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

**R-45**

\+ **ITA 18/2002**

COMMISSIONER OF INCOME TAX
CENTRAL 1 ..... Appellant

Through: Mr Kamal Sawhney, Sr. Standing Counsel with Mr Raghvendra, Jr Standing Counsel and Mr Shikhar Garg, Advocate.

versus

MR. SRI CHAND GUPTA ..... Respondent

Through:

WITH

**R-46**

\+ **ITA 19/2002**

COMMISSIONER OF INCOME TAX
CENTRAL - 1 ..... Appellant

Through: Mr Kamal Sawhney, Sr. Standing Counsel with Mr Raghvendra, Jr Standing Counsel and Mr Shikhar Garg, Advocate.

versus

MRS. USHA RANI GUPTA ..... Respondent

Through:

AND

**R-47**

\+ **ITA 20/2002**

COMMISSIONER OF INCOME TAX
CENTRAL 1 ..... Appellant

Through: Mr N.P. Sahni with Mr Nitin Gulati,

Advocates.

versus

MR. GIAN CHAND GUPTA ..... Respondent
Through:

**CORAM:**
**HON'BLE DR. JUSTICE S. MURALIDHAR**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**O R D E R**

**% 31.07.2015**

**Vibhu Bakhru, J.**

1. These appeals are filed by the Revenue under Section 260A of the Income Tax Act (hereafter 'Act') impugning a common order dated 11th July, 2001 passed by the Income Tax Appellate Tribunal (hereafter 'The Tribunal') in respect of the six separate appeals being ITA Nos. 1780/Del/1995, 5933/Del/1995 5931/Del/1995, 1874/Del/1995, 6082/Del/1995 and 6084/Del/1995; ITA Nos. 1780/Del/1995, 5933/Del/1995 and 5931/Del/1995, were filed by Shri Gian Chand Gupta, Smt. Usha Rani Gupta and Shri Sri Chand Gupta ( hereafter collectively referred to as the 'Assessees') respectively against separate orders passed by the Commissioner Income Tax (Appeals) [hereafter 'CIT(A)'] and ITA Nos. 1874/Del/1995, 6082/Del/1995 & 6084/Del/ 1995 were cross appeals preferred by the Revenue against the orders of CIT (A). The CIT(A) had by

separate orders disposed of the appeals preferred by the Assessees against the orders passed by the Assessing Officer (hereafter the 'AO') rejecting the respective applications filed by the said Assessees under Section 154 of the Act.

2. The present appeals involve a common question concerning the treatment of the currency seized during the search and seizure operations conducted under Section 132 of the Act. The Assessees claim that the amounts seized during the search ought to be accounted for as payment of advance tax on the date of seizure and interest chargeable under Section 234A, 234B and 234C of the Act ought to be computed accordingly. The Revenue disputes this contention. According to the Revenue, the currency seized during the search operations under section 132 of the Act, cannot be treated as payment of tax till the filing of the return by the Assessee surrendering the seized amount as payment of tax or a demand being raised pursuant to a regular assessment.

3. In view of the above controversy, this Court, by an order dated 12th February, 2004 framed the following question of law for determination:-

> "Whether the Tribunal was right in holding that amount retained u/s 132(5) of the Income-tax Act, 1961 amounts to payment of taxes and should be taken into consideration while calculating

interest payable u/s 234A, 234B and 234C of the Income-tax Act, 1961?"

4. It is relevant to note that all parties had agreed before the Tribunal that the facts and the questions of law involved in all the appeals were common and a decision in the case of Sh. Gian Chand Gupta (hereafter the 'Assessee') [ITA 1780/Del/1995 and 1874/Del/1995] would cover the issues in all the appeals. Thus, for the purposes of addressing the disputes in the present appeal, the facts pertaining to the case of Sh. Gian Chand Gupta, (the Respondent/Assessee in ITA No. 20/2002) are briefly stated as under:-

4.1 The search and seizure operations were conducted under Section 132 of the Act at the premises of the Assessee on 14th January, 1991. During the course of the search, Indian currency amounting to Rs.25,62,500/- was found and seized by the concerned officers.

4.2 On 10th May, 1991 an order under Section 132(5) of the Act was made estimating the income of the Assessee at Rs.1,95,93,756/-. Accordingly, the AO passed an order retaining the cash seized to be dealt with in accordance with provisions of Section 132B of the Act.

4.3 The Assessee filed his return of income on 26th April, 1993 declaring a total income of Rs.56,56,380/- for the relevant period (i.e. Previous Year

1990-1991 relevant to the Assessment Year 1991-92). The said return was processed under Section 143(1)(a) of the Act on 27th September, 1993 and a demand of Rs.58,49,796/- was raised. This demand included interest payable under Section 234A, 234B & 234C of the Act. The cash seized during search operations was appropriated against the aforesaid demand.

4.4 Aggrieved by the same, the Assessee filed an application on 19th January, 1994 under Section 154 of the Act for rectification of the said demand. The Assessee contended that the cash seized on 14th January, 1991 ought to have been treated as payment of tax on that date and the failure to treat the said amount as advance tax paid on that date had resulted in a mistake apparent from the record. According to the Assessee, the said mistake was liable to be corrected and the interest chargeable under Section 234A, 234B, 234C ought to have been recomputed.

4.5 By an order dated 25th January, 1994 the AO rejected the Assessee's application under Section 154 of the Act. The AO held that the cash seized during the search operations had to be dealt with in accordance with Section 132B of the Act and had to be applied towards *"regular demand raised on the assessment and other proceedings under the I.T Act."* Thus, the seized cash could not be treated as advance tax payment on the date of the seizure

and, therefore, was adjusted towards the part payment of the demand finally raised pursuant to assessment under Section 143(1)(a) of the Act.

4.6 Aggrieved by the aforesaid order, the Assessee preferred an appeal before CIT(A) being Appeal No.461/1994-95. It was contended before the CIT(A) that the demand of tax would necessarily relate back to the relevant accounting year since the liability of income tax crystallises on the last date of the accounting year, which in this case was 31st March, 1991. Therefore, the amount seized by the Income Tax Authorities ought to be adjusted on the date of the seizure and if not so, at least on the last date of the accounting year. The Assessee further urged that he had surrendered income under Section 132(4) of the Act during the course of the search operations and, thus, had also not sought a refund of the amount seized. In the given circumstances, it was contended, that the Assessee's request for making the adjustment from the date of the search ought to be acceded to. The CIT(A) passed an order dated 23rd December, 1994 holding that the amount seized during the search, ought to be adjusted from the date of the order under Section 132(5) of the Act, i.e., 10th May, 1991 and interest be charged accordingly. The CIT(A) directed that the interest under Section 234A, 234B, 234C of the Act be computed only up to the date of 10th May, 1991

and further interest be charged only on the balance amount, if any, remaining after adjustment of the cash seized as on 10th May, 1991. In other words, the CIT(A) was of the view that the cash seized ought to be appropriated as tax paid as on 10th May, 1991 being the date of the order passed under Section 132(5) of the Act retaining the amount seized. The CIT(A) directed the AO to re-compute the demand.

4.7 The aforesaid order dated 23rd December, 1994 passed by the CIT(A) was challenged by the Assessee as well as by the Revenue before the Tribunal. It was argued on behalf of the Assessee that during the course of the search, the Assessee had declared a sum of Rs. 25,62,500/- as additional income under Section 132(4) of the Act. Therefore, the tax on the income disclosed ought to have been treated as an existing liability and the amount seized ought to have been adjusted against the said liability as on the said date. The Assessee also contended that the question whether interest was chargeable or not was a debatable issue and, therefore, could not be charged while processing the return under Section 143(1)(a) of the Act.

4.8 The Revenue also assailed the decision of CIT(A) to treat the cash seized as tax paid w.e.f. 10th May, 1991 i.e. the date of order passed under Section 132(5) of the Act. According to the Revenue, the amount retained

under Section 132(5) of the Act could not be treated as payment of tax and, therefore, the said amount could not be adjusted against the advance tax payable by the Assessee.

4.9 The Tribunal upheld the contention of the Revenue that the seized cash could not be treated as payment of advance tax on the date of the seizure. However, the Tribunal held that the liability to pay advance tax by the Assessee stood discharged on the date of the order under Section 132(5) of the Act, as the amount seized had to be applied in accordance with Section 132B of the Act and in terms of that Section the cash seized was to be applied towards "existing liability" referred to in clause (iii) of Section 132(5) of the Act. The Tribunal reasoned that the AO was bound to adjust the cash seized after passing of the order under Section 132(5) of the Act and, therefore, it would be fair to hold that the adjustment of tax by the AO should relate back from the date of order under Section 132(5) of the Act. The Tribunal held that the liability to pay advance tax had occurred during the financial year 1991 and, therefore, had to be treated as an existing liability as mentioned in clause (iii) of Section 132(5) of the Act.

5. Mr Sahni, Sr. Standing Counsel appearing on behalf of the Revenue contended that an order under Section 132(5) of the Act did not permit

appropriation of the assets seized but, only empowered the AO to retain the assets to be applied in a manner as provided under the Act. He further contended that the amount retained by the AO could only be appropriated towards the income tax liability once the Assessee had filed a return accepting the same as payment of tax or on a regular assessment being made. He emphasised that prior to the filing of the return, there was no determination of liability towards which the seized assets could be applied. He further submitted that the expression "existing liability" as used in Section 132(5)(iii) of the Act would refer to liability which was crystallized or determined under the provisions of the Act. He stated that unless an assessment had been framed, there would be no determination of any liability for the relevant year and, thus, the assets seized could not be applied towards any such liability.

6. We have heard the learned counsel for the Revenue, however none appeared for the Assessees.

7. Before proceeding to address the issue, it would be relevant to refer to the provisions of Sections 132(4), 132(5) & 132B of the Act as existing at the material time. The same are set out as under:-

"132(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act.

*Explanation.*—For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income-tax Act, 1922 (11 of, 1922), or under this Act.

132(5) Where any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) is seized under subsection (1) or sub-section (1A), as a result of a search initiated or requisition made before the 1st day of July, 1995, the Income-tax Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, shall, within one hundred and twenty days of the seizure, make an order, with the previous approval of the Joint Commissioner,-

(i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;

(ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income-tax Act, 1922 (11 of 1992), or this Act;

(iia) determining the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Indian Income-tax Act, 1922 (11 of

1922), or this Act, as if the order had been the order of regular assessment;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of section 230A in respect of which such person is in default or is deemed to be in default.

and retain in his custody such assets/or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii), (iia) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized:

Provided that if, after taking into account the materials available with him, the Income-tax Officer is of the view that it is not possible to ascertain to which particular previous year or years such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year in which the assets were seized and may also determine the interest or penalty, if any, payable or imposable accordingly:

Provided further that where a person has paid or made satisfactory arrangements for payments of all the amounts referred to in clauses (ii), (iia) and (iii) or any part thereof, the Income-tax Officer may, with the previous approval of the Chief Commissioner or Commissioner, release the assets or such part thereof as he may deem fit in the circumstances of the case.

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**132B. Application of retained assets.**—(1) The assets retained under sub-section (5) of section 132 may be dealt with in the following manner, namely:—

(i) The amount of the existing liability referred to in clause (iii) of the said sub-section and the amount of the liability determined on completion of the regular assessment or reassessment for all the assessment years relevant to the previous years to which the income referred to in clause (i) of that sub-section relates (including any penalty levied or interest payable in connection with such assessment or reassessment) and in respect of which he is in default or is deemed to be in default 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;

(iii) The assets other than money may also be applied for the discharge of any such liability referred to in clause (i) as remains undischarged and for this purpose such assets shall be deemed to be under distraint as if such distraint was effected by the Assessing Officer or, as the case may be, the Tax Recovery Officer under authorisation from the Chief Commissioner or Commissioner under sub-section (5) of section 226 and the Assessing Officer or, as the case may be, the Tax Recovery Officer may recover the amount of such liabilities by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule.

(2) Nothing contained in sub-section (1) shall preclude the recovery of the amount of liabilities aforesaid by any other mode laid down in this Act.

(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 fifteen per cent. per annum on the amount by which the aggregate of money retained under section 132 and of the proceeds, if any, of the assets sold towards the discharge of the existing liability referred to in clause (iii) of sub-section (5) of that section exceeds the aggregate of the amounts 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 six months from the date of the order under sub-section (5) of section 132 to the date of the regular assessment or reassessment referred to in clause (i) of sub-section (1) or, as the case may be, to the date of last of such assessments or reassessments."

8. Section 132(4) of the Act enables an authorised officer to examine on oath any person who is found to be in possession or control of any books of accounts, documents or other assets. Any disclosure made by an Assessee with regard to its income under the aforesaid provision would only serve as evidence required for carrying out the assessment. Clearly, any declaration made under Section 132(4) of the Act is not a substitute for a return of income by an Assessee. In the present case, even though the Assessee had declared income under Section 132(4) of the Act during the course of the search and seizure operations, the same would not constitute a determined liability towards which the assets seized could be readily applied. Thus, the contention advanced by the Assessee that once the Assessee had declared

income (undisclosed or otherwise) during the course of search operations, the assets seized were liable to be immediately appropriated towards the tax liability on such income cannot be sustained. A plain reading of Section 132 of the Act indicates that once the search and seizure operations have been conducted and assets have been seized from the Assessee, the Income Tax Officer (ITO) has to estimate the amount/assets required to meet the Assessee's known and estimated liability and retain the same. By virtue of the provisions of Section 132(5) of the Act, the ITO is required to make an order within 120 days of the date of seizure with the prior approval of the Joint Commissioner. The ITO has to (a) estimate the undisclosed income to the best of his judgment on the basis of material available with him; (b) calculate the amount of tax on such income; (c) determine the amount of interest payable to penalty imposable; and (d) specify the amount required to satisfy any existing liability under the Act. The ITO can retain in its custody only such assets which in his opinion are sufficient to satisfy the amounts as aforesaid and any assets in excess of the same have to be returned and cannot be withheld from the Assessee. Section 132(5) of the Act serves to protect interest of the Revenue as well as the Assessee; whilst sufficient assets to meet the liability of the Assessee are retained in the custody of the

Income Tax Authority, the concerned Authority is not permitted to retain assets in excess or what may be required to meet the Assessee's liability. The words "retained in his custody" are key operative words which, clearly, indicate that the ITO retains the assets in his custody and the same are not appropriated towards payment of tax. Section 132(5) of the Act does not contemplate appropriation of assets towards any liability, whether existing or in future, but is limited to permitting the ITO to retain the seized assets to be applied as provided under the Act.

9. In view of the aforesaid, the conclusion of the CIT(A) as well as the Tribunal that liability of the Assessee would stand discharged to the extent of cash seized from the date of the order under Section 132(5) of the Act is not sustainable as Section 132(5) of the Act does not deal with appropriation of the assets seized.

10. Clause (i) of Section 132B(1) of the Act as it existed in the statute book at the material time enables the Income Tax Authorities to apply the assets retained under Section 132(5) of the Act towards any "existing liability" as referred to in clause (iii) of Section 132(5) of the Act. By virtue of that clause, the ITO could specify any existing liability and retain assets sufficient to meet the same. The expression "existing liability" as used in

Section 132(5) of the Act would mean a liability which has been determined and crystallized and, thus, is capable of being specified in an order under Section 132(5) of the Act. In absence of any return filed, any assessment made or any determinative process undertaken, the question of the ITO specifying a liability under clause (iii) of Section 132(5) of the Act does not arise. Thus, plainly, the reference to an "existing liability" as used in Section 132(5)(iii) of the Act would mean such liability that has already been determined and crystallized such demands outstanding in respect of prior years where assessment have been made for or any other liability that stands crystallized by any determinative process under the Act.

11. We are unable to accept the Tribunal's view that payment of advance tax was an existing liability as on the date of the order under Section 132(5) of the Act and, thus, seized assets could be applied towards the said liability as on that date. Although it cannot be disputed that the Assessee had the liability to pay the advance tax, nonetheless, this liability could not have been determined by the AO prior to the assessment under the Act. Advance tax is, essentially, to be paid by an assessee on the amount of taxable income estimated by it. The AO can determine whether payment of advance tax paid fell short of the required amount only when an assessee's income is

assessed. Thus, at the stage of Section 132(5) of the Act, such liability in respect of the Assessee's income for the Previous Year 1990-91 could not be specified under clause (iii) of Section 132(5) of the Act.

12. Admittedly, no order under Section 132B of the Act was passed for applying cash seized and retained by the ITO. It is not disputed that the Assessee had also not made any request that the amount seized by the ITO be applied towards the discharge of its liability under the Act. Thus, the assets retained by the ITO could not have been appropriated towards the payment of tax until the Assessee had filed a return indicating the application of seized cash towards its tax liability or till an assessment was framed for the Assessment Year 1991-1992.

13. For the reasons stated above, the question of law framed by an order dated 12th February, 2004 is answered in the negative and in favour of the Revenue. The appeals are, accordingly, allowed. No order as to costs.

**VIBHU BAKHRU, J**

**S. MURALIDHAR, J**

**JULY 31, 2015/RK**