

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ITA No. 25 of 2016 (O&M)
Date of decision: 28.02.2017**

The Pr. Commissioner of Income Tax-1, Amritsar

....Appellant

Vs.

Sh. Surinder Kumar Khindri, 86-Shakti Nagar, Amritsar

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

Present: Mr. Denesh Goyal, Advocate for the appellant.
Mr. Salil Kapoor, Mr. Sumit Lal Chandani,
Mr. Nitin Mehra, Ms. Ananya Kapoor, and
Mr. Saurabh Kapoor, Advocates for the respondent.

Ajay Kumar Mittal,J.

1. This appeal has been preferred by the appellant-revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 31.08.2015, Annexure A.3, passed by the Income Tax Appellate Tribunal, Amritsar Bench, Amritsar (in short, "the Tribunal") in ITA No. 185/Asr/2015, for the assessment year 2011-12, claiming following substantial question of law.

(i) "Whether the Hon'ble ITAT committed an error of facts and in law by ignoring the fact that penalty under Section 271AAA of I.T. Act, 1961 was imposed due to non payment of taxes on surrendered income under Section 132(4) of the

Income Tax Act, 1961 in the event of department not responding to the assessee' request for adjustment of cash seized against advance tax liability without appreciating the fact that the advance tax does not constitute the existing liability as per specific provision of Section 132B of the I.T. Act, 1961?

(ii) Whether the Hon'ble ITAT is correct in facts and in law by not treating the Explanation 2 to Section 132B of the I.T. Act, 1961 inserted by the Finance Act, 2013 with effect from 01.06.2013 which has clarified that the "existing liability" does not include advance tax payable in accordance with the provision of Part C of Chapter XVII?

(iii) Whether the Explanation 2 to Section 132B of the I.T. Act, 1961 though inserted by the Finance Act, 2013, with effect from 01.06.2013 being clarificatory in nature, make explicit what was implicit in the provision before the insertion of the said explanation?"

2. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. On 09.09.2010, during the course of search, cash of ₹ 99,00,000/- was seized from the residence and bank lockers of the respondent-assessee. Vide letter dated 15.09.2010, the assessee requested the Assessing Officer to adjust the cash seized during search against his expected advance tax liability. The request of the assessee was not accepted by the Assessing Officer as Assessing Officer was of the view that seized cash could not be adjusted against advance tax liability as the same was not existing liability. The assessee filed returned income of ₹ 3,04,23,555/- on 30.03.2012 in which ₹ 3,00,00,000/- was shown as undisclosed income. The assessee did not pay any tax as according to him, his liability to pay tax and interest on returned income was less than the amount of cash seized during search. Returned income was accepted by the Assessing Officer vide order dated 28.02.2013 under

Section 143(3) of the Act. Seized cash of the assessee was adjusted against the regular taxes and interest payable. Liability determined on completion of assessment order was higher than the amount of cash seized due to charging of interest under Sections 234B and 234C of the Act. The Assessing Officer initiated proceedings under Section 271AAA of the Act as all the conditions specified for non application of penalty under the said provision were not fulfilled. The assessee pleaded that he had paid all the taxes and interest in relation to undisclosed income and hence no penalty could be levied. The Assessing Officer did not accept the plea of the assessee to the effect that seized cash could be adjusted towards existing tax liability and not against advance tax. The Assessing Officer further held that Explanation 2 to Section 132B of the Act which states that existing liability does not include advance tax payable in accordance with the provisions of Part 'C' of Chapter XVII is clarificatory in nature and hence applies to all pending proceedings. It was concluded that the assessee was in default for having failed to pay the taxes and interest in relation to undisclosed income declared and levied penalty under Section 271AAA of the Act vide order dated 26.08.2013, Annexure A.1. Aggrieved by the order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)]. Vide order dated 27.01.2015, Annexure A.2, the CIT(A) held that Explanation 2 to Section 132B of the Act inserted by Finance Act, 2013 was clarificatory in nature. It was further held that the said amendment did not have retrospective effect. Thus, the CIT(A) allowed the relief to the assessee. Not satisfied with the order, the department filed an appeal before the Tribunal. Vide order dated 31.08.2015, Annexure A.3, the Tribunal upheld the decision taken by the

CIT(A) and dismissed the appeal filed by the Department. Hence, the instant appeal by the revenue.

3. We have heard learned counsel for the parties.

4. Learned counsel for the appellant-revenue relied upon a Single Bench judgment of the Madhya Pradesh High Court in ***Ramjilal Jagannath and Others Vs. Assistant Commissioner***, (2000) 241 ITR 758 (MP) to contend that the amount seized could not be adjusted towards the advance tax. Reliance was also placed on Explanation 2 to Section 132B of the Act introduced with effect from 01.06.2013 by urging that it was clarificatory and would operate retrospectively.

5. On the other hand, learned counsel for the respondent-assessee supported the impugned order.

6. We do not find any merit in the submission made by the learned counsel for the appellant-revenue. The issue has already been decided by this Court against the revenue in Income Tax Appeal No. 36 of 2004 ***Commissioner of Income Tax Vs. Ashok Kumar***, (2011) 334 ITR 355 wherein it was recorded as under:-

“In ***Commissioner of Income Tax (Central), Ludhiana Vs. Arun Kapoor***, ITA No. 149 of 2003 decided on 27.07.2010, this Court had occasion to consider similar issue where it has been held that the assessee is entitled to adjustment of seized amount towards advance tax liability from the date of making the application in that regard. In the present case, the assessee had made request for adjustment of the advance tax liability of ₹ 3,14,312/- against the seized amount of ₹ 5,90,000/- on 28.08.1989. Since the first installment of advance tax was payable on 15.09.1989 and the request for adjustment having been made on 28.08.1989 and reminder on 12.09.1989, no interest was exigible under Sections 234-A and 234-B of the Act. The Tribunal has rightly held that the assessee was

entitled to adjustment of the said amount and no interest could be charged on that basis. Therefore, no fault could be found with the approach adopted by the Tribunal.”

7. Similarly, in ITA No.425 of 2014 (***Commissioner of Income Tax (Central), Ludhiana Vs. M/s Cosmos Builders and Promoters Limited***) decided on 14.07.2015, the issue was adjudicated against the revenue. The assessee has been held entitled to adjustment of cash seized against its advance tax dues. It has further been held that the Explanation 2 to Section 132B of the Act is not retrospective in nature. The SLP against the said judgment has already been dismissed by the Apex Court vide order dated 06.05.2016. Moreover, Explanation 2 to Section 132B of the Act came into force on 01.06.2013 whereas the present case relates to the assessment year 2011-12. Further, the relevant findings recorded by the Tribunal read thus:-

“We find that the explanation 2 to Section 132B, as Finance Act, 2013 clearly states is effective from 1st June, 2013. When the law so specifically states, there is no scope of holding that it is retrospective in effect. This provision restricts the scope of adjustment of seized cash, and, therefore, is to be treated as advance to the assessee. As held by Hon’ble Supreme Court in the case of ***CIT Vs. Vatika Township Private Limited***, (2014) 367 ITR 466 (SC), the legislation which modifies accrued rights or which imposes obligations or impose new duties or attach a new disability have to be treated as prospective, unless the legislative intent is clearly to give the enactment a retrospective effect. In view of these discussions and consistent with the stand taken by the co-ordinate bench, we approve the reasoning adopted by the CIT(A). Accordingly we approve the order of the CIT(A) and decline to interfere in the matter.”

8. In view of the above, we do not find any ground to interfere with the impugned order dated 31.08.2015, Annexure A.3, passed by the Tribunal. The judgment of learned Single Bench of Madhya Pradesh High

Court in ***Ramjilal Jagannath’s*** case (supra) does not come to the rescue of the revenue in view of binding decisions of the Division Benches of this Court as noticed hereinbefore. Consequently, no substantial question of law arises and the appeal stands dismissed.

(Ajay Kumar Mittal)
Judge

February 28, 2017
‘gs’
Whether speaking/reasoned
Whether reportable

(Ramendra Jain)
Judge
Yes/No
Yes/No

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(Ajay Kumar Mittal)
Judge

February 28, 2017
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Whether speaking/reasoned
Whether reportable

(Ramendra Jain)
Judge
Yes/No
Yes