

Narendra N. Thacker, Kolkata vs Department Of Income Tax on 28 September, 2015

IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "B", KOLKATA
[Before Shri Mahavir Singh, JM & Shri M.Balaganesh, AM]
IT(SS)A No.01/Kol/2012
Assessment Year : 2006-07

(APPELLANT)		(RESPONDENT)
A.C.I.T., Central Circle-XXIV, Kolkata	-versus-	Narendra N.Thacker Kolkata (PAN:ABNPT 3231 A)

For the Appellant : Shri S.Srivastava, CIT(DR)
For the Respondent : Shri A.K.Tibrewal, FCA

Date of Hearing : 25.08.2015.
Date of Pronouncement : 28.09.2015.

ORDER

Per Shri M.Balaganesh, AM

1. This appeal of the revenue arises out of the order of the Learned CIT(A) in Appeal No.01/CC-XXIV/CIT(A)/C-III/10-11 dated 21.10.2011 for the Asst Year 2006-07 arising out of the order of the Learned Assessing officer framed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act').
2. Shri.A.K.Tibrewal, FCA, the Learned AR argued on behalf of the assessee and Shri.Sachidhanand Srivastava, the Learned CIT DR argued on behalf of the revenue.
3. The only issue to be decided in this issue is as to whether the Learned CIT(A) is justified in allowing the adjustment of seized cash against self assessment tax liability though the Act does not provide for adjustment of seized cash before determination of tax liability.
4. The brief facts of this issue is that the search and seizure operation was conducted on Thacker Group on 27.7.2006 and it was seen that the four brothers Sri Dinesh N Thacker, Sri Vinod N Thacker, Sri Narendra N Thacker and Sri Mahendra N Thacker were doing separate business. The activities relating to the family unit of Sri Narendra N Thacker are mainly investment related activities which are carried on IT(SS)A.01/Kol/2012 Narendra N.Thacker.

A.Yr.2006-07 in the names of his family members. Pursuant to the search, a notice u/s 153A was issued on the assessee on 10.8.2007 and in response to the same , the assessee filed his return of income for the Asst Year 2006-07 on 28.11.2007 declaring taxable income of Rs. 60,12,240/-.During the course of search, cash to the extent of Rs. 20,00,000/- was found from Locker No. 646 with Canara Bank, Vashi Branch, Mumbai, belonging to the assessee and the same was seized by the

department. The assessment was completed u/s 153A of the Act on 1.7.2008 determining taxable income at Rs. 60,12,240/- raising a demand of Rs. 24,02,249/-. Originally the Learned AO gave credit for seized cash of Rs 20,00,000/- towards self assessment tax which was later rectified u/s 154 of the Act by the Learned AO on 2.3.2010 by revoking the credit for seized cash of Rs 20,00,000/- as according to the Learned AO, there was no existing liability, and consequentially charged interest u/s 234B and 234C of the Act. This action was not confirmed by the Learned CITA. Aggrieved, the revenue is in appeal before us on the following grounds:-

"1. That in the facts and circumstances of the case and in law, the Learned CIT(A) has erred in allowing the adjustment of seized cash against self assessment tax liability though Income Tax Act does not provide for adjustment of seized cash before determination of tax liability.

2. That the Department craves leave to add, modify or alter any of the ground(s) of appeal and/or adduce additional evidence at the time of hearing of the case."

5. The Learned DR argued that there is no provision in the Income Tax Act to adjust the seized cash towards the self assessment tax payable by the assessee and accordingly supported the order of the Learned AO. In response to this, the Learned AR argued that pursuant to the search operations, cash of Rs. 20,00,000/- was seized on 31.8.2006 and kept in PD account of the department and the same was adjusted from PD account by the Learned AO on 11.6.2010. He stated that the assessee while filing the return in response to notice issued u/s 153A of the Act for the Asst Year 2006-07, made a request for adjustment of seized cash towards self assessment tax payable by the assessee. He argued that the action of the Learned AO in adjusting the seized cash towards the tax liability determined pursuant to search assessment framed u/s 153A of the Act, is in accordance with law. However, his subsequent action of revoking the said adjustment of seized cash is illegal.

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6. We have heard the rival submissions and perused the materials available on record. We find that the action of the Learned AO in adjusting the seized cash towards the tax liability determined to be payable pursuant to section 153A assessment framed by the Learned AO is in order in terms of section 132B of the Act. For the sake of convenience, the provisions of section 132B of the Act is reproduced here in below:-

"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 under section 153A 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 :

Provided that where the person concerned makes an application to the Assessing Officer within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained to the satisfaction of the Assessing Officer, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the 36[Principal Chief Commissioner or] Chief Commissioner or 36[Principal Commissioner or] Commissioner, to the person from whose custody the assets were seized:

Provided further that such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or for requisition under section 132A, as the case may be, was executed;

(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 36a [Principal Chief Commissioner or] Chief Commissioner or 36a[Principal 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.

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A.Yr.2006-07 (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 under section 153A or under Chapter XIV-B. [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.- 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.]"

7. We find that the subsequent action of Learned AO in revoking the credit given for seized cash towards existing tax liability under proceedings u/s 154 of the Act is illegal. The provisions of section 132B of the Act makes it clear that the terms 'existing liability' does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII. But this amendment was brought in the statute by Finance Act 2013 with effect from 1.6.2013 only. Hence it can be safely concluded that what is precluded in the statute is adjustment of seized cash towards advance tax liability only and not self assessment tax or regular tax and that too only with effect from 1.6.2013. We hold that the action of the assessee in seeking to adjust the seized cash with self assessment tax payable along with the return of income is in order and in accordance with section 132B of the Act as admittedly self assessment tax payable becomes 'existing liability' on the part of the assessee to settle. Similarly we hold that the action of the Learned AO in adjusting the seized cash towards the tax liability determined pursuant to completion of section 153A assessment also is in order and is in accordance with the provisions of section 132B of the Act.

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8. We don't appreciate the arguments of the Learned DR that the amendment brought in section 132B to this effect is to be construed retrospective in operation. We find that this is a substantive law and not procedural law and is a substantive levy on the part of the government on the assessee and hence could be held to be prospective in operation only. Reliance is placed on the decision of the apex court in the case of CWT vs Sharvan Kumar Swarup and Sons reported in 210 ITR 886 (SC) , wherein it was held that :-

"Substantive law is concerned with the ends which the administration of justice seeks ; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated.

What facts constitute a wrong is determined by the substantive law ; what facts constitute proof of a wrong is a question of procedure.

So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."

It is also pertinent to look into the larger bench decision of the apex court rendered in the case of CIT vs Vatika Township P Ltd reported in 367 ITR 466 (SC), wherein their Lordships while deciding the issue of applicability of levy of surcharge u/s 113 of the Act brought in the statute with effect from 1.6.2002 is not to be construed as retrospective in operation, had held as follows:-

"We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In Government of India v. Indian Tobacco Association, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra. It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

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A.Yr.2006-07 In such cases, retrospectively is attached to benefit the person in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors."

We find that the decision of the principle laid down by the larger bench of the apex court in the case of CIT vs Vatika Township P Ltd in 367 ITR 466 (SC) would squarely apply to the applicability of the amendment brought in section 132B with effect from 1.6.2013 and accordingly we hold that the amendment brought in section 132B would be construed prospective only as it is a provision which is onerous to the assessee.

9. Moreover, even if we hold that the said amendment in section 132B of the Act is to be construed as retrospective in operation, still it will not disturb the impugned case as in the facts of the instant case, the assessee never requested for adjustment of seized cash towards advance tax liability. He only requested for adjustment of seized cash towards self assessment tax. It is beyond doubt that the terms ' advance tax' and 'self assessment tax' are distinct and separate.

10. Looking at the issue of the Learned AO under section 154 proceedings revoking the adjustment of seized cash towards the tax liability determined on completion of search assessment from another angle, we find that this issue has reached the corridors of various courts as to the legality of the adjustment of seized cash and that itself makes the issue highly debatable and hence in any case cannot be the subject matter of rectification u/s 154 of the Act. It is well settled that an issue which is highly debatable cannot be rectified u/s 154 of the Act.

11. We find that the various case laws cited by the Learned AR in the paper book filed by him need not be considered as those case laws pertain to the adjustment of IT(SS)A.01/Kol/2012 Narendra N.Thacker.

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In conclusion, we hold that the action of the Learned AO in adjusting the seized cash towards the tax liability determined on completion of search assessment is in order. With regard to charging of interest u/s 234B and 234 C of the Act for non-payment and short payment of advance tax is concerned, we have already held that the amendment in section 132B of the Act is held to be prospective in operation from 1.6.2013 and accordingly not applicable for Asst Year 2006-07. Hence we hold that no interest u/s 234B and 234 C of the Act shall be charged by the Learned AO from the

date of seizure of cash to the date of completion of assessment in respect of seized cash of Rs. 20,00,000/-.

In the result, the appeal of the revenue is dismissed.

Order pronounced in the court on 28.09.2015.

Sd/-
[Mahavir Singh]
Judicial Member

Sd/-
[M. Balaganesh]
Accountant Member

Date: 28.09.2015.
R.G. (.P.S.)

Copy of the order forwarded to:

1. Narendra N.Thacker, 2, Rafi Ahmed Kidwai Road, Kolkata-700013.
- 2 The A.C.I.T., Central Circle-XXIV, Kolkata.
3. The CIT-Central-III, Kolkata, 4. The CIT(A)-Central-III, Kolkata.
5. DR, Kolkata Benches, Kolkata True Copy, By order, Deputy /Asst. Registrar, ITAT, Kolkata Benches IT(SS)A.01/Kol/2012 Narendra N.Thacker.

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