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

% Judgment reserved on: 1st November, 2013
Judgment pronounced on: 10th January, 2014

+ ITA 62/2001

COMMISSIONER OF INCOME TAX ....Appellant

Through: Mr. Rohit Madan, Advocate.

Versus

PRAMOD KUMAR DANG ..... RESPONDENT

Through: Mr. Prakash Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The Revenue has filed the present appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") impugning the order dated 28.08.2000 passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal").

2. The Tribunal vide the impugned order set aside the

order of the Commissioner Income Tax (Appeals) (hereinafter referred to as the CIT (Appeals)) dismissing the appeal of the Assessee holding that the Assessee had not paid the amount of tax due on the income returned by him prior to filing of the appeal. The Tribunal while setting aside the order has returned a finding that the Assessee had not committed any default under Section 249(4)(a) of the Act and restored the matter to the file of the CIT (Appeals) for deciding the appeal on merits.

3. Vide the order dated 30.07.2001, the present appeal was admitted and the following substantial question of law was framed:-

> "Whether the Tribunal was correct in its view that requirements of Section 249(4)(a) of the Income-Tax Act, 1961 were complied with?"

4. Since the dispute is in a very narrow campus, we will briefly refer to the facts in the case.

5. The Assessment Year in issue is 1996-97. A search and seizure operation under Section 132(1) was conducted on the respondent Assessee on 14th/15th September, 1995 at the residential premises of the Assessee.

6. Alongwith certain documents and other materials, cash of Rs.4,60,000/- was recovered and seized from the premises of the Assessee.

7. On 28.11.1996, the Assessee filed his return of income declaring an income of Rs.4,97,700/- and as per the return, the due tax payable was shown as Rs.1,61,080/-. The Assessee claimed and had stated that Rs. 50,000/- was paid as advance tax and the amount seized during search at Rs.4,60,000/-, should be treated as paid. Thus, the total amount claimed as paid was Rs.5,10,000/- and accordingly, after adjustment of the due tax as calculated by the Assessee on the returned income of Rs.1,61,080/-,

refund of Rs.3,48,920/- was claimed.

8. On 31.03.1997, an intimation under Section 143(1)(a) was issued by the Assessing Officer creating a demand of Rs.2,15,926/-. No credit on account of payment of due tax was given. Neither was credit given on account of advance tax payment nor was credit given on account of cash seized during the course of search.

9. On 11.09.1997, the Assessee moved an application under Section 154 of the Act requesting adjustment against the demand of Rs.2,15,926/-. It was requested that intimation under Section 143(1)(a) be modified by giving credit for the payment of Rs.50,000/- as advance tax and a sum of Rs.4,60,000/- seized during the course of search.

10. On 23.09.1999, order under Section 154 was passed whereby credit was granted for Rs.50,000/- paid as advance tax. However, no order was passed in

respect of the request for adjustment of the seized amount of Rs.4,60,000/-. No order in this regard was passed even till the date of passing of the impugned order, as noticed in paragraph 5 of the impugned order.

11. On 12.02.1999, an assessment order was passed whereby an additional demand of Rs.60 odd lakhs was created.

12. The respondent Assessee preferred an appeal before the CIT (Appeals). However, the CIT(Appeals) vide order dated 22.12.1999 dismissed the appeal in-limine holding that the Assessee had failed to pay due tax on the amount of the return income and had defaulted in terms of the provisions of Section 249(4)(a) of the Act.

13. By the impugned order on an appeal by the Assessee, the Tribunal noticed the fact that the amount which was found in cash was still lying under the custody of the Revenue and there were no liquid funds with the

Assessee for making payment under Section 140A. The Tribunal noticed that there was no dispute that the Assessee had filed return declaring an income of Rs.4,97,700 on which tax due was at Rs.1,73,080/- and the total amount claimed by the Assessee as paid was Rs.5,10,000/- which was more than the tax due and payable by the returned income.

14. The Tribunal held that the AO had failed to discharge his duty by not passing any order in regard to adjustment of Rs.4,60,000/- which was seized by the Department on 14.09.1995. The Tribunal, therefore, held that the amount of Rs.4,60,000/- should be treated against payment of due tax on returned income. The Tribunal further noticed that the liquid funds of the Assessee were exhausted either by attachment of bank accounts or by seizure of cash amount and thus held that the Assessee's intentions were bona fide for not depositing the tax under Section

140A and requesting for adjustment of the seized amount against the due tax payable on returned income.

15. The Tribunal thus held that the Assessee had not committed default under Section 249(4)(a) and restored the matter to the file of the CIT (Appeal) for deciding the issue on merits. The Revenue has filed the present appeal impugning the order of restoration of the appeal to the file of the CIT (Appeals).

16. We find no infirmity in the order of the Tribunal and find no merit in the appeal filed by the Revenue.

17. Section 249 (4) reads as under:-

> "(4) No appeal under this Chapter shall be admitted unless at the time of filing of the appeal,-
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> (a) where a return has been filed by the assessee, the assessee has

paid the tax due on the income returned by him; or

(b) where no return has been filed by the assessee, the assessee has paid an amount equal to the amount of advance tax which was payable by him;

Provided that, in a case falling under clause (b) and on an application made by the appellant in this behalf, the Commissioner (Appeals) may, for any good and sufficient reason to be recorded in writing, exempt him from the operation of the provisions of that clause."

18. Section 249(4)(a) stipulates that an appeal shall not be admitted unless at the time of the filing of the appeal, the Assessee has paid the tax due on the income returned by him, in case, a return has been filed and in case, no return has been filed, the Assessee has paid an amount equal to the amount of the advance

tax which was payable by him. In case, where the Assessee had not filed a return, power is granted to the Commissioner (Appeals) to exempt the Assessee from the requirements to pay the tax for good and sufficient reasons.

19. In support of his case the counsel for the respondent relied upon the judgment of this Court in ***COMMISSIONER OF INCOME TAX VS. RAMA BODY BUILDERS (DELHI),*** **(2001) 250 ITR 825 (DEL.).** In the said case, the Division Bench of this High Court upheld the decision of the Tribunal in restoring the appeal in a case where the Assessee had paid only part of the tax as advance tax and paid the balance of the tax payable as worked out on the return filed on the date later than filing of the appeal but prior to the appeal being taken up for hearing. The High Court held that if prior to issuance of a show cause notice, the Assessee had made deposit of the deficit tax then

it would tantamount to compliance of the provisions of Section 249(4).

20. The facts of the case at hand are at a much better footing. Admittedly, the tax due on the returned income was Rs.1,73,080/-. The Assessee had paid Rs.50,000/- by way of advance tax and Rs.4,60,000/- was seized during the search and seizure operations and thus a sum of Rs.5,10,000/- was available with the Department. The Assessee had even moved an application under Section 154 requesting the Assessing Officer to adjust the amount of tax payable on the returned income from the amount that had been seized from the Assessee. No order in this regard was passed rejecting the said request of the Assessee. The Tribunal has even noticed that there was an attachment order vis-à-vis the bank accounts of the Assessee and as such, the Assessee had no cash available for payment of the tax as computed on

the returned income. The Tribunal has held that the action of the Assessee of requesting for adjustment of the amount was bond fide. No reason or ground for not accepting the said request is stated or mentioned in the grounds of appeal. Section 132B of the Act relates to application of seized assets towards tax liability. It is not stated why and on what ground the application or adjustment was not made. It is not the case of the revenue that that the cash seized was adjusted for another year or was claimed and assessed in the hands of a third person.

21. The rationale behind Section 249(4) appears to be that where an Assessee has filed a return of income, then the tax which is admittedly payable by the Assessee should be paid prior to the hearing of any appeal filed by the Assessee. The rationale seems very logical for the reason that no Assessee can be heard in an appeal where the tax which is admittedly payable by

the Assessee is outstanding. It is enforce payment of tax on admitted income where an Assessee files the return of income then at least the tax which is payable in terms of the return income should be paid by the Assessee. But where the Assessee either has paid the tax on the returned income or sought adjustment of the amount admittedly lying with the revenue towards the tax payable on the returned income, the Assessee cannot be denied a hearing. In the present case, the amount of Rs.4,60,000/- belonging to the Assessee which was admittedly available with the appellant was far in excess of the amount of tax payable in terms of the returned income and was even in excess of the demand created under Section 143(1)(a). The Assessee could not have been denied a hearing merely on the ground of nonpayment of tax due on the returned income.

22. In view of the above, we are of the considered opinion

that the Tribunal was correct in holding that the requirements of Section 249(4)(a) of the Act were duly complied with. The question of law is thus answered in favour of the Assessee and against the Revenue. The appeal is accordingly dismissed with no order as to costs.

SANJEEV SACHDEVA, J.

10th JANUARY , 2014 **SANJIV KHANNA, J.**
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