IN THE INCOME TAX APPELLATE TRIBUNAL
RAJKOT BENCH, RAJKOT

Before Shri D.K. Tyagi (JM) and Shri A.L. Gehlot (AM)

I.T.A. No.1172/Rjt/2010
(Assessment year 2008-09)

Shri Ram S Sarda Sarda's Court Central Bank Road Jamnagar PAN : ABSPS7231E	vs	Dy,.CIT, Cent.Cir.II Rajkot
(Appellant)		(Respondent)

Date of hearing : 29-09-2011
Date of pronouncement : 02-11-2011

Applicant by : Shri Kalpesh Doshi
Respondent by : Shri Yogesh Pande

O R D E R

Per Bench

This appeal filed by the assessee is directed against the order of CIT(A)-IV, Ahmedabad dated 26-07-2010 for the assessment year 2008-09. The following effective grounds are taken in the appeal:

"1. Hon.CIT(A) had erred in law as well as on fact in holding that the appeal filed against levy of interest u/s 234A, 234B and 234C is not maintainable.

2. Hon.CIT(A) had erred in law as well as on fact in not treating cash seized as advance tax from the date of seizure though specific request was made to assessing officer.

3. Hon.CIT(A) had erred in law as well as on fact in confirming levy of interest u/s 234A, 234B and 234C of the Act on facts and circumstances of the case."

2. In gist, the grounds pertain to charging of interests u/s 234A, 234B and 234C of the Act. Thus the issues for consideration are – (1) whether the appeal is maintainable where levy of interests u/s 234A, 234B and 234C are challenged; (2) whether the cash seized could be held as advance-tax from the date of seizure or from the date when assessee made request for adjustment or should it be from the date of adjustment of the cash seized towards advance-tax by the assessing officer?; and (3).Whether cash seized from third party which was found to be the cash of the assessee could be adjusted as advance-tax payment.

3. The brief facts of the case are that a search was carried out at the premises of the assessee on 21-02-2008 and cash of Rs.20,30,000 was seized. The assessee treated the said seized cash as advance-tax paid and adjusted the same against tax liability. However, the assessing officer did not allow adjustment of cash seized against tax liability nor did he treat the cash seized on 21-02-2008 which was later adjusted against the advance-tax liability as advance-tax paid on 21-02-2008. The assessing officer charged interests u/s 234A, 234B and 234C by ignoring the cash seized which was adjusted against the advance-tax liability, though there was specific request from the assessee to treat the cash seized and adjusted subsequently as the advance-tax payment on 21-02-2008 vide his letter dated 30-07-2009. On appeal the CIT(A) dismissed the assessee's appeal on the ground that the same is not maintainable. The CIT(A) relied upon the judgment of the Apex court in the case of Central Provinces Manganese Ore Co Ltd vs CIT 27 Taxnman 275 (SC) and in the case

of MP High Court in the case of Vineet Talkies vs XI 19 Taxman 35 (MP) and CIT vs Saraswati Industrial Syndicate Ltd 45 Taxman 11 (P&H). The CIT(A) also dismissed the assessee's appeal on merit on the ground that the cash of Rs.9,30,000 was seized from the premises of Shri Subhash Rajnikant Sarda and cash of Rs.11 lakhs was seized from the premises of M/s Sarda Forex Exchange Pvt Ltd whereas the request letter dated 30-07-2009 to the assessing officer was signed by Shri Sriram Subhash Sarda and Managing Director of Sarda Forex Pvt Ltd. The CIT(A) was of the view that the seized cash of other persons cannot be adjusted against the liability of the assessee as advance-tax. Therefore, the assessing officer was justified in not allowing credit of Rs.20,30,000 seized from other persons as advance-tax liability of the assessee and has therefore rightly charged interests u/s 234A, 234B and 234C of the Act.

5. The ld.AR reiterated the submissions made before the revenue authorities and submitted that the appeal is maintainable. For this proposition, he relied upon the following judgements:

Central Provinces Manganese Ore Co Ltd vs CIT 160 ITR 961 (SC)

Jalgaon Dist.Centrral Co-io Bank Ltd vs ITO 70 ITD 290 (Pune)

Trinity Forge vs ACIT 73 TTJ 582 (Pune)

The ld.AR further submitted that the interests u/s 234A, 234B and 234C are not chargeable as the seized cash is adjustable as advance-tax. For this proposition he relied upon the following decisions:

CIT vs Ashok Kumar 334 ITR 355 (P&H)

Nikka Mal Babu Ram vs ACIT 41 SOT 407 (Chd)

Sudhakar M Shetty vs ACIT 10 DTR 173 (Mum)

Satya Prakash Sharma vs ACIT 20 DTR 561 (Del)

Satpaul D Agarwal (HUF) vs ACIT 62 TTJ 98 (Mum)

CIT cs Kesar Kimam Karyalaya 278 ITR 596 (Del)

6. The ld.DR on the other hand relied upon the order of CIT(A) and submitted that the cash seized from other parties is not adjustable against the advance-tax liability of the assessee.

7. We have heard the ld.representatives of the parties, record perused and have gone through the decisions cited.

8. The first issue is whether appeal is maintainable against levy of interests u/s 234A, 234B and 234C. it is well settled position that there is no inherent right of appeal. That right has to be specifically conferred by the statute. It is equally well settled that if there is a provision conferring a right of appeal it should be construed in a reasonable and liberal manner. The power of the Income-tax Officer is to make assessment under section 143 of the Income-tax Act. It is that assessment which is the subject matter of appeal. The appellate authority, on appeal, has the power to confirm, reduce, increase or annul the assessment.

Clause (a) of section 246(1) is in two parts. The first part deals with an order against an assessee where the assessee denies his liability to be assessed. The second part deals with an order of assessment under section 143(3) or section 144. In the second part, there is a restriction, namely, that an appeal against such order shall lie only where the assessee objects to the amount of income assessed or where the assessee objects to the amount of tax determined or where the assessee objects to the amount of loss computed or where the assessee objects to the status under which he is assessed. Here it is useful to refer the judgment of the Apex Court in the case of Central Provinces Manganese Ore Co. Ltd. v. Commissioner of Income-tax [1986] 160 ITR 961 (SC). In that case the assessee was assessed to income-tax for the assessment year 1967-68, the relevant previous year being the year ended December 31, 1966. Interest under sub-section (8) of section 139 of the Income-tax Act, 1961, amounting to Rs. 56,391 and interest under section 215 of that Act amounting to Rs. 9,42,336, subsequently reduced to Rs. 5,07,880, were levied on the assessee. According to the assessee, there was ample and clear justification for the delay in furnishing the return under section 139 and for the payment of advance tax under section 212 at a figure less than 75 per cent. of the assessed tax. On March 22, 1971, the assessee preferred an appeal under clause (*c*) of section 246 of the Act before the Appellate Assistant Commissioner of Income-tax, Nagpur raising objection to the total income assessed and also including grounds objecting to the interest charged under sections 139 and 215 of the Act. The Apex court had considered the nature of the levy of interest under sub-

section (8) of section 139 and under section 215. It was held that it is not correct to refer to the levy of such interest as a penalty. The expression "penal interest" has acquired usage, but is in fact an inaccurate description of the levy. Having regard to the reason for the levy and the circumstances in which it is imposed, it is clear that interest is levied by way of compensation and not by way of penalty. The Income-tax Act makes a clear distinction between the levy of a penalty and other levies under that statute. Interest is levied under sub-section (8) of section 139 and under section 215 because, by reason of the omission or default mentioned in the relevant provision, the Revenue is deprived of the benefit of the tax for the period during which it has remained unpaid. The very period for which interest is levied under the relevant provision points to the nature of the levy. If that is borne in mind, it will be apparent that the levy of interest is part of the process of assessment. Although section 143 and section 144 do not specifically provide for the levy of interest and the levy is, in fact, attributable to sub-section (8) of section 139 or section 215, it is nevertheless a part of the process of assessing the tax liability of the assessee. Where the Income-tax Officer considers that there is a case for levying of interest under sub-section (8) of section 139 or under section 215, what he does in practice, is to make an order levying such interest after completing the assessment of the assessee's total income and the tax payable by him. Now, the question is whether orders levying interest under sub-section (8) of section 139 and under section 215 are appealable under section 246 of the Income-tax Act? Clause (c) of section 246 provides an appeal against an order where the assessee denies his liability to be

assessed under the Act or against any assessment order under sub-section (3) of section 143 or section 144, where the assessee objects to the amount of income assessed or to the amount of tax determined or to the amount of loss computed or to the status under which he is assessed. Inasmuch as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. The court held that the levy of penal interest under section 139 or section 215 is made in the regular assessment order; the demand notice issued pursuant to the assessment order is for the total amount of liability imposed inclusive of tax and interest.

9. While levy of penal interest under section 18A of the 1922 Act up to April 1, 1952, was automatic, as was noticed by Chagla, CJ. in *Ramnath's* case [1955] 27 ITR 192 (Bom), under the Act, such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in rule II7A and rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the said Rules, the Income-tax Officer is bound by law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under sections 139 and 215 is part of the assessment. When such penal interest is levied, the assessee is 'assessed ', meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the

Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 215 by the order of assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income-tax Officer as payable ought to be reduced. In either case, he denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied under section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. In such a case also, he denies his liability to be assessed to interest.

9. In view of the law laid down by the Apex Curt in CIT vs Kanpur Coal Syndicate (1964) 53 ITR 225 (SC) we do not find any justification to constitute the expression 'denying his liability to be assessed" as denial of the total liability, for the Apex Court has observed:

> "What is the substance of the objection of the assessee? The assessee denies his liability to be assessed under the Act in the circumstances of the case and pleads that the Members of the Association shall be assessed only individually. The expression 'denial of liability' is comprehensive enough to take into only the total denial of liability but also the liability under particular circumstances:"

In view of above observations, it could be held that the expression 'denies the liability to be assessed under the Act' refers only to total denial of liability. The denial may be total as well as partial and the liability to pay interest, in our

opinion, would certainly be a partial denial to be assessed under the Act as envisaged by section 246(1) of the Act because on acceptance of adjustment or seized amount against advance tax paid / liability created, there is no amount to pay by the assessee. Therefore, there will be no question of levy of interest u/s 234A, 234B and 234C.

10. The Apex Court in the case of JK Synthetics Ltd V CTO 119 CTR 222 (SC) laid down the law that levy of interest partakes the nature of substantive law and not adjectival law.

11. In the case under consideration, the CIT(A) relied upon certain judgments; however, on consideration of facts we find those judgments do not help the revenue. The judgment of the Apex Court relied upon by revenue in case of Central Provinces Manganese Ore Co Ltd (supra) as discussed is in favour of assessee. The judgment of Madhya Pradesh High Court in the case of Vineet Textiles vs CIT (supra) is also not helpful to revenue as in the judgment itself it was observed that there is divergence of opinion amongst different High Courts. As such, when divergent opinions of the different High Courts are available on the issue, in the interest of substantial justice and keeping in view the legal precedents, we have to necessarily follow the judgment which favours the assessee. Therefore, the judgment in the case of Vineet Textiles vs CIT (supra) also does not help the revenue. The judgment of Punjab & Haryana High Court in the case of Saraswati Industries Syndicate Ltd vs CIT 178 ITR 419 (P&H) (on

merits) has been reversed by the Apex Court in 237 ITR 1 (SC). Therefore, in the light of the facts and above discussion this judgment also does not help the revenue.

12. In the light of above discussion we find that charging of interest under section 234A, 234B, and 234C is very much part and parcel of assessment proceedings and is an order against the assessee to which the assessee denies his liability to be assessed. Therefore, appeal against charging of interest under those sections is maintainable as in the case of an assessment order.

13. Now coming to the second issue whether cash seized could be adjusted against the advance-tax and other demands. To examine this issue we would like to refer to section 132B prior to its substitution with effect from 01-06-2002 by the Finance Act, 2002 which provides for application of seized or requisitioned assets. As per sub section (1) to this section the assets retained under sub section (5) of section 132 could be appropriated against the discharge of existing liability as per clause (iii) of the sub section as well as against the amount of liability determined on completion of regular assessment or re-assessment for all the assessment years relevant to the previous years. Clause (i) of sub section (1) of the newly inserted section has been enacted to harmonise the provision contained in section 132B with the provisions for assessment u/s 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 XIVB for the block period, as the case may be, and to include therein a provision for release of assets seized during search, if the nature and source of acquisition of assets is explained to the satisfaction of the assessing officer, after recovery therefrom of any existing liability. Section 132B(1)(i) empowers the assessing officer to recover the prescribed liability out of the assets seized u/s 132 of the Act and even the liability to pay advance-tax as per the statutory provisions and there is no plausible reason ascribing a restricted meaning to the expression 'existing liability' appearing in section 132B(1)(i) of the Act. The expression existing liability in section 132B(1)(i) cannot be read to exclude a particular tax liability if it can be shown to have existed on a particular date. If the liability to pay the advance-tax had arisen it would certainly constitute a part of existing liability as per section 132B(1)(i). According to the scheme of section 132B, the seized assets to be applied to the discharge of existing liabilities in respect of which the assessee was in default or was deemed to be in default as well as the liability in respect of regular assessment or re-assessment for the years relevant to the previous years to which the income related and in respect of which the assessee was in default or was deemed to be in default. However, during the search, money had been seized and retained by the revenue, such money can be applied for the discharge of both the liabilities. On the other hand, if money seized was not sufficient for the purpose of discharge of the liabilities, the assets other than money which had been retained would be deemed to be restraint as is such restraint was effected by the assessing officer u/s 226(5) of the Act. The

assessing officer, then could sell assets if he finds it necessary for the purposes of recovery of the aforesaid liabilities. If any assets or proceeds thereof remained after the liabilities had been discharged, they would be required to be forthwith paid or made to the person from whose custody they had been seized. There is a provision in sub section (4) of section 132B for interest to be paid by the Central Government as compensation for the retention of money seized and proceeds of the assets shown in excess of the total tax liabilities against which they had not been applied. Where the character of the amount retained u/s 132B and the proceeds, if any, of the assets sold for the purpose of recovery of existing liability referred to in that section existed the character of the existing liability in default and the liability determined at regular assessment, the central government would be under obligation to pay simple interest on the amount of such excess. When under the scheme of section 132B the Central Government is under obligation to pay simple interest on excess amount, the same scheme of the provision is applicable when interest is to be recovered from the assessee, may be u/s 234A, 234B or 234C. Thus, the cash seized during the course of search is required to be adjusted against taxes due including advance-tax for the purpose of computation of interest u/s 234A, 234B and 234C. This view is fortified by various decisions of ITAT in the case of Satpal D Agarwal, HUF vs ACIT 62 TTJ (Mum) 98; Satyaprakash Sharma vs ACIT 20 DTR (Del Trib) 561; Sudhakar M Shetty vs ACIT 10 DTR (Mum Trib) 173; Nikamal Baburam vs ACIT 41 SOT 407 (Chd) and the judgment of Punjab & Haryana High Court in the case of CIT vs Ashok Kumar 334 ITR 355 (P&H).

14. The ITAT, Mumbai Bench in the case of Sudhakar M Shetty vs ACIT held that the department has to adjust the seized amount towards the advance-tax from the date when it was seized and accordingly directed the assessing officer to adjust the seized cash from the date of seizure. In the case under consideration we find that the assessee claimed adjustment of seized cash in the return of income filed by the assessee. The assessee also made the request for the adjustment of cash seized against the advance-tax with effect from 21-02-2008 vide letter dated 30-07-2009. To maintain consistency we follow the above order of ITAT and we issue similar direction to assessing officer that should adjust the seized cash against advance-tax liability from the date of seizure itself.

15. As regards the third issue whether cash seized from third party can be adjusted against the liability of the assessee, this issue becomes academic as the cash seized from third party was found to be the cash of the assessee and this fact is not disputed. Under the circumstances, cash seized from third party or cash seized from the assessee would retain the same character, we have to hold that it does not affect processing of such seized cash. The same is to be treated as cash seized from the assessee. In the case under consideration, thee AO himself has given credit of that amount against liability created against assessee. A copy of letter dated 21-03-2011 of AO addressed to the assessee filed by the ld.AR has been placed on record. As the amount seized has been adjusted against the demand created against assessee, the interest under sections 234A, 234B and 234C have to be calculated as per the above discussion. The AO is directed accordingly.

16. In the light of above discussion we hold that under the facts and circumstances, the appeal is maintainable against the levy of interest u/s 234A, 234B and 234C of the Act. The cash seized is adjustable against the due liability of advance-tax. The cash seized from third party, which was ultimately found belonging to the assessee, is adjustable against the demand created on the assessee.

17. In the result, appeal of the assessee is allowed, as indicated above.

Order pronounced in the open court on the date as mentioned above.

Sd/-	sd/-
(D.K. Tyagi)	(A.L. Gehlot)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Rajkot, Dt : 21-12-2011
pk/-

Order pronounced in open court on 02-12-2011

Sd/-	sd/-
(T.K. Sharma)	(A.L. Gehlot)
Judicial Member	Accountant Member

copy to:

1. Appellant
2. Respondent
3. the CIT(A)-IV, Ahmedabad
4. the CIT, Central-II, Ahmedabad
5. the DR, I.T.A.T., Rajkot

(True copy) By order

Asstt.Registrar, ITAT, Rajkot