$~8

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of decision: 01.11.2023*

\+ **W.P.(C) 4707/2019**

ASHOK KUMAR AGGARWAL ..... Petitioner
Through: Mr Vidit Sharma, Advocate.

versus

ASSTT. COMMISSIONER OF INCOME TAX CIRCLE-2, NEW DELHI & ORS. ..... Respondents
Through: Mr Shailendera Singh, Sr. Standing Counsel with Ms Anuja Pethia, Advocate.

CORAM:
HON'BLE MR JUSTICE RAJIV SHAKDHER
HON'BLE MR JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. *Via* the instant writ petition, the petitioner has articulated broadly two grievances.

1.1 First, that the amount seized during the search action carried out under Section 132 of the Income Tax Act, 1961 [in short, "the Act"] has not been treated as advance tax, although such representation was made by him from time to time.

1.2 Second, which is really a consequence of the first grievance, that the respondents/revenue having treated the amount seized as money paid towards self-assessment tax has gone on to levy interest under Sections

234A, 234B and 234C of the Act.

1.3 As a result of the aforementioned grievances, the petitioner says that the refund for the Assessment Year (AY) in issue i.e., AY 2009-10 has been truncated.

2. The notice in the instant writ petition was issued on 08.05.2019. On that date, the respondents/revenue were represented by a counsel. Although, on that date and thereafter several opportunities were granted, no counter-affidavit was filed on behalf of the respondents/revenue. Resultantly, the opportunity to file a counter-affidavit was closed *via* order dated 09.10.2019 passed by the learned Registrar. It is common ground that this direction has not been disturbed.

3. We may note that despite the aforementioned order closing the right of the respondents/revenue to file a counter-affidavit, on 20.07.2023, an opportunity was granted to the counsel for the parties to file written submissions in the matter.

3.1 The record shows that only the petitioner has filed written submissions in the matter. Once again there has been a failure on the part of the respondents/revenue to file written submissions in the matter.

4. Given the situation, Mr Vidit Sharma, learned counsel, who appears on behalf of the petitioner, has submitted before us that the matter has been hanging fire only on account of the procrastination on the part of the respondents/revenue and therefore, it should be heard on the basis of pleadings presently available on record.

4.1 We tend to agree with Mr Sharma. Accordingly, arguments were advanced based on the record available with the court, by Mr Sharma as well as Mr Shailendera Singh, learned senior standing counsel, who appears

on behalf of the respondents/revenue.

5. The record shows that the search and seizure action under Section 132 of the Act, an aspect referred to hereinabove, was carried out *qua* the petitioner on 15.01.2009. During the search, cash amounting to Rs.50 lakhs was seized.

5.1 It is the petitioner's submission that copies of the documents seized were made available to the petitioner only on 26.02.2010. It is in these circumstances the petitioner says that the Return of Income (ROI) for the AY in issue could only be filed on 15.03.2010. The computation sheet appended to the ROI categorically stated that the cash seized i.e., Rs.50 lakhs should be treated as advance tax.

6. The record shows that the respondents/revenue, while giving credit in respect of Rs. 50 lakhs seized during the search, have treated the said amount as having been paid towards self-assessment tax.

6.1 As noted above, consequently interest was imposed under Sections 234A, 234B, and 234C of the Act. The interest imposed under Section 234A of the Act was Rs.1,38,784/-. Insofar as the interest levied under Section 234B of the Act was concerned, the figure was pegged at Rs. 4,16,352/-. Likewise, insofar as the interest imposed under Section 234C of the Act was concerned, the amount was crystalized at Rs.64,187/-. The petitioner, after being given credit for the prepaid taxes and tax deducted at source, was refunded Rs.20,73,340/-.

7. As alluded to hereinabove, it is the petitioner’s case that because the cash seized was treated as self-assessment tax and interest under Sections 234A, 234B, and 234C of the Act was imposed, the resultant figure concerning refund was scaled down.

8. It is Mr Sharma's submission that in the AY in issue, before its amendment *via* Finance Act, 2013 [FA 2013], the petitioner was entitled to take a stand that the cash seized should be treated as advance tax and thus consequences as provided in law should follow. In support of this plea, Mr Sharma seeks to place reliance on the following judgments:

(i) ***Latika Datt Abbott v. Director of Income Tax Investigation Unit-II & Ors.,*** passed in two writ petitions including WP(C) 6491/2016 dated 22.08.2017;

(ii) ***Pranoy Roy & Anr. V. Commissioner of Income Tax & Anr.,*** 2001 SCC OnLIne Del 1362;

(iii) ***Commissioner of Income Tax Kanpur v. Sunil Chandra Gupta*** 2015:AHC:34306-DB.

9. Furthermore, Mr Sharma to buttress his argument that the amendment made in Section 132B of the Act by insertion of Explanation 2, which forbade the adjustment of cash seized as advance tax, has prospective effect i.e., from the date indicated in FA 2013, relied on Circular No. 20 of 2017 dated 12.06.2017 issued by the Central Board of Direct Taxes (CBDT). It is common ground that FA 2013 stipulated that Explanation 2 would take effect from 01.06.2013.

10. In rebuttal, Mr Singh made a valiant attempt to persuade the court that adjustment could only be made against existing tax liability and since on the date of seizure of the cash no tax liability had been determined, the adjustment could not have been made otherwise than as self-assessment tax.

10.1 Based on this argument, Mr Singh sought to support the assessment order dated 29.12.2010 passed by the Assessing Officer (AO) to which we have already made a reference hereinabove.

11. Having heard learned counsel for the parties, we are of the view that the stand taken by Mr Singh cannot be accepted both on facts as well as on law. The record which is available to the court clearly shows that the petitioner had offered Rs.50 lakhs seized in search to be treated as advance tax. This endorsement is found both in the ROI as well as in the computation sheet accompanying the ROI.

12. It is also not in dispute that the ROI was filed after the seizure of cash; an aspect that we have already noted hereinabove while narrating the facts. The respondents/revenue cannot but accept that at the relevant point in time i.e., before 01.06.2013, Section 132B of the Act did allow for the person from whom cash was seized to offer the same for adjustment of tax liability. This is evident from a bare perusal of the following relevant parts of Section 132B of the Act:

> *"**132B**. (1) The assets seized under section 132 or requisitioned under section 132A may be dealt with in the following manner, namely:—*
> *(i) the amount of any existing liability under this Act, the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1987 (35 of 1987), the Gift-tax Act, 1958 (18 of 1958) and the Interest-tax Act, 1974 (45 of 1974), and the amount of the liability determined on [completion of the assessment or reassessment or recomputation] [and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be] (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is [deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245C, may be recovered out of such assets:*
> *(ii) if the assets consist solely of money, or partly of money and partly of other assets, the Assessing Officer may apply such money in the discharge of the liabilities referred to in clause (i) and the assessee shall be discharged of such liability to the extent of the money so applied;*

xxx xxx xxx

(3) Any assets or proceeds thereof which remain after the liabilities referred to in clause (i) of sub-section (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized.

(4) (a) The Central Government shall pay simple interest at the rate of [one-half per cent for every month or part of a month] on the amount by which the aggregate amount of money seized under section 132 or requisitioned under section 132A, as reduced by the amount of money, if any, released under the first proviso to clause (i) of sub-section (1), and of the proceeds, if any, of the assets sold towards the discharge of the existing liability referred to in clause (i) of sub-section (1), exceeds the aggregate of the amount required to meet the liabilities referred to in clause (i) of sub-section (1) of this section.

(b) Such interest shall run from the date immediately following the expiry of the period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or requisition under section 132A was executed to the date of completion of the assessment [or reassessment or recomputation].

[Explanation 1].—In this section,—

(i) "block period" shall have the meaning assigned to it in clause (a) of section 158B;

(ii) "execution of an authorisation for search or requisition" shall have the same meaning as assigned to it in Explanation 2 to section 158BE.]"

Explanation 2 appended to Section 132B of the Act, inserted *via* FA 2013 w.e.f. 01.06.2013

"[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.]"

13. It is important to note that the expression "existing liability" on which stress was laid by Mr Singh, finds mention in Explanation 2 appended to Section 132B. Explanation 2 which was inserted in the Act via FA 2013 *albeit* w.e.f. 01.06.2013 is a clear indicator that the expression "existing liability" did include advance before its insertion. Therefore, this argument of Mr Singh does not find favour with us.

14. Furthermore, the judgment of the coordinate bench of this court in ***Latika Datt Abbott*** also makes this aspect abundantly clear. In that case as well, the seizure of cash happened on 27.09.2011 whereas, the return was filed thereafter i.e., on 29.03.2013. Given these broad facts, the coordinate bench proceeded to answer the issue as framed in paragraph 11, in which reference was also made to Circular No. 20 of 2017. For convenience, the relevant part of the said paragraph is extracted hereafter:

> *"11. The question which then arises is what should happen to all those cases where request had been made by Assessee, prior to 1st June 2013, for adjustment of seized cash against advance tax payment that was due. It is in this context that the above Circular No. 20/2017 clarifies that "insertion of Explanation 2 to Section 132B of the Act shall have a prospective application……"*

15. The court thereafter ruled as follows:

> *"13. The Court is unable to accept the above submission of learned counsel for the Department. Circular No. 20/2017 makes clear the intention of the Department not to contest those cases where the Assessees had been given the benefit of adjustment of seized cash against the advance tax liability. There cannot be a situation where for those Assessees who have continued to remain in default of payment of advance tax the benefit of Circular No. 20/2017 is extended but not to those defaulting Assessees whose request made prior thereto for adjustment of the seized cash against advance tax dues is refused and adjustment is made against the tax demand prior to the date of the above Circular. This discrimination vis-a-vis two sets of defaulting Assessees cannot be legally countenanced, particularly since the stand of the Department, as made explicit by Circular No. 20/2017, is to grant the benefit of adjustment of seized cash against advance tax liability to all Assessees in default of payment of advance tax.*
>
> *14. The Court, therefore, sees no justification in the Department not granting the benefit of the Circular No. 20/2017 to these two Assessees, notwithstanding that the Department may have adjusted the seized cash against their respective determined tax liability."*

16. Briefly put, the court in no uncertain terms held that the assessees in the said case were entitled to the benefit of Circular No.20 of 2017 and that their request for adjustment of tax liability would have to be allowed w.e.f. from the date when the request was first made. This is evident upon a perusal of the paragraph 15 of the said judgment.

17. Therefore, in our view, the stand taken on behalf of the petitioner by Mr Sharma would have to be accepted for the reasons given above. The respondents/revenue ought to have treated the cash seized as advance tax and accordingly passed the assessment order.

18. To be noted, Section 234A of the Act imposes a liability on the assessee for payment of interest where there is default in filing the ROI. Likewise, Section 234B of the Act imposes a liability on the assessee for payment of interest where there is default in payment of advance tax. As far as Section 234C is concerned, it adverts to the liability of the assessee to pay interest where there is a deferment of advance tax.

19. In this case, as is noted above, the ROI was filed, though after the search. The seized cash was offered by the assessee, under the regime which was prevailing then, to be treated as the advance tax and thus there was no default in payment of advance; although its payment /adjustment was triggered due to a search action. Lastly, for the same reason, it cannot be said there was a deferment of payment of advance tax.

20. Thus, in sum, the liability imposed on the petitioner while framing the assessment order dated 29.12.2010 with regard to interest under the aforesaid provision was wrong. The respondents/revenue would be required to excise the imposition of interest made under the aforesaid provisions and thereafter calculate what would have been the refund payable to the

petitioner. Once the respondents/revenue arrived at that figure, the same would be adjusted from the refund already paid to the petitioner, which, as noted above, is Rs.20,73,340/-. The respondents/revenue would, after making the adjustment, pay interest @ 6% from the date of filing the return i.e., 15.03.2010.

21. Besides this, interest will also have to be paid on Rs.32,65,210/-, which is the refund amount shown in the ROI filed by the petitioner after adjusting the aggregate tax liability amounting to Rs.31,58,127/-, the advance tax of Rs.50 lakhs and tax deducted at source amounting to Rs.14,23,332/-.

22. In addition, thereto, interest will also be paid on the interest wrongly imposed under Sections 234A, 234B, and 234C of the Act.

23. The writ petition is disposed of, in the aforesaid terms.

24. It is made clear, something which Mr Sharma does not contest, that interest on all amounts will run from the date when the ROI was filed i.e., 15.03.2010.

25. Since the petition has been pending for the last four years, we expect the amount due to be remitted to the petitioner, once computed as indicated above, at the earliest though not later than six (6) weeks from the date of receipt of a copy of the judgment by the respondents/revenue.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 1, 2023 / tr