. AO was accordingly directed to re-compute u/s 234B of the Act. He submitted that against the aforesaid order of CIT(A) for A.Y. 2005-06, Revenue did not prefer any appeal meaning thereby that the order of Ld.CIT(A) has been accepted by the Department. As far as A.Y. 2006-07 is concerned, he submitted that a different view has been taken by the Revenue which according to him is not permissible. He further placed reliance on the decision of Pune Benches in the case of ACIT Vs. M/s. Pratibha Constructions Engineers and Contractors (India) Pvt. Ltd for A.Y. 2005-06 (ITA No.2269/PUN/2014 order dated 13.09.2017) and in the case of Jivaram Magaji Chaudhary Vs. DCIT reported in (2017) 50 CCH 0079. He also placed on record the copy of the aforesaid decisions. Ld.A.R. therefore urged that the credit of the cash seized be given from the date of request made by the assessee to the date of order of Ld.CIT(A). Ld. D.R. on the other hand, supported the order of AO and Ld.CIT(A).

5. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to adjustment of seized cash at the time of search against the tax liability. It is an undisputed fact that cash of Rs.3,14,83,870/- was seized from the assessee on 20.07.2005 and assessee vide letter dt.15.05.2006 had requested to grant the credit of the cash seized against the advance tax.

We find that Ld.CIT(A) while deciding the issue for A.Y. 2005-06 had held that the cash seized can be considered as advance tax and therefore interest u/s 234B be charged from 01.04.2005 to 15.05.2006 and that Revenue is not in appeal against the order of Ld.CIT(A) meaning thereby that the order of Ld.CIT(A) has been accepted by Revenue. We thus find that on the issue of the same cash seized two different views are taken by the Revenue in two different assessment years, which in our opinion is not permissible. We further find that identical issue arose in the case of M/s. Pratibha Constructions Engineers and Contractors (India) Pvt. Ltd. (supra), wherein the Co-ordinate Bench of the Tribunal has decided the issue by observing as under :

“5. We have heard the rival submissions and perused the material on record. The issue in the present case is with respect to adjustment of seized cash against the tax liability. It is an undisputed fact that cash of Rs.2,42,85,000/- was seized at the time of search on 15.06.2010 and in the return of income filed by the assessee on 07.07.2011 u/s 153A, assessee had considered the seized cash towards the payment of tax liability. Assessee vide letter dt.28.02.2012 submitted on 28.03.2012 had requested the Commissioner of Appeals to appropriate the cash seized towards income tax liability. It is Revenue’s case that the seized cash cannot be adjusted against the tax liability because the liability crystallizes only after the assessment is finalized. We find that identical issue arose before the Co-ordinate Bench of the Tribunal in the case of Jivaram Magaji Chaudhary in ITA No.1039/PUN/2015 order dt.31.05.2017 wherein the Co-ordinate Bench of the Tribunal after considering the decisions of Ahmedabad Tribunal in the case of Kanishka Prints Pvt. Ltd., Vs. ACIT reported in (2014) 159 TTJ 629 (Ahd) and Punjab and Haryana High Court in the case of Spaze Towers Private Limited Vs. DCIT, decided the issue in favour of assessee by holding as under :

“8. We have heard the rival submissions and perused the material on record. The issue in the present case is about the adjustment of cash seized at the time of search against the advance tax liability. It is an undisputed fact that cash of Rs.2.55 crore was seized on 06/08/2010. It is also an undisputed fact that Assessee vide letter dtd 28/09/2010, addressed to CIT(C) had requested for adjusting of seized cash against the advance tax liability for AY 2011-12. It is Revenue’s case that the seized cash cannot be adjusted against advance tax liability in view of the amendment made to Section 132B by insertion of Explanation 2 by Finance Act 2013, wherein it is stated that “existing liability” does not include advance tax payable. On the issue as to whether the insertion of Explanation 2 to s.132B by Finance Act 2013, is prospective or retrospective, we find that the Co-ordinate Bench of Ahmedabad

Tribunal in the case of Kanishka Prints(supra) has observed the amendment made of s.132B by insertion of Explanation 2 is prospective and is applicable from 1st June 2013. The relevant observation of the Tribunal is as under:-

“11. We have heard that the rival submissions and perused the material on record. It is an undisputed fact that during the course of search at the residence of directors on 8.2.2007 and locker on 7.3.2007 aggregate cash of Rs.43 lacs was seized. It is also an undisputed fact that Assessee vide his letter dated 13.3.2007 submitted that out of the cash seized, Rs 10 lacs be treated towards payment of advance tax in the case of assessee and similarly balance of Rs. 33 lacs be treated towards payment of advance tax in case of family members/group companies. It is also a fact that vide aforesaid letter, the Assessee had requested that cash of Rs 8 lacs be considered as advance tax in the case of Shreeji Prints P. Ltd. The co-ordinate Bench of Tribunal in the case of Shreeji Prints (ITA No 359/Ahd/2012 – order dated 20.4.2012) decided in favour of Assessee by holding as under:

It is evident from a bare reading of the aforesaid provisions that the existing liability under the Income-tax can be discharged from the assets or money seized. In the present case, the search operation was conducted on 22-9-2005 and the assessee filed return on 31-5-2006 declaring the seized money as income. 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. Now coming to the fact of the present case, it is not disputed that the money seized from the premises of Shri Lalit Patel and same was subsequently declared in the return of income filed on 31-5-2006. Hence, it can very well be inferred from the return so filed that the respondent/assessee was required to pay advance tax on such income as mandated u/s.208 of the I.T.Act. Therefore, in view of the fact that there is no ambiguity in the provision so far application/adjustment of the seized money is concerned. Further, the judgments as relied upon by the Ld. D.R. would not apply on the facts and circumstances of the present case since this is not a case where application u/s.132(5) is made. Moreover, Section 132(5) is no more on statue book, even otherwise there is divergence in opinion between the Hon'ble High Court of Madhya Pradesh and Hon'ble Delhi High Court as fairly pointed by the Ld.D.R. The order of the ITAT Delhi Bench in ITA No.1151/Del/2008 as relied by the Ld. D.R. is on different set of facts therefore, is not applicable on the facts of the present case. The issue whether the seized money should be applied towards advance tax liability of assessee and credit should be given credit there-from the date of seizure of money has been decided in favour of the assessee by the decision of ITAT Rajkot Bench in ITA No. 172/RJT/2010 in the case of Shri

Ram S. Sarada V. DCIT and the decision of ITAT Mumbai Bench in the case of Sudhakar M. Shetty v. ACIT in ITA No.4238 & 4239/MUM/2007. Respectfully following the ratio laid therein we do not find any infirmity into the impugned order.”

12. Before us, Ld. D.R. has relied on the amendment made to s. 132A vide Finance Bill of 2013, We find that the amendment has been made by insertion of Explanation and the Explanation has been made applicable with effect from 1st June, 2013,. For ready reference, the amendment made by Finance Bill 2013 and the memorandum is reproduced hereunder:-

13. The amendment made by Finance Bill 2013 reads asunder:-
Amendment of section 132b.

34. In section 132B of the Income-tax Act, the Explanation shall be numbered as explanation 1 thereof and after explanation 1 as so numbered the following explanation shall be inserted with effect from the **1st day of June, 2013,** (emphasis supplied) namely:-

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 Par C of Chapter XVII.”

The explanatory memorandum to the Finance Bill reads as under:-

The existing provisions contained in section 132B of the Income-tax Act, inter alia, provide that seized assets may be adjusted against any existing liability under the Income Tax Act. Wealth tax Act, the Expenditure-tax Act, the Gift-tax Act and the Interest tax Act and the amount of liability determined on completion of assessments pursuant to search, including penalty levied or interest payable and in respect of which such person is in default or deemed to be in default.

Various courts have taken a view that the term “existing liability” includes advance tax liability of the assessee, which is not in consonance with the intention of the legislature. The legislative intent behind this provision is to ensure the recovery of outstanding tax/interest/penalty and also to provide for recovery of taxes/interest /penalty, which may arise subsequent to the assessment pursuant to search.

Accordingly, it is proposed to amend the aforesaid section so as to clarify that the existing liability does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII of the Act.

This amendment will take effect from 1st June, 2013.

(emphasis supplied)

14. In Taxmann’s publication “Interpretation of Statutes” 2nd Edition by Shri D.P. Mittal at page 807 it has been stated as under:-
“The effect to be given to an explanatory amendment depends upon several factors, including its language. When the legislature has made the explanation operative prospectively by words expressed

therein, its operation shall have to be confined to the future date. The same reasoning governs the case when Parliament limits the retrospectivity of the Explanation with effect from a particular date. In such a situation, giving future respectivity to the Explanation would be hijacking the intention of the Legislature into an impermissible area-CIT vs. Rajasthan Mercantile Co. Ltd. (1995) 211ITR 400 (Delhi). Thus, there is no doubt that ordinarily, a statute, and particularly when the same has been made applicable with effect from a particular date, should be construed prospectively and not retrospectively.”

15. Thus considering the totality of the aforesaid, interpretation of applicability of explanation, and amendment made by Finance Bill 2013, facts and respectfully following the decision of the co-ordinate Bench, we are of the view that the amended Explanation cannot be applied in present case. We therefore allow the appeal of the Assessee and direct the AO to give credit of Rs 10 lacs as advance tax. Thus the appeal of the Assessee is allowed.”

9. We further find that, Hon'ble Punjab & Haryana High Court in the case of Spaze Towers (supra) has also held that the amendment made by insertion of Explanation 2 to section 132B is prospective. The relevant substantial question before Hon'ble High Court & its observations are reproduced herewith for ready reference:

“II. Whether under the facts & circumstances of the case, the Tribunal order is unsustainable, as Explanation 2 to Section 132B of the Income Tax Act, 1961 inserted by the Finance Act, 2013 w.e.f. 01.06.20103 is ‘prospective’ in nature?”

III. Whether under the facts & circumstances of the case, Explanation 2 to Section 132B of the Income Tax Act, 1961, though inserted by the Finance Act, 2013 is ‘prospective’ in nature, pursuant to the judgment of this Hon'ble Court in the case of CIT vs Sh. Sandeep Jain & others in ITA 261 of 2014, CIT (Central) Ludhiana vs. Cosmos Builders & Promoters Ltd., in ITA No.425 of 2014?”

3. The appeal is pressed only in respect of these questions of law and not in respect of the questions of law raised in the original appeal.

4. The appeal is admitted on the above questions of law. The judgement of a Divison Bench of this Court dated 29.09.2014 in ITA-261-2014 titled as Commissioner of Income Tax (Central), Ludhiana Vs Sh. Sandeep Jain and others covers the case in favour of the assessee. It was held that Explanation 2 to Section 132B of the Income Tax Act, 1961 is prospective in nature w.e.f. 01.06.2013. The present appeal is in respect of the assessment year 2008-2009. In view of the said judgment, Explanation 2 would not be applicable to the assessee’s case. This judgment was followed by another judgment of a Divison Bench of this Court dated 14.07.2015

to which one of us (S.J. Vazifdar, CJ) was a party titled as Commissioner of Income Tax (Central), Ludhiana Vs M/s Cosmos Builders and Promoter Ltd. By an order dated 06.05.2016, the Petition for Special Leave to Appeal against the judgment filed by the department was dismissed by the Supreme Court.

5. We are bound by the above judgment. In fact, in M/s Cosmos Builders and Promoters Ltd. case, the judgment in Sh.Sandeep Jain and others was followed. We follow the same in this appeal also. As we are bound by that judgment, we have not considered Mr. Sethi's argument on behalf of the respondent that the judgment does not lay down the correct law. He also relied upon the memorandum explaining the Finance Bill to contend that Explanation 2 to Section 132B is retrospective.

6. In these circumstances, the questions of law are answered in favour of the appellant/assessee. It is admitted that the order of the Tribunal is liable to be set aside and is accordingly set aside."

10. Before us, Revenue has not placed any contrary binding decision in its support nor has placed any material to demonstrate that against the decision of Ahmedabad Tribunal in the case of Kanishka Prints(supra), Revenue has preferred any appeal before High Court or the aforesaid decision of Ahmedabad Tribunal has been reversed, set aside or overruled in any manner by the higher court. In view of the aforesaid facts, we are of the view that, that cash seized at the time of search be adjusted against the advance tax liability and as per ld. Authorised Representative submission the credit for it be given from the date of its request made to CIT(C) for adjustment of cash. We thus direct accordingly. In the result, the grounds of Assessee are allowed."

6. We further find that CBDT vide Circular 22/2017 dt.12.06.2017 has also accepted the decision of Punjab and Haryana High Court in the case of Spaze Towers (supra) wherein it was held that the explanation 2 of Sec.132B of the Act is prospective in nature. Before us Revenue has relied on the decision of Sri Chand Gupta (supra). We find that the facts of that case relied upon by Revenue are distinguishable with the present case because in that case assessee had not made any request that the amount seized be applied towards the discharge of liability under the Act whereas in the present case assessee had requested for adjustment of cash towards tax liability. Considering the totality of the aforesaid facts and relying on the decision of the Co-ordinate Bench of Pune Tribunal cited hereinabove, we find no reason to interfere with the order of Ld.CIT(A) and **thus the grounds of Revenue are dismissed.**

6. Before us, no distinguishing feature in the facts of the present case and to the facts in the case of M/s. Pratibha Constructions Engineers (supra) for A.Y. 2006-07 has been pointed out by Revenue. Further

Revenue has also not placed any material to demonstrate that the order of Tribunal in the case of M/s. Pratibha Constructions Engineers (supra) has been set aside / stayed or overruled by Higher Judicial Forum. In view of the aforesaid facts, we following the order of the Co-ordinate Bench of the Tribunal in the case of M/s. Pratibha Constructions Engineers (supra), direct that the cash seized at the time of search be adjusted against the tax liability from the date of request made by assessee to Ld.CIT(A) for adjustment of cash. We thus direct accordingly.

Thus, the grounds of assessee are allowed.

7. In the result, the appeal of the assessee is allowed.

Order pronounced on the 28th day of June, 2019.

Sd/-
(**PARTHA SARATHI CHAUDHURY**)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(**ANIL CHATURVEDI**)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे Pune; दिनांक Dated : 28th June, 2019.

Yamini

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-3, Pune.
4. Pr. CIT-1, Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" / DR,
ITAT, "A" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune.