

Gian Chand Gupta Vs. Dy. Cit

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Court : Delhi

Decided On : Jul-11-2001

Reported in : (2001)72TTJ(Del)665

Appeal No. : ITA No. 1780/Del/1995 11 July 2001 A.Y. 1991-92

Appellant : Gian Chand Gupta

Respondent : Dy. Cit

Advocate for Pet/Ap. : P.C. Jai; & Pankaj Jain, for the assessed; Ms. Amrita Misra, for the Revenue

Judgement :

ORDER

K.C. Singhal, J.M.

Since common issue is involved in all these appeals the same are being disposed of by the common order. The only issue arising out of these appeals relates to charging of interest under sections 234A, 234B and 234C.

2. Both the parties are agreed that facts in all the appeals are common and the decision taken in the case of Shri Gian Gupta would be applicable in respect of all the assessed. therefore, we would narrate the facts in the case of Shri Gian Gupta. A search and seizure action was carried out under section 132 at the premises of the assessed on 14-1-1991, in the course of which cash amounting to

Rs. 25,62,500 was found and seized by the search party. In the search proceedings the assessed surrendered a sum of Rs. 53,05,000 as his income. After the search, order under section 132(5) was made on 10-5-1991, estimating the income of the assessed at Rs. 1,95,93,756. Since the tax liability on the aforesaid amount was much more than the amount of cash seized, the cash seized was retained by the assessing officer to be dealt with in accordance with the provisions of section 132B. The return of income was filed by the assessed on 26-4-1993, declaring total income of Rs. 56,56,380. The said return was processed under section 143(1)(a) on 27-9-1993, on the basis of which the demand of Rs. 58,49,796 was raised against the assessed which included the interest under sections 234A, 234B and 234C. The amount retained by the assessing officer was adjusted against the aforesaid demand.

3. Aggrieved by the same, the assessed moved an application under section 154 on 19-1-1994, contending that the cash seized on 14-1-1991, should have been treated as advance tax paid, failure of which had resulted in mistake apparent from the record. Accordingly, it was prayed that the said mistake be rectified and consequently, the interest chargeable under sections 234A, 234B and 234C should be modified. The said application was rejected by the assessing officer vide order dated 25-1-1994, by holding that cash seized in the course of search and retained under section 132(5) was to be dealt with under section 132B which did not provide to treat the cash retained under section 132(5) as advance tax paid. According to him, the advance tax could be paid only on 15-9-1990, 15-12-1990, and 15-3-1991. Since the assessed had not paid any amount by these dates, no deduction could be allowed against the total demand of the assessed on account of advance-tax paid.

4. The matter was carried before the Commissioner (Appeals) who after considering the arguments of the learned counsel for the assessed was of the view that by virtue of the order passed by the assessing officer under section 132(5) on 10-5-1991, the assessed could not have claimed the refund of cash so retained by the department. In other words, the assessed had forfeited any claim to that amount and consequently the assessed stood discharged of all his liability to that extent towards the tax payable in view of the provisions of section

132B(1)(ii). It was further held by him that the amount of cash retained by the assessing officer and adjusted by him on 19-10-1993, would relate back to the date of retention i.e., 10-5-1991. Accordingly, no interest could be charged under sections 234A, 234B and 234C after the period commencing from 11-5-1991. Accordingly, he directed the assessing officer to recompute the interest chargeable under the aforesaid provisions for the period up to 10-5-1991, and on the balance after 10-5-1991, with reference to the amount of tax arrived at after adjusting the amount of cash retained. Aggrieved by the same, the assessed as well as the revenue are in appeal before the Tribunal.

5. The learned counsel for the assessed has vehemently assailed the order of Commissioner (Appeals) by contending that seizure of cash in the course of search proceedings should be considered as payment of advance tax. He drew our attention to the provisions of sections 234A and 234B to point out that the legislature has used the word paid after the words advance tax. According to him, a person can be said to have paid an amount when he was divested of the money by a process of law. He drew our attention to the decision of Delhi High Court in the case of Mohd. Usman v. Union of India : [1997]224ITR730(Delhi) and the decision of Gujarat High Court in the case of Anil Kumar D. Gajjar v. CIT : [1996]220ITR470(Guj) for the proposition that assessed is entitled to interest on the seized amount where such seized amount is in excess of the tax payable by the assessed. On the same principle it was submitted by him that where the seized amount is adjusted against the tax due from the assessed then no interest should be charged with reference to that amount. Accordingly, it was prayed that the amount of cash seized in the course of search proceeding should be considered as advance tax payment as on 14-1-1991, against the liability of advance tax incurred under section 208.

5.1. He then drew our attention to the provisions of sections 132 and 132B. According to him, the assessing officer is bound to pass an order under section 132(5) estimating the undisclosed income, calculating the amount of tax on the income was estimated, determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Act as if the order had been order of the regular assessment and specifying the amount that

will be required to satisfy any existing liability under the Act. In pursuance of such order, the assessing officer may retain in his custody such assets or part thereof as in his opinion, is sufficient to satisfy the aggregate of the amounts mentioned above and thereafter release the remaining portion to the person from whose custody the same was seized. He then referred to the provisions of section 132B which provides that assets retained under section 132(5) may be adjusted against the existing liability referred to in section 132(5) as well as the amount of liability determined on the completion of regular assessment or reassessment, as the case may be, including any interest or penalty. He then drew our attention to the Supreme Court decision in the case of *Kesoram Industries & Cotton Mills Ltd. v. CWT* : [1966]59ITR767(SC) for the proposition that liability to pay income-tax accrues on the last day of the accounting year. For the similar proposition, reference was also made to the decision of the Supreme Court reported as *H.H. Sethu Parvati Bayi v. CIT* : [1968]69ITR864(SC) . According to him, once the assessed had declared a sum of Rs. 53,05,000 as additional income under section 132(4) on 14-1-1991, this amount became part of the current income on which assessed was liable to pay the advance tax or income-tax, as the case may be. Accordingly, the tax on such income was an existing liability against which the seized amount could be adjusted. Had it been done so, the assessed would not have been liable to pay the huge interest under sections 234A, 234B and 234C. According to him, the assessed should not be penalised on account of the failure to discharge the duty by the assessing officer.

5.2. He also drew our attention to the provisions of advance tax payment to point out that every assessed is liable to pay advance tax under section 208 on the current income if such advance tax was Rs. 5,000 or more. He also drew our attention to the provisions of section 218 to point out that an assessed shall be deemed to be in default if he does not pay the amount of advance tax which he is liable to pay. On this basis also the liability to pay an advance tax is an existing liability against which the assessing officer should have adjusted the amount of cash seized under the search proceedings. He also drew our attention to the two Tribunals decisions reported as *Satpal D. Aggarwal v. Asst. CIT* (1999) 8 DTC 734 (Mum) : (1998) 62 ITJ (Mum) 98 and *Nitin M. Jadia v. Asst. CIT* (1999) 107 Taxman 203 (Mum) wherein it has been held that the seized assets could be

applied against the advance tax liability. He also cited the decision of Supreme Court in the case of CIT v. Kohinoor Flour Mills (P) Ltd. : [1991]187ITR585(SC) and the decision of Gujarat High Court in CIT v. Kohinoor Flour Mills : [1975]99ITR54(Guj) for the proposition that any amount paid after the due dates of advance-tax should also be considered as advance-tax payment. Proceeding further it was contended by him that even assuming that seized amount cannot be considered as advance-tax payment, the relief should be allowed on the basis of equity and justice and the assessed should not be allowed to suffer on the basis of technicalities. According to him, the object of the entire machinery provisions is to recover the amount and such provisions should be construed considering the objectivity. thereforee, if the amount seized from the possession of the assessed is utilized by the department then credit should be given for the same on the basis of principle of justice and equity.

5.3. Lastly, it was contended by him that the issue whether the interest was chargeable or not was also a debatable issue and, thereforee, the interest could not be charged while processing the return under section 143(1)(a). The charging of interest by the assessing officer in such proceedings amounted to a mistake apparent from the record which was liable to be rectified under section 154.

5.4. Before parting with the arguments of learned counsel for the assessed, we would like to mention that a query was raised by the Bench as to whether any specific request was made by assessed at any point of time for adjusting the seized cash. In response to the same, it was fairly conceded by the learned counsel for assessed that no such request was made by assessed.

6. On the other hand, the learned Departmental Representative on behalf of the revenue has supported the order of the Commissioner (Appeals) by contending that there is no provision to treat such amount as payment of advance tax. According to her, the word paid means voluntary payment which does not include the amount seized under section 132. In support of the Commissioner (Appeals)s order she also relied on the decision of Madhya Pradesh High Court in the case of Ramjilal Jagan Nath & Ors. v. Asst. CIT & Ors. (2000) 13 DTC 105 (MP) : (1999) 241 ITR 758 wherein it has been categoricallyheld that seized assets cannot be

adjusted towards advance tax paid. Accordingly, the assessed is liable to pay interest under sections 234A, 234B and 234C. Accordingly to her, this is the only direct decision on the issue before this Bench. She also distinguished the two Tribunals decisions relied on by the learned counsel for the assessed on the ground that in those cases the assessed had made specific request for adjustment of the seized amount against the advance-tax liability.

7. With reference to the departmental appeal, the learned Departmental Representative contended that there is no provision for treating the seized amount towards the payment of advance tax after the expiry of the financial year and that too, after the date of order under section 132(5). She drew our attention to the provisions of section 132B which is complete code in itself to deal with the application of retained assets. According to her, this provision does not empower the assessing officer to adjust the retained assets against the advance tax liability. Accordingly it was prayed that order of Commissioner (Appeals) directing the assessing officer to exclude the amount of seized cash from the date of order under section 132(5) should be quashed. On the other hand, the learned counsel for the assessed has strongly relied on the order of Commissioner (Appeals).

8. Rival submissions of the parties, have been considered carefully. We have also gone through the various provisions of Income Tax Act, 1961 (hereinafter referred to as the 'Act'), and the case law to which our attention was drawn. The question for our consideration is whether the seizure of cash in the course of action under section 132 can be treated as payment of advance-tax either on the date of the seizure as contended by the learned counsel for the assessed or on the date of order under section 132(5) read with section 132B as held by the Commissioner (Appeals). Section 234A provides for levy of interest for delay in filing the returns @ of 18 per cent p.a. on the amount of tax on the total income determined under section 143(1) or on regular assessment as reduced by advance-tax paid and tax deducted or collected at source. Section 234B provides for levy of interest in case of non-payment or short payment of advance tax at the similar rate for the period commencing from 1st day of April, next following the financial year to the date of determination of the total income under section 143(1) or on regular assessment on the amount of assessed tax. Assessed tax has been defined in Explanationn 1

to section 234B which means tax on total income determined as mentioned above reduced by the payment of advance tax and tax deducted or collected at source. Section 234C provides for levy of interest where payment of advance-tax is below the prescribed percentage. This shortfall is with reference to tax on returned income and not with reference to assessed tax. So there is departure from the provisions of sections 234A and 234B in this regard. The perusal of the above provisions clearly shows that interest is not to be charged to the extent of the amount of advance tax paid by the assessed. Thus, the issue whether seizure of the amount under section 132 amounts to payment of advance tax assumes importance for the disposal of these appeals.

9. The scheme of the Act regarding advance tax payment shows that every assessed is liable to pay advance tax where such tax is computed in accordance with the provisions of Chapter xviii-C is Rs. 5,000 or more (section 208) section 209 provides the manner in which such tax is to be computed which, inter alia, includes that assessed is required to estimate his current income and to calculate tax thereon at the rates in force in the financial year. Section 210(1) provides that such assessed shall on his own accord, pay, such tax on or before the due dates as prescribed in section 211. This is subject to revision under sub-section (2). Sub-section (3) provides that if the assessed, who is regularly assessed and has not paid such tax on his own accord, the assessing officer also may issue an order in writing to pay such advance tax as may be calculated in the manner provided in section 209. Such estimates are also subject to revisions in the manner specified in sub-sections 4(5) and (6). Section 218 provides that if the assessed does not pay the advance tax on due dates mentioned in section 210 which he is required to pay under sub-sections (3) to (6) of section 210 then he shall be deemed to be in default in respect of such non-payment of advance tax.

10. Scheme regarding seizure of assets, its retention and application thereof is contained in sections 132 and 132B. The power of search and seizure of assets found is given under section 132(1). Where there is seizure of assets, section 132(5) provides that Income Tax Officer after affording reasonable opportunity to the assessed and making such enquiry as may be prescribed, shall within a period of 120 days of the seizure, make an order estimating the undisclosed income and

tax thereon. He shall also determine the interest payable and penalty imposable as if it is an order of regular assessment. He is also required to specify the amount that will be required to satisfy the existing liability under the Act or any other Act specified under section 132(1) in respect of which assessed is in default or is declared to be in default and retain in his custody such assets as in his opinion are sufficient to satisfy the aggregate of the amounts mentioned above. Excess amount, if any, is required to be realised by the Income Tax Officer. The second proviso to section 132(5) provides that if the assessed makes satisfactory arrangement for payment of the aforesaid amount then the Income Tax Officer may release the assets. Section 132(6) provides that assets so retained shall be dealt with in accordance with the provisions of section 132B. Section 132B prescribes the manner in which the assets retained under section 132(5) may be applied. It is not necessary for us to mention all these situation and it would be sufficient to state that assets retained under section 132(5) can be applied to satisfy the existing liability as mentioned in clause (iii) of section 132(5) and the amount of liability determined on completion of regular assessment or reassessment relevant to the previous year to which the income referred to in clause (i) of section 132(5) relates (including penalty and interest payable in connection with such assessment or reassessment) and in respect of which the assessed is in default or deemed to be in default.

11. In view of the provisions mentioned in the preceding paras, we are of the view that income disclosed by the assessed under section 132(4) became part of the current income on which assessed was liable to pay advance tax under section 208. Consequently, where the assessed failed to discharge such liability, the same could be treated as existing liability on the last day of the accounting year as held by the Honble Supreme Court in the case of Kesoram Industries & Cotton Mills Ltd. (supra). To that extent, we are in agreement with the learned counsel for the assessed. But this legal position by itself does not help the assessed because the amount of seized cash could not be applied by the assessing officer in a manner other than the manner provided under section 132B. According to the opening words of this section, the seized cash could be applied only when the seized asset is retained under section 132(5). thereforee, in our considered opinion, the department could not deal with such money on its own accord during the period

commencing from the date of seizure till the date of order passed under section 132(5). The issue whether seized assets could be applied against the advance tax liability prior to the order of assessing officer under section 132(5) at the specific request of the assessed is not before us and, therefore, is left open. In view of the said procedure laid down by the legislature to deal with the seized asset, it would be illogical to hold that the seized cash amounted to payment of advance tax on the date of seizure itself. Further, seized cash continues to be owned by assessed since there is no provision for vesting of ownership of the seized asset in the Central Government. The department is merely a trustee of the money seized and cannot deal with the same except as provided by the statute. It is only section 132B which authorises the department to deal with the same. therefore, question of payment or deemed payment of seized cash toward tax or advance tax does not arise. Further, tax and equity are strangers to each other and only in rarest cases, principles of equity should be applied where a particular aspect is not covered by an enactment. Since the legislature has made specific procedure for dealing with the seized assets, it has to be held that the seized cash did not amount to payment of advance tax automatically either on the date of seizure or any other date prior to the date of order under section 132(5).

12. Now the next question is whether it can be said that liability to pay advance tax in the present case stood discharged on the date of order under section 132(5) as held by the Commissioner (Appeals). In our opinion, the answer is in affirmative. Section 132B provides that retained assets under section 132(5) can be applied in discharge of the following liabilities :

- (i) The amount of existing liability referred to in clause (iii) of section 132(5);
- (ii) The amount of liability determined on completion of assessment or reassessment of past years to which income referred to in clause (i) of the above section including interest payable or penalty imposable;
- (iii) The amount in respect of which the assessed is in default or deemed to be in default.

The contention of the assessed (sic-Revenues) counsel that assessed is deemed to be in default by virtue of section 218 cannot be accepted. Section 218 speaks of failure to pay the advance tax as required under sub-sections (3) to (6) of section 210. thereforee, the assessed cannot be said to be in default or deemed to be in default under section 218 where no order under section 210 is passed. However, as already held, we are in agreement with assessed counsel that there was liability to pay advance tax on assessed by virtue of section 208 which accrued during the financial year and, thereforee, has to be treated as existing liability as mentioned in clause (iii) of section 132(5). Reference can again be made to the Supreme Court judgment in the case of Kesoram Industries and Cotton Mills (supra). Section 132B was enacted by the legislature for the benefit of the revenue and, thereforee, assessing officer was duty bound to adjust the cash seized after passing of the order under section 132(5) except where the assessed had made satisfactory arrangement as provided in second proviso to section 132(5). thereforee, the assessed should not suffer on account of the negligence on the part of the assessing officer in performing his duties. Accordingly, we are of the view that it would be fair to hold that adjustment of tax by assessing officer should relate back to the date of the order under section 132(5).

13. Before parting with our order, we would like to mention that the case law referred to by the learned counsel for the assessed are distinguishable on facts. In the case of Satpal D. Aggarwal, (supra), the Tribunal was dealing with a case where specific request was made by the assessed for adjusting the cash seized during the course of search. Facts of the case reveal that the cash was seized during the search on 25-11-1988, and the request was made by the assessed for adjustment on 15-3-1989, requesting the assessing officer to adjust against the tax that may be found due by virtue of order under section 132(5). It is clear that request was made by the assessed before the end of financial year itself. But in the present case no such request was made by the assessed and this fact has been admitted by the learned counsel for the assessed in the course of hearing. Similarly in the case of Nitin M. Jadia v. Assistant Commissioner (supra), the assessed had made a specific request for adjustment of seized cash against the tax liability. In that case search was made on 10-8-1988, and the assessed had declared the sum of Rs. 10 lakhs as his income under section 132(4). Seizure in

that case was a gold jewellery. On 14-9-1988, the assessed had informed the department that he will pay the tax either by raising loan against the seized jewellery or by selling the same. In another letter dated 17-12-1990, he gave unqualified proposal to the department to sell the jewellery and appropriate the proceeds towards the advance tax. On the basis of those facts the Tribunal came to the conclusion that advance tax could be said to have been paid only on 17-12-1990, when unqualified offer was made and not when the vague letter was issued on 14-9-1988. This decision rather goes against the assessed since the date of payment related to the date when a specific request was made by the assessed.

14. The view which we have taken is rather fortified by the decision of Honble Madhya Pradesh High Court in the case of Ramjilal Jagan Nath & Ors. (supra) wherein it has been held that the seized amount cannot be adjusted towards advance tax payment even at the request of the assessed. We are only referring this decision for the proposition that there is no automatic or deemed payment of advance tax on account of the seizure of cash itself. The issue whether seized cash can be adjusted against advance tax payment at the request of assessed has been kept open by us for some other appropriate case.

15. We are also not impressed by the arguments of the learned counsel for the assessed that the issue whether interest under sections 234A, 234B and 234C could be charged while processing the return under section 143(1)(a) is a debatable issue.

The provisions of sections 234A, 234B clearly provide that such interest has to be charged on the amount of tax on the total income as determined under section 143(1) or in regular assessment has reduced by advance tax paid and tax deducted or collected at source. thereforee, the assessing officer is bound to charge interest in accordance with such provisions. Further, there is no provision in the Act to the effect that seized cash would be treated as payment of advance tax on the date of seizure. thereforee, the assessing officer could not give any credit for the same specially in the absence of any specific request of the assessed for adjustment. thereforee, in our opinion, no mistake was committed by the assessing officer in charging such interest.

16. In view of the above, it is held that there was no automatic payment of advance-tax on the date of seizure as argued by learned counsel for the assessed. It is further held that Commissioner (Appeals) was justified in holding that adjustment of seized cash should relate back to the date of order under section 132(5). Secondly, he was further justified in giving direction to the assessing officer to charge interest up to 10-5-1991, i.e., the date of order under section 132(5) on the amount of tax on the total income and thereafter on the balance amount (after adjustment of seized cash) up to date of intimation under section 143(1)(a). Consequently, the orders of Commissioner (Appeals) in all the cases are upheld.

17. In the result, all the appeals of the assessed as well as revenue are dismissed.

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