

AFR**Reserved on: 25.10.2017****Delivered on:09.11.2017****Court No. - 4****Case :- INCOME TAX APPEAL No. - 39 of 2009****Appellant :- Mahabeer Prasad Jain****Respondent :- Commissioner Of Income Tax****Counsel for Appellant :- Amit Mahajan****Counsel for Respondent :- Krishna Agarwal, Piyush Agarwal****Hon'ble Abhinava Upadhya, J.****Hon'ble Ashok Kumar, J.****(Delivered by Ashok Kumar, J.)**

1. This is an appeal arises from a decision of the Income Tax Appellate Tribunal dated 28.11.2008 passed by the Tribunal in ITA No.18/Agra/2007 .

2. The following questions of law have been framed by the assessee.

(i) *Whether, on the facts and in the circumstances of the case, the Tribunal was justified in confirming the demand of interest u/s 234-A and 234-B of the Income Tax Act ?*

(ii) *Whether, interest of Rs.16,398/- under Section 234A is liable to be deleted as the amount of Rs.4,90,899/- allegedly belonging to the appellant stood seized by the department on 31.05.1990 and appropriated vide order dated 23.11.1990 under Section 132(5) of the Act ?*

(iii) *Whether, interest of Rs.1,31,184/- under Section 234-B is liable to be deleted as the amount of Rs.4,90,899/- allegedly belonging to the appellant stood seized by the department on 31.05.1990 and appropriated vide order dated 23.11.1990 under Section 132(5) of the Act ?*

(iv) *Whether, the term 'existing liability under the Act' has been correctly interpreted and applied in the facts and circumstance existing in the present case ?*

3. We have heard Sri Amit Mahajan, learned counsel for the appellant and Sri Piyush Agarwal, learned Senior Standing

Counsel for the Department.

4. The brief facts of the case are that search and seizure operation under Section 132(1) has held on the office premises of Chief General Manager, Dispatch and Coordination, Central Coal Field Ltd., Ranchi on 30.07.1990. During the course of search, cash amounting to Rs.4,90,889/- was seized. The said amount which was found during the course of search, was for purchase of coal in the office of Chief General Manager, Central Coal Field Ltd., Ranchi.

5. An order under Section 132 (5) of the Income Tax Act, 1961 (*hereinafter referred as 'The Act'*) has been passed in the name of M/s Gyan Chand Mahavir Prasad Jain Industries, Firozabad of which the sole proprietor was Mahabir Prasad Jain. While passing the order under Section 132(5), the authority has found undisclosed income of the appellant and it has been estimated at Rs.5,40,889/-.

6. Section 132(5) of the Act provides the procedure for **search and seizure**. Sub-Section 5 of Section 132 of the Act provides as follows:

“(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 sub-section (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 1922), 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 payment 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.”*

7. After the order passed under Section 132(5) of the Act, a notice under Section 143(2) has been issued and in pursuance thereto the appellant-assessee appeared and after considering the submission of the assessee, the assessing authority has passed an order dated 02.03.1993 under section 143(3) of the Act by which the assessing authority has treated the recovered cash as undisclosed investment and accordingly the assessing authority has determined the taxable income at Rs. 5,34,120/-. A demand notice has been issued under Section 156 wherein a demand of Rs.4,20,914/- was raised. The said amount comprised tax at Rs. 2,73,332/- interest under Section 234(A) of the Act at Rs.16,398/- and interest under Section 234(B) of the Act at Rs.1,31,184/-.

8. This part of the order passed under Section 143(3) has been challenged by the appellant-assessee before the Commissioner of Income Tax (Appeals). Before the Commissioner of Income Tax (Appeals) it has been contended by the appellant that the amount

of Rs.4,90,889/- does not belong to him. It has also been contended by the appellant that the interest under Section 234A and under Section 234B of the Act cannot be levied. The appellant has challenged the demand itself by praying that the tax stands be adjusted against the amount which has been recovered and retained by the department during the course of search.

9. Before the CIT(A) the appellant has contended that since in the order of the demand there is no specific mention of the charging of the interest hence the same cannot be realised. The Commissioner of Income Tax (Appeals) vide its order dated 18.08.2006 has dismissed the appeal filed by the appellant and has held that the interest can be charged even when the same has not been mentioned in the order of the assessment.

10. Since the CIT(A) has brushed aside the submission and contention as well as the objection of the appellant-assessee with regard to charge of interest, the assessee has filed an appeal before ITAT, Agra which appeal has been dismissed by the ITAT by the impugned judgment and order dated 28.11.2008.

11. The present appeal, therefore, arises from the order of the ITAT dated 28.11.2008.

12. The sole issue which has been raised by means of present appeal is confined to confirmation of demand of interest under Sections 234A and 234B of the Act, therefore, it would be relevant to place the provision of Section 234A and Section 234B of the Act, which are as follow;

“234A. Interest for defaults in furnishing return of income.-(1)
Where the return of income for any assessment year under sub-section (1) or sub-section (4) of Section 139, or in response to a notice under sub-section (1) of section 142, is furnished after the due date, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the date immediately following the due date, and,—

(a) where the return is furnished after the due date, ending on the date of furnishing of the return; or

(b) where no return has been furnished, ending on the date of completion of the assessment under section 144,

on the amount of the tax on the total income as determined under sub-section (1) of section 143, and where a regular assessment is made, on the amount of the tax on the total income determined under regular assessment, as reduced by the amount of,—

(i) advance tax, if any, paid;

(ii) any tax deducted or collected at source;

(iii) any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(iv) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;

(v) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and

(vi) any tax credit allowed to be set off in accordance with the provisions of section 115JAA or section 115JD.

Explanation 1.—In this section, "due date" means the date specified in sub-section (1) of Section 139 as applicable in the case of the assessee.

Explanation 2.—In this sub-section, "tax on the total income as determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

Explanation 3.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 4.—[* * *]

(2) The interest payable under sub-section (1) shall be reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section.

(3) Where the return of income for any assessment year, required by a notice under section 148 [or section 153A] issued after the determination of income under sub-section (1) of section 143 or after the completion of an assessment under sub-section (3) of section 143 or section 144 or section 147, is furnished after the expiry of the time allowed under such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time allowed as aforesaid, and,—

(a) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return; or

(b) where no return has been furnished, ending on the date of

completion of the reassessment or recomputation under section 147 or reassessment under section 153A,

on the amount by which the tax on the total income determined on the basis of such reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the earlier assessment aforesaid.

Explanation.—[* * *]

(4) Where as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 260 or section 263 or section 264 or an order of the Settlement Commission under sub-section (4) of section 245D, the amount of tax on which interest was payable under sub-section (1) or sub-section (3) of this section has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.

234B. Interest for defaults in payment of advance tax.— (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Explanation 1.—In this section, "assessed tax" means the tax on the total income determined under sub-section (1) of section 143 and where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of,—

(i) any tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income;

(ii) any relief of tax allowed under section 90 on account of tax paid in a country outside India;

(iii) any relief of tax allowed under section 90A on account of tax

paid in a specified territory outside India referred to in that section;

(iv) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and

(v) any tax credit allowed to be set off in accordance with the provisions of section 115JAA or section 115JD.

Explanation 2.—Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3.—In Explanation 1 and in sub-section (3) "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

(2) Where, before the date of determination of total income under sub-section (1) of section 143 or completion of a regular assessment, tax is paid by the assessee under section 140A or otherwise,—

(i) interest shall be calculated in accordance with the foregoing provisions of this section up to the date on which the tax is so paid, and reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section;

(ii) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax so paid together with the advance tax paid falls short of the assessed tax.

(2A) (a) where an application under sub-section (1) of section 245C for any assessment year has been made, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of making such application, on the additional amount of income-tax referred to in that sub-section;

(b) where as a result of an order of the Settlement Commission under sub-section (4) of section 245D for any assessment year, the amount of total income disclosed in the application under sub-section (1) of section 245C is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April of such assessment year and ending on the date of such order, on the amount by which the tax on the total income determined on the basis of such order exceeds the tax on the total income disclosed in the application filed under sub-section (1) of section 245C;

(c) where, as a result of an order under sub-section (6B) of section 245D, the amount on which interest was payable under clause (b) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly;

(3) where, as a result of an order of reassessment or recomputation under section 147 or section 153A, the amount on which interest was payable in respect of shortfall in payment of advance tax for any

financial year under sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent for every month or part of a month comprised in the period commencing on the 1st day of April next following such financial year and ending on the date of the reassessment or recomputation under section 147 or section 153A, on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of section 143 or on the basis of the regular assessment as referred to in sub-section (1), as the case may be;]

(4) where, as a result of an order under section 154 or section 155 or section 250 or section 254 or section 260 or section 262 or section 263 or section 264, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded;

(5) the provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.”

13. Having heard the learned counsel for the parties and after perusal of the orders passed by the authorities below as well as the impugned judgment and order of the Tribunal, we have noticed that while deciding the appeal, the CIT(A) has recorded categorical finding that the appellant-assessee has purchased 5 bank drafts towards amounting of Rs.4,90,899/- on 31.05.1990. The said drafts were purchased for lifting coal by road from the collieries of CCL, Ranchi. These five drafts were deposited along with an application prepared by the appellant's company by 31st May, 1990. During the course of examination and verification, the assessing authority has asked the appellant to explain the source of investment while purchasing the aforesaid drafts. The appellant has explained that he has authorised by one Mahesh Chandra Bansal of Firozabad for lifting the coal from CCL, Ranchi and accepted that he has no knowledge about any purchase of the

said drafts. In his submission, the person authorised has further explained that he did not know who had made the said investment in the bank. In fact, he had denied the transaction.

14. This stand of the authorised person was challenged and thereafter a fresh explanation has been given that the appellant has not clearly given any authority to the said authorised person namely Mahesh Chandra Bansal. The assessing authority has noticed the contradiction in the statement of the authorised authority in the changed stand by the appellant. The assessing authority had noticed that Mahesh Chandra Bansal had denied the allegation of appellant. He came to the conclusion that since Mr. Bansal denied having done any work with the assessee and having made any investment on behalf of the assessee or any other person while purchasing of the said drafts and since no plausible explanation has been furnished about the investment in the purchase of drafts and stands clearly establishes that the investment in the bank drafts amounting of Rs.4,90,899/- has been made in the name of the appellant and the same was made by the appellant himself which was nothing but clearly the undisclosed source and accordingly the addition under Section 69 of the Act has been made.

15. During the course of the appellate proceeding before the CIT(A), the CIT(A) has referred the matter to the assessing authority for his comments. The assessing authority vide his letter dated 26.10.2005 has submitted his comments as under;

“Regarding pt. No.5 to 7 of assessee's contention that he has been writing letters to the Branch Manager of concerned bank to seek information about the persons who applied for or obtained the said drafts. Perusal of letters reveals that the assessee has written letters to the concerned bank only on 05.02.03, 26.11.04 and 21.1.05 whereas the assessment proceedings were started after filing of return on 12.12.91. The assessee could have obtained the desired information from the bank during the course of assessment proceedings as well as at appeal stage but he did not do so. Only he has tried from 5.2.03 by merely writing a letter. The

assessee has earnestly not tried to obtain information from the Bank. He could not have collect the information from Bank personally but he failed to do so. After a lapse of 12 years simply writing a letter in the bank in get the information is only to press his claim that he has written several letters. But the onus was on the assessee to prove the investment in aforesaid drafts. Everybody knows that the information from banks after a lapse of such long period will not be available. Such papers are destroyed after three to four years by the bank.

16. After examination of entire material available with the CIT(A), the CIT(A) concluded that the contention of the appellant that he has failed to receive any reply from the bank with regard to purchase of draft is not at all relevant. Admittedly, the drafts were purchased in the name of the appellant by depositing the cash (no source of availability of cash is explained), therefore, evidence regarding purchase of drafts will not throw any new light on the facts. The CIT(A) further mentioned that moreover onus was on the appellant to submit any additional evidence with regard to his explanation, which he failed. The CIT(A) has further mentioned that the five drafts were purchased in the name of the appellant and same were deposited by the appellant with affidavit and application with own signature is itself a sufficient proof that the appellant has invested a sum of Rs.4,90,899/- from unaccounted source and therefore assessing authority has fully justified in making the addition of Rs.4,90,899/-.

17. The CIT(A), therefore, arrived at the conclusion that in view of the aforesaid facts and the determination of the addition by the assessing authority, the appellant is liable to pay interest under Section 234A of the Act.

18. While affirming the view of imposition of interest under Section 234A and 234B, the CIT(A) has relied upon several decisions of the High Court as well as of the Hon'ble Supreme Court which are discussed in detail in the order of the CIT(A) dated 30.03.1993. The CIT(A) has held by following the decisions that levy of interest is mandatory in the facts and circumstances

of the present case. He has held that the moment it is found that the legitimate tax has not been paid by specified date interest become payable. He has further held that there is subjectivity or discretion in the matter of levy of such interest under Section 234A and 234B of the Act. He has, therefore, noted that in the present case, default committed by the appellant-assessee is not in dispute, and therefore, interest was clearly leviable under Section 234A and 234B as per law.

19. In appeal before the ITAT, the assessee has submitted that the department has failed to exercise power to get the require details from the bank from where the drafts were purchased. It is further contended on behalf of the assessee that, in fact, the department has failed to prove that the investment was actually made by the appellant and further that the order of the CIT(A) is incorrect both on facts and law in affirming the levy of interest.

20. The ITAT has considered the grounds of the appeal and observed in paragraph 5.1 of its order dated 28.11.2008, that the interest levied under reference is under Sections 234A and 234B. While the latter section concerns the default of the short-fall in the payment of advance-tax, which the law mandates the assessee to pay in full by the close of the relevant previous year, the former is in relation to the delay in the furnishing of its return of income (ROI) by the assessee, i.e., a default which is independent of the assessee's tax liability or its payment in time, if any.

21. In the present case, the assessee admittedly failed to furnish the return as also not deposited the advance tax as required under the law, therefore, the appellant/assessee is liable to pay interest under Sections 234A and section 234B.

22. We have heard the learned counsel for the parties and we find no illegality in the order of the CIT(A) and in the impugned

order of the ITAT. Both the appellate authorities after considering the judgments which are relied upon by the learned counsel for the assessee correctly arrived at the conclusion to hold that the assessee/appellant is liable to pay interest under section 234A and under section 234B of the Act. The Tribunal has held that no infirmity is noticed in levy of interest in the present case.

23. In view of the aforesaid facts, since the Tribunal has recorded categorical findings of fact, which is supported by the law, we find no force in the instant appeal. Accordingly, the appeal is **dismissed**.

Order Date :-09.11.2017

A.Kr.*

[Ashok Kumar, J.]

[Abhinava Upadhya, J.]