IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G' NEW DELHI
BEFORE SHRI R. S. SYAL, ACCOUNTANT MEMBER
AND
SHRI C. M. GARG, JUDICIAL MEMBER

I.T.A .No.-2557/Del/2012
(Assessment Year-2008-09)

DCIT Central Circle-II Faridabad.	**Vs.**	Spaze Tower Pvt. Ltd. Spazedge, Sector-47, Sohna Road, Gurgaon. PAN: **AACCK8088R**
(APPELLANT)		**(RESPONDENT)**

C.O. No. 268/Del/2012
Assessment Year: 2008-09

M/s Spaze Tower Pvt. Ltd. Spazedge, Sector-47, Sohna Road, Gurgaon. **PAN: AACCK8088R**	**Vs.**	DCIT Central Circle-II, Faridabad. .
(APPELLANT)		**(RESPONDENT)**

Revenue by:-Sh. Ramesh Chandra, CIT DR.
Assessee by:-Sh. V. S. Rastogi, Adv.
ORDER

PER C. M. GARG, JM.

This appeal has been preferred by the Revenue against the order of the CIT(Central) Gurgaon dated 30.03.2012 in appeal No. 169F/69/CIT(A)(c)/GGN/2011-12 for A.Y. 2008-09. On receipt of notice, assessee has filed Cross-objection bearing no. 268/Del/2012.

2. The appellant Revenue has raised following grounds (revised on 07.09.2012) in this appeal:

> *"(i) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in law in holding and directing that the amount seized from the assessee be adjusted towards the advance tax liability without appreciating that the provision of section 132B of the IT Act do not provide for the same.*
>
> *(ii) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in admitting the additional ground regarding non credit of seized cash before the levy of interest u/s 234A of IT Act without seeking comments from the Assessing Officer as required by Rule 46A of the IT Rules."*

The Additional Grounds of the Revenue

3. The Revenue department has also submitted following additional ground in this appeal:

> *"(iii) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in admitting the additional evidences in the form of the letters dated 30.06.2008 and 18.08.2008 without recording reasons and without giving any opportunity to the AO under rule 46A.*
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> *(iv) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in allowing the appeal of the assessee on the basis of two letters dated 30.06.2008 and 18.08.2008 which are not written by the assessee.*
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> *(v) Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was right in allowing the appeal of the assessee on the basis of 2 (two) letters dated 30.06.2008 and 18.08.2008 which are written by some other assessee in individual capacity for release of seized jewellery and ornaments and not for adjustment of seized cash against the advance tax liability of the assessee."*

4. We have heard both the sides on admissibility of above additional grounds and perused the relevant material inter alia assessment and impugned order. The Ld. D.R. submitted that the two letters dated 30.06.2008 and 18.08.2008 were not filed before the AO and the CIT(A) erred in accepting the additional evidence without following the due procedure as per Rule 46A of the Income Tax Rules, 1962 and considering and accepting these letters without confronting them to the AO. The D.R. further prayed that the additional grounds of the Revenue may be admitted in the light of decision of Hon'ble Jurisdictional High Court of Delhi in the case of Munish Build Well P. Ltd. Vs. CIT.

5. Replying to the above the Ld. counsel for the assessee submitted that these impugned letters were placed before the AO by the assessee during assessment proceedings, hence, there was no requirement to follow Rule 46A of the Rules. The Ld. counsel of the assessee also contended that as per certification given on the paper book filed by the assessee, these letters were placed before the AO, hence additional grounds of the Revenue are irrelevant and cannot be admitted.

6. On careful consideration of above rival contentions on the issue of admissibility additional grounds pressed by the Revenue, from paper book filed by the assessee on

Pages 37 to 38 and on Pages 39 to 40 we observe that the letters dated 30.06.2008 and 18.08.2008 were submitted before the AO and the AO gave detail deliberations and findings thereon. However, during first appellate proceedings the CIT(A) considered these letters and relief was granted for the assessee relying on the same letters but this contention of the Revenue is not acceptable that the CIT(A) admitted additional evidence without confronting the same to the AO in contravention of Rule 46A of the Rules. Hence, additional grounds based on this legal contentions are not admissible and we dismiss the same.

Ground No.1 of the Revenue

7. Apropos ground No.1 the Ld. D.R. submitted following written submissions:

> *"2.2.4. That apart, as also submitted the adjudication by the CIT(A) is not conformity with the requirement of law as contained u/s 132B of the Act as per which assets seized can only be approached towards the existing liabilities and the liabilities as determined on completion of the assessment. It is requested to kindly appreciate that assets seized, as per section 132B can only be applied in the following manner:*
>
> *(a) towards the existing liability under the*
>
> *(i) Income Tax Act:*
> *(ii) Wealth Tax Act:*
> *(iii) Expenditure Tax Act:*
> *(iv) Gift Tax Act;*
> *(v) Interest Tax Act;*

(b) towards liability created

(i) on completion of assessment u/s 153A;

(ii) on completion of assessment of the year in which search took place;

(iii) On completion of assessment under chapter XIVB;

(iv) for penalty/interest payable qua assessment framed in I.T. Act referred above.

2.2.5 Kindly appreciate that the phrase 'existing liability' is used in reference to all Acts (i.e. Income Tax Act, Gift Tax Act, Expenditure Tax Act, Wealth Tax Act & Interest Tax Act) which means that interepretation has to be the same under all these Acts. That is, it cannot hold different meanings under different Acts. Under Gift Tax Act, Wealth Tax Act etc. The concept of advance tax'is not applicable which means that existing liability'cannot mean advance tax under the Income Tax Act.

2.2.6 Even otherwise, under the Income Tax Act, 1961, as clarified in ITO v. Ch. Atchaiah {218 ITR 239 SC} income is required to be assessed in the correct assessment year that too under the correct head and in the correct hands. At the time of seizure it cannot as such be said as to in which year the income referable to assets seized were required to be assessed. Likewise, AO is required to conduct enquiry to find out as to in whose hands assets seized have to be assessed. All these questions which need investigations/enquiries can onlybe answered only on conclusion of the assessment proceedings. Thus, application of assets would be possible only on conclusion of assessment and not before that. So far as liability of advance tax is concerned it is not dpendent upon assessment. Rather its payment always proceeds the assessment which means, advance tax cannot be said to be covered by the phrase existing liability'.

2.2.7 Advance tax is referable to the income of the current year which has not yet ended on search. Unless the investigations are carried out which end only on assessment, it can never be said with certainty that the assets

seized were acquired from the current year's income. Depending upon the facts even in respect of cash seized it is quite possible that the same might pertain to the income of the previous years which had already ended. This also shows that application of income has to follow the conclusion of assessment proceedings except when it is a case of liability which stands crystallized for which demand notice is issued by the Revenue.

2.2.8 Though equity and taxation are strangers to each other yet the equity principles are otherwise inbuilt in section 132B itself which permits assessee to seek release of assets on his explaining the source of acquisition and getting the existing liabilities satisfied. Second proviso to 132B(1)(i) lays down the limitation of 120 days for which assets can be retained after seizure and thereafter clause (b) to section 132B(4) directs the officer for payment of interest if request for release is made. Very clearly since the question about the ownerships, etc. Is complex in most of the cases period of 120 days is not enough to determine; still the Legislature taking care of assessee's interest has in its own wisdom and rightly so fixed up the limitation of 120 days within which these question shave to be decided failing which revenue has been made responsible to compensate by way of interest for the deprivation of the assets seized.

2.2.9 Thus, as prescribed under the law correct approach on the part of the assessee is to lodge claim for payment of interest after the expiry of 120 days instead of claiming that money seized be appropriated towards advance tax. Consequently interest u/s 234B or 234C is leviable on the quantum of money seized for the reason that such a claim for application is not allowable as per the express provisions of section 132B. Thus, to the extent required the Legislature has framed provisions based upon the principles of equity. To invoke further equity will not be justifiable at all.

2.3.1 Before the CIT(A), the assessee has placed reliance on its 3 letters

(i) dated 30.06.2008

(ii) 18.08.2008 and

(iii) undated letter.

In so far as undated letter is concerned the CIT(A) has very rightly ignored it which adjudication has not been challenged by the Assessee either by filing appeal or by way of specific ground in the CO. Without prejudice to what is submitted above whereby it is viewed that seized cash cannot in law be appropriated towards advance tax, it is submitted that while undated letter found to be signed by one Aman Sharma, Director of ***Spaze Group (and not the assessee)*** *the other two letters are found signed by one Bharat Bhushan Kumar probably in individual capacity because these do not disclose his status. About these letters it is important to note that;*

(i) these are not in regard to application of seized cash towards the advance tax liability;
(ii) letters dt. 30.06.2008 & 18.08.2008 signed by Shri Bharat Bhushan) are for release of jewellery;

and when it is so these cannot be taken to be letters towards adjustment of cash towards advance tax.

(iii) these letters are not found diarized in the records of the Revenue which means that these were not contemporaneous;
(iv) these letters have neither been even indirectly referred in So F (Form 35) nor in Grounds of Appeal.

which goes to show that the assessee company also viewed them to be of no relevance qua the adjustment of cash seized which was required to be strictly done as per the provisions of section 132B of the Act. Failure of the assessee to disclose existence of these letter in the So F as well as in the Grounds of Appeal that too for no disclosed reasons goes to show that contentions raised before the CIT(A) are purely after thoughts.

(v) All three letters are found addressed to the ADIT (Inv) (and not the AO);

and the ADIT no power at all to appropriate the seized cash in any manner as this power involves discharge of quasi judicial function which were to be performed by the AO, a quasi judicial authority. This important aspect of the case has been ignored by the CIT(A).

(vi) Signatures appearing on two letters are at variance with the signatures as found on the cheques attached with the undated letter. It is not understood how the ld. CIT(A) had drawn any support from these letters when the relationship of the signatories of these letters with the assessee company was not even disclosed.

(vii) Further, the CIT(A) has ignored that from the office of Spaze Towers P Ltd cash of just 1.20 crores was found. When it was so how it was permissible for the assessee to place reliance on certain letters which talk about the seizure of 4.50 crores. Clearly the attempt of the assessee to seek reliance from these letters is malafide and need to be viewed adversely. Bench is requested to kindly appreciate that this is a clear attempt to defraud the Revenue.

2.4.1 While adjudicating the appeal the Id. CIT(A) has drawn support from the judgments of the Punjab and Haryana High Court in the cases of CIT v. Arun Kumar (334 ITR 351) and CIT v. Ashok Kumar (334 ITR 355). In this regard it is submitted that the CIT(A) has ignored the settled principle of interpretation of a court judgment which, as also held by the Supreme Court in Ashwani Kumar Singh iv. UPSC (2003) 11 SCC 584,588-589 (paras 10 &12), is that;

"the Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. "

On this basis alone the order of the CIT(A) needs to be set aside. Further, the CIT(A) had ignored that ill these two cases letters were for adjustment of cash seized whereas in the appeal under consideration request is (that too by non-actor signatory) only for release of assets.

2.4.1.1 That apart, it is submitted that the CIT(A) erred in drawing support from Punjab & Haryana High Court judgment in CIT v. Ashok Ku mar (334 ITR 355) because this judgment was even on facts distinguishable, because unlike the case in hand of the assessee, there (in Ashok Kumar case) the assessee had specifically written letters requesting that the advance tax payable be adjusted out of cash seized and that he may not be held liable for interest u/s 234B. Without appreciating that in the assessee's case neither there was any letter for adjustment of cash towards the adjustment of advance tax nor there was any request to not

to levy the interest u/s 234A/B/C the CIT(A) had applied this judgment which was clearly distinguishable on facts as well as in Jaw.

2.4.2 Likewise, in so far as judgment of the Punjab and Haryana High Court in the cases of CIT v. Arun Kumar (334 ITR 351) is also concerned it is pointed out that even this judgment was not applicable. Here also there was a specific request for adjustment of cash towards tax due whereas in the case in hand (of the assessee) instead of adjusting the cash the request is for release of assets, Further, the CIT(A) had ignored the finding of law recorded by the High Court vide para 8 of the judgment as per which the High Court had held the interest u/s 234B to be chargeable on the tax liability determined on the income assessed by the Assessing officer.

2.4.3 Apart from the above it is submitted that even if it is viewed that the judgements of the Punjab & Haryana High Court relied by the CIT(A) arc applicable, it is submitted that still these judgments have to be ignored. As would be noticed that in neither of the judgments bare applicable provisions of section 132B of the Act were referred to or argued. The judgments do not refer the arguments made by the parties and even the High Court has not referred to the applicable provisions. Had the provisions of section 132B been considered the High Court would held otherwise. Very clearly, in view of the Supreme Court judgment in State v. Ratan Lal Arora, (2004) 4 SCC 590 where decision taken without reference to statutory bars, was held to be not having any precedential value and was also held to be treated as having been rendered per incuriam, it is prayed to kindly decide the dispute in view of the bare provisions of section 132B only ignoring the High Court decision in view of Supreme Court judgment in Mukesh K Tripathi v. Senior Divisional Manager, LIC(2004.) 8 SCC 387 (para 23) where it was held that 'once a decision has been rendered per incuriam, it cannot be said that it lays down a good law, even if it has not been expressly overruled. Further, it is to be appreciated that the judgments neither refer section 132B nor refer the arguments of the Counsels and hence the judgments were decisions sub silentio apart from being per incuriam and hence for this reason also the judgments lose the sanctity of binding precedent.

2.5. Notwithstanding what is submitted herein above, it is requested to kindly appreciate that in this ease search took place on 29-04·-2008 relevant to AY 9-10 whereas the assessment under consideration is AY 8-9. This means, there cannot be any question of adjustment of cash seized against the advance tax for AY 8-9 at all because advance tax is payable only during the currency of the assessment year and not for the closed assessment years. Thus, the attempt of the assessee to seek refuge on

certain disputed letters written is nothing short of putting blinkers on the eyes of the Revenue to gain some thing against the express provisions of law. It needs to be appreciated that the question of adjustment of cash (even if presumed to be so) towards the advance tax liability would have been possible only for AY 2009-10 and not for earlier years.

8. The ld. counsel for the assessee replied that a search and seizure operation u/s 132(1) of the Act was initiated against the assessee on 29.04.2008 when the books of account for assessment year 2008-09 were not closed. It was further contended that at the time of search cash aggregating to Rs.4,43,36,500/- was found at different places and seized by the Revenue authorities.

8.1 The ld. counsel for the assessee further contended that on 29.4.2008 a letter addressed to Additional Director of Investigation, Faridabad, requesting that the seized cash approximately amounting to Rs.4.50 crore may kindly be adjusted and appropriated against the tax liability in respect of the income of the A.Y. 2008-09 which was offered as the income in the statement made u/s 132(4) of the Act.

8.2 The ld. counsel for the assessee drawn our attention towards page no. 34 of the paper book and submitted that in the said letter it was prayed that the tax due for A.Y. 2008-09 was approximately of 9 crore and Rs.4.50 crore be adjusted and remaining sum was undertaken to be paid in 4 instalments from June to September

2008 and the Revenue has not disputed that the seized cash was the cash of the assessee company.

8.3 The ld. counsel for the assessee has drawn our attention towards page no. 37 & 38 and submitted that in letter dated 30.06.2008 addressed to Assistant Director Investigation, Gurgaon, was also filed stating the fact that the assessee had discharged its more than 60% of tax liability in the form of seized cash which had been requested to be adjusted towards the tax liability for the A.Y. 2008-09 and also paid first installment of the tax. The ld. counsel for the assessee further drawn our attention towards page nos. 39 & 40 of the paper book and submitted that another letter dated 18.8.2008 addressed to Additional Director of Investigation, Gurgaon, was also submitted and reiterated the fact that the assessee has discharged its more than 70% of tax liability in the form of seized cash which had been requested to be adjusted towards tax liability and also paid 2nd instalment of the tax.

8.4 The ld. counsel for the assessee further submitted that the assessee filed return u/s 139(1) of the Act on 30.9.2008 disclosing a taxable income of Rs.25,76,35,593/- including therein such sum which had not yet been entered in the books of accounts including the cash of Rs.4,43,36,500/- therefore, it should be inferred that the assessee had paid the advance tax and before the due date of filing of return.

8.5 The ld. counsel for the assessee further submitted that in response to notice vide dated 31.08.2009 issued to the assessee u/s 153A of the Act. The assessee filed a return of income on 18.05.2010 disclosing an income of Rs.27,69,01,087/- including an income which had been disclosed u/s 132(4) of the Act. The ld. counsel for the assessee further contended that the assessment was framed u/s 153A/143(3) of the Act on 24.12.2010 at an income of Rs.27,90,92,922/- as against the income declared by the assessee.

8.6 The ld. counsel for the assessee vehemently contended that an outstanding demand of Rs.7,13,79,239/- was thus raised, after giving credits of taxes already paid Rs.4.50 crore and also by granting adjustment of refund relating to A.Y. 2009-10 against the total tax payable of Rs.12,33,36,483/-. The ld. counsel for the assessee further contended that the aforesaid demand was raised and was prior to the adjustment made by seized cash of Rs.4,43,36,500/- which have been prayed to be adjusted on the date of search i.e. 29.04.2008 and on subsequent occasions by furnishing letters on 30.06.2008 and 18.8.2008.

9. The ld. Counsel for the assessee submitted that the AO denied prayer of the assessee that the adjustment of seized cash should be given from the date of search i.e. 29.4.2008 and the AO has given adjustment of seized cash towards aforesaid demand from 23.2.2011 which is contrary to law because the said sum of seized cash

ought to have been adjusted on 29.4.2008 as there was no outstanding liability against the assessee as provided u/s 132B(1) of the Act.

10. The ld. counsel for the assessee also drawn our attention towards this fact that the AO levied interest u/s 234A & 234B of the Act, after giving credit of Rs.4.50 crore paid from June 2008 to September 2008 but did not give credit of the amount seized in cash on 29.4.2008 which was the date of search and seizure operation.

11. The ld. counsel for the assessee further submitted that there is no dispute of the fact that the amount of Rs.4,43,36,500/- which had been seized on 29.4.2008 was actually adjusted but instead of having given credit of the same from the date of search and seizure i.e. 29.4.2008 the same was given credit only on 23.2.2011 which is not relevant for giving credit. The date of adjustment i.e. 23.02.2011 has been adopted by the AO himself without any basis for the reasons best known to the Revenue authorities.

12. The ld. counsel for the assessee also submitted that the amount of cash seized was to be adjusted against existing liability, if any, and since there was no existing liability of A.Y. 2008-09 and therefore the remaining sum ought to have been adjusted against the admitted liability of tax on declared income of Rs. 27 crore.

13. The ld. counsel for the assessee vehemently contended that it is a well settled rule of law that the levy of interest is compensatory in nature and it is not permissible for the Revenue that on one hand the Revenue is holding the amount of cash seized without giving any credit and paying any interest thereon despite the fact that the assessee had prayed that the said sum be adjusted towards the tax liability and further on the other hand, the Revenue charged the interest from the assessee.

14. The ld. counsel for the assessee also submitted that there is no stringent meaning has been assigned to the words “advance tax” and when it is an admitted fact that on the date of search i.e. 29.4.2008 an amount of Rs.4,43,36,500/- had been seized and there was no “existing liability” on the date, therefore, other sum has been reduced while calculating the interest u/s 234B of the Act.

15. The ld. counsel for the assessee further drawn our attention towards provision of section 234B(2) of the Act and submitted that this provision of the Act specifically provides that whereby on the date of determination of total income or completion of regular assessment, if tax was paid by the assessee u/s 140A of the Act or otherwise, the total interest u/s 234B of the Act shall be calculated after reduction of interest on tax already paid, and no interest u/s 234B (2) could be levied without giving adjustment of the amount seized on 29.4.2008 which was to be prayed by the

assessee to be adjusted by the assessee towards the tax on that date i.e. 29.04.2008 and not on 23.2.2011.

16. The ld. counsel for the assessee finally contended that in this situation the interest levied from 31.3.2008 to 23.2.2011 is not sustainable without giving credit of the amount of cash seized on 29.4.2008. The ld. counsel for the assessee has placed his reliance on various decisions including decision of **Hon'ble High Court of Delhi in the case of Dr. Prannoy Roy vs CIT 254 ITR 755 (at page 769) and Hon'ble Jharkhand High Court vide dated 2.11.2012 in the case of Shri Mahesh Choudhary vs. CIT in Tax case No. 11/2001, the decision of Hon'ble Supreme Court in the case of CIT vs. Tulsyan NEC Ltd. 330 ITR 226(SC) and decision of Hon'ble Bombay High Court in the case of CIT vs. Jyotindra B. Mody** and vehemently contended that the cash seized was to be adjusted from the date of search for levy of any interest u/s 234B and 234C of the Act and submitted that the Hon'ble Apex Court uphold the said judgment of Hon'ble Bombay High Court when the SLP filed by the Revenue on 23.7.2012 (CCNo.9229-9231/2012) was dismissed.

17. The ld. Counsel for the assessee has also placed reliance on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Arun Kapoor 334 ITR 351 (P& H) and other decision in the case of CIT vs. Ashok Kumar 334 ITR 355 (P & H) which were related to A.Y. 1994-95 & 1990-91 respectively.

18. The ld. DR submitted his rejoinder against the above submissions and contentions of the ld. Counsel for the assessee and submitted that the aforementioned decisions, as relied by the assessee are not applicable and clearly distinguishable from the facts and circumstances of the present case as the decision of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Arun Kapoor (Supra) and CIT vs. Ashok Kumar (Supra) are related to the A.Y. 1994-95 & 1990-91 respectively which deals only with the provisions of section 234A, 234B, 234D and 234C of the Act without considering the provisions of section 132B of the Act which was substituted by the Finance Act, 2002 w.e.f. 1.6.2002 and Explanation 2 attached to provision to section 132B of the Act, which was inserted by Finance Act 2013 with retrospective effect.

18.1 The ld. DR also drawn our attention towards decisions of the Hon'ble Supreme Court in the case of CIT vs. Shelly Products and Others 261 ITR 367 (SC) and CIT vs. Kanji shivji & Co. 242 ITR 124 (SC) and submitted that clarificatory provisions inserted to clarify the law so as to remove doubts are always retrospective, even if, stated to be applicable from a particular assessment year or date.

19. On careful consideration of above rival submission and contention, at the outset, we find it appropriate to reproduce section 132B of the Act with Explanation attached to this provision which read as under:

*" [**Application of seized or requisitioned assets.***

***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, 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 **[**Principal Chief Commissioner or**]** Chief Commissioner or **[**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 ***[****Principal Chief Commissioner or****]*** *Chief Commissioner or* ***[****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.

(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.]

20. From careful study of the above relevant provision of the Act, we also observe that prior to insertion of section 132B of the Act, w.e.f. 01.06.2002 the provision of section 132(5) was existed in the Act which has been deleted and omitted by the Finance Act 2002 w.e.f. 1.6.2002. Thus clarificatory Explanation No. 2 inserted to section 132B of the Act would be of retrospective effect from the date of insertion of provision of section 132B of the Act i.e. from 01.06.2002.

21. At this juncture, on careful and logical analysis, we respectfully hold that the benefit of the ratio of the decisions of Hon'ble Punjab & Haryana High Court in the case of CIT vs. Arun Kapoor (Supra) and CIT vs. Ashok Kumar is not available for the assessee as these cases are related to A.Y. 1994-95 & 1990-91 respectively. We also note that these cases are related to section 132(4) & 132(5) of the Act, which are not applicable to the present case pertaining to A.Y. 2008-09, which is subsequent to the insertion of provision of section 132B of the Act. At the same time we also respectfully hold that the benefit of the ratio of decision of Hon'ble Jharkhand High Court in the case of Shri Mahesh Choudhary vs. CIT (supra) is also not available for the assessee as this case is also related to section 132(5) of the Act, which was existed in

the Act prior to insertion of section 132B of the Act but provision of section 132B of the Act and Explanation 2 attached to this section are applicable to the extant case.

22. The decision of Hon'ble Supreme Court in the case of CIT vs Tulsyan NEC Ltd. (supra) is related to provisions of Minimum Alternate Tax. In this case the Hon'ble Apex Court has held that a form prescribed under the rules can never have any effect on the interpretation or operation of the parent statute. On careful perusal of this decision, we respectfully hold that the benefit of the ratio of this decision is not available for the assessee as in the extant case we are not interpreting the effect of any form prescribed in the rules on the interpretation or operation of the parent statute but we have to adjudicate and interpret the issue of retrospective or prospective effect of Explanation 2 inserted to section 132B of the Act itself in the statutory provisions of the Act.

23. Ld. Counsel of the assessee has also stressed his reliance on the decision of Hon'ble High Court of Delhi in the case of Dr. Prannoy Roy & Others vs CIT (supra) and submitted that advance tax has been defined to mean the advance tax payable in accordance with the provisions of chapter XVII-C and if the word "Advance Tax "is given a literal meaning, the same apart from being used only for the purpose of Chapter XVII-C may be held to be paid in advance before its due date i.e. tax paid before its due date. Ld. DR replied that this decision is clearly distinguishable from

the present case because as per Explanation 2 of the Act ''existing liability" does not include Advanced Tax.

24. On careful consideration and perusal of the decision of Hon'ble High Court of Delhi in the case of Dr. Prannoy Roy (supra) we respectfully hold that the benefit of the ratio of this decision is not available for the assessee as this case is related to the applicability of provisions of section 234A of the Act where "Advance tax" had not been deposited prior to the date of filing of return but in the extant case, the main issue is related to the adjustment of seized cash towards "existing liability" and as it is clear from Explanation 2 to section132B of the Act that existing liability" does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII of the Act.

25. As per provisions of section 132B of the Act the assets seized u/s 132 or requisitioned u/s 132A may be adjusted towards the amount of any "existing liability". The Explanation 2 attach to section 132B of the Act clarifies that for 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 of the Act.

26. The ld. Counsel for the assessee submitted that Explanation 2 to section 132B is of prospective effect because it was inserted by the Finance Act, 2013 w.e.f. 1.6.2013.

27. The ld. DR contended that the provision of Explanation 2 is a clarificatory which was inserted to clarify the provision of section 132B and its legislative intention and

to remove doubts therefore, the same is having retrospective effect even if, the same is stated to be applicable from a particular date. Ld. DR contended that Explanation 2 to section 132B is applicable with retrospective effect from 1.6.2002 which cannot be given prospective effect.

28. On careful consideration of above contention of both the sides on the applicability of provision Explanation 2 to section 132B of the Act. We take respectful guidance from the decision of Hon'ble Apex Court in the case of CIT vs. Shelly Products and Ors. (Supra) and CIT vs. Kanji Shivji and Co. (Supra) wherein it was held that the clarificatory and declaratory provisions which were inserted to clarify the law so as to remove doubts are of retrospective effect even if, the same provisions are stated to be applicable from a particular assessment year or date.

29. Turning to the facts and circumstances of the present case, we observe that in a Memorandum of Explanation the provisions of Finance Act, 2013 it has been stated that the amendment for insertion of Explanation-1 and Explantion-2 to the provisions of section 132B of the Act are propose to amend the aforesaid section was as to clarify the existing liability does not include advance tax payable in accordance with the provisions of part 'C' of Chapter XVII of the Act. Therefore, the Explanation 2 to section 132B of the Act is a clarificatory provision which was inserted to clarify the

intention of the legislature that the "existing liability" does not include advance tax payable in accordance with the provisions of Part 'C' of Chapter XVII of the Act.

30. We are inclined to accept the contention of the ld. DR that the Explanation 2 attached to section 132B of the Act, is a clarificatory provision which is of retrospective effect, even if, the same was stated to be applicable from a particular date. We also hold that Explanation 2 to section 132B of the Ac t is retrospectively effective from the date of insertion of provision of section 132B of the Act w.e.f. 1.6.2002.

31. On the basis of foregoing discussion, we reach to a legal conclusion that the assets or cash seized u/s 132 of the Act is adjustable against the amount of any "existing liability" under the Act which does not include "advance tax" payable in accordance with the provisions of Part 'C' of Chapter XVII of the Act. At the same time, we take cognisance of the provisions of section 208 which stipulates the conditions of liability to pay "advance tax". Section 208 of the Act reads thus:

> ***"Conditions of liability to pay advance tax.***
>
> *208. Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is [ten thousand] rupees or more.]"*

32. In the present case the search and seizure operation was carried out on the premises of the assessee on 29.04.2008 during the financial year 2008-09 which was related to A.Y. 2009-10 and obviously as per provisions of section 208 of the Act the advance tax shall be payable during the financial year in every case where the amount of such tax payable by the assessee during the year, as computed in accordance with the provisions of Chapter XVII of the Act, is Rs.10,000/- or more.

33. In view of the above provision of section 208 of the Act, the amount of cash seized could not be adjusted as advance tax for the A.Y. 2008-09. From the copy of return of income submitted by the assessee for A.Y. 2008-09, we observe the assessee has shown advance tax paid as Rs.1.50 crore besides self assessment tax paid of Rs.3,37,50,000/- and cash seized amount of Rs.4,44,81,500/-. Therefore the assessee himself has not treated the amount of cash seized as an advance tax.

34. Turning to the letters as stated to have been filed before the Additional Director Investigation, Gurgaon, we observe that in the statement recorded u/s 132(4) of the Act on 29.04.2008 Shri J.S. Chawla, Director of the assessee company (Paper Book page 36 to 63) has not clearly mentioned that the seized cash may be adjusted against the tax liability of the assessee.

35. Turning to the contentions of the ld. Counsel of the assessee that the assessee has filed letters before Assistant Director Investigation, Faridabad for adjustment of

seized cash on 29.04.2008 and subsequently 2nd letter dated 30.6.2008 and 3rd letter dated 18.8.2008 for adjustment of seized cash before Additional Director of Income Tax, Gurgaon. At the outset, from Para 11 of the impugned order, we observe that the CIT (A) has held that no credits is given to the first letter as there was no valid date of receipt of this letter by the Department and the ld. CIT(A) has rightly ignored the same. The assessee has not challenged these observations of the CIT(A) either by filing an appeal or by way of specific grounds in the cross-objection. In the same Para 11 the ld. CIT(A) has observed that the letter dated 30.6.2008 was received by the Department on 1.7.2008 and letter dated 20.8.2008 was also acknowledged by the Department.

36. On careful perusal of above letters dated 30.6.2008 (Paper book pages no. 37 & 38) and 18.8.2008 (Paper book pages no. 39-40) we observe that there is no specific request for adjustment of cash seized and however in these letters the assessee has mentioned this fact that the assessee has infact discharged his tax liability due by more than 60% and 75% respectively on the date of filing of these letters compassing the adjustment of cash seized as well as the payment of installment of tax.

37. From operative paragraph of impugned order we observe that the ld. CIT(A) has granted relief for the assessee following decisions of Hon'ble Punjab & Haryana

High Court in the cases of CIT vs. Arun Kapoor (Supra) and CIT vs. Ashok Kumar (Supra) and the CIT(A) allowed ground nos. 1 to 5 of the assessee with following conclusions and direction to the AO.

> *".....However the letter dated 30.06. 2008 would have to be given credence as the same was received by the department on 01.07.2008. This was received by the department with in a fortnight of the first instalment of advance tax. It is also clear that on 20.08.2008 about 75% of the advance tax was paid. However when was the balance 25% paid is not clear from the submission made. So for purpose of determining the date the same is taken as 01.07.2008."*

38. Since in the earlier part of this order, we have held that the benefit of ratio of decision of Punjab & Haryana High Court in the cases of CIT vs. Arun Kapoor (Supra) and CIT Vs. Ashok Kumar (Supra) is not available for the assessee, therefore, we further hold that the ld. CIT(A) has wrongly placed reliance on these judgments to support his findings and for granting relief to the assessee.

39. The ld. Counsel for the assessee has drawn our attention towards the decision of ITAT, Delhi 'G' Bench in ITA No. 2296/Del/2012 for the A.Y. 2008-09 wherein the Tribunal in its order dated 8.8.2013 in assessee's own case has deleted the penalty of Rs.80 lacs which was imposed u/s 271AAA of the Act.

40. On careful consideration of this judgment of the Tribunal in assessee's own case pertaining to penalty u/s 271AAA of the Act (supra), we are of the view that although the Tribunal has deleted the penalty imposed by the AO u/s 271AAA of the Act which was upheld by the ld. CIT(A) but this judgment has no relevance to the issues involved in the extant appeal and the order of the Tribunal does not help for the assessee in any manner to substantiate the fact that the cash seized was to be adjusted as an advance tax from the date of search i.e. from 29.4.2008 as per provisions of the Act.

41. The ld. DR has also placed reliance on the decision of Hon'ble Supreme Court in the case of ITO vs. Ch. Atchaiah 218 ITR 239 (SC) wherein it has been held that income is required to be assessed in the correct assessment year. The ld. DR also contended that at the time of seizure it cannot be said as to in which year the income referable of assets seized were required to be adjusted and AO's is required to conduct the inquiry to find out as to in whose hands assets seized have to be assessed. All these questions which need investigation/ inquiries can only be answered only on conclusion of the assessment proceedings and therefore, application of assets would be possible only on conclusion of relevant assessment and not before that.

42. In the present case the assessment was framed u/s 153A/143(3) of the Act on 24.12.2010 on total income of Rs.27,91,00,920/- therefore, the application of assets

u/s 132B of the Act r/w Explanation 2 would be possible only on conclusion of assessment proceedings i.e. 24.12.2010. Therefore, on the basis of foregoing discussions we reach to fortified and logical conclusion that the AO was wrongly granted adjustment of seized cash from 23.2.2011 and the ld. CIT(A) was also grossly erred in holding that the assessee was entitled to adjustment of seized cash from 01.07.2008. Hence, ground no. 1 of the assessee is adjudicated with the direction to the AO that the adjustment of cash seized be given for the assessee from the date of completion of assessment proceedings u/s 153A /143(3) of the Act i.e. from 24.12.2010 as per provisions of Explanation 2 to section 132B of the Act.

Ground No. 2 of the Revenue

43. Apropos ground no. 2, the ld. Departmental Representative (DR) submitted that CIT(A) was not right in admitting additional ground regarding non-credit of the seized cash before the levy of interest u/s 234A of the Act without seeking comments from the AO as required by Rule 46A of the IT Rules 1962.

44. The ld. Councel for the assessee replied that the CIT(A) has not granted any relief for the assessee in respect to levy of interest u/s 234A and 234B of the Act. The

CIT(A) has left these issues open for the AO for taking into consideration the decisions of Punjab and Haryana High Court in the case of Ashok Kumar (Supra) and Arun Kapoor (Supra).

45. On careful consideration of above submissions and careful perusal of the relevant portion of the impugned order we observe that the CIT(A) has not specifically granted any relief for the assessee on the issue of levy of interest u/s 234A and 234B of the Act, but the CIT(A) has directed the AO to adjudicate these issues while giving appeal effect to the main grounds and the AO is also directed by the CIT(A) to take consideration of the decisions of Hon'ble High Court in the case of Ashok Kumar (Supra) and Arun Kapoor (Supra).

46. Since earlier part of this order we have held that the CIT(A) wrongly granted relief for the assessee following the decisions of Hon'ble Punjab & Haryana High Court in the case of Ashok Kumar (supra) and Arun Kapoor (supra) and we have also held that the adjustment of seized cash is to be given for the assessee from the date of completion of assessment which was 24.12.2010, therefore, levy of interest u/s 234A of the Act being consequential is also restored to the file of the AO with a direction that the issue of levy of interest u/s 234A of the Act shall be decided in view of our findings on the main issue and in accordance with calculation of adjustment of seized cash u/s 132B r/w Explanation 2 of the Act.

47. Before we part with the conclusion on ground no. 2 it is pertinent to mention that the Revenue is harping on this legal contention that the CIT(A) admitted the additional ground without seeking comments from the AO as required by Rule 46A of the IT Rules but Rule 46A of the IT Rules 1962 stipulates production of additional evidence before first appellate authority and the same is not related to the admission of additional ground before the CIT(A). Therefore, ground no. 2 of the Revenue is misconceived. We further hold that the issue of levy of interest u/s 234A of the Act is consequential to the main issue, therefore, we set aside the same to the file of the AO with the above directions. Hence, ground no 2 of the Revenue is deemed to be allowed for statistical purposes as indicated above.

Cross-objection No. 268/Del/2012

48. The assessee has raised following cross-objection with read as under:

> *1. That the learned Commissioner of Income Tax (Appeals) has erred both on facts and in law, in only part relief, in not holding that the amount seized on 29.4.2008, ought to have been adjusted towards the tax for A.Y. 2008-09, for the purpose of levy of interest charged u/s 234B of the Income Tax Act, whereas he has merely held that, the same was required to be adjusted from 01.07.2008, against the income offered on 29.4.2008, as advance tax.*

2. That the findings of the learned Commissioner of Income Tax (Appeals) are partially erroneous, both on facts and in law in so far as the interest levied under section 234B of the Act. The learned CIT(A) ought to have held that, no interest u/s 234B of the Act was leviable from 29.04.2008, when the amount was seized and was prayed to be adjusted against the income declared and accepted as the income for the assessment year 2008-09.

49. We have heard arguments of both the sides and carefully perused the relevant material placed on record. The ld. Counsel for the assessee submitted that the CIT(A) has erred on facts and in law in granting only part relief and not holding that the amount seized on 29.4.2008 ought to have been adjusted towards the tax for A.Y. 2008-09 for the purpose of levy of interest charged u/s 234B of the Act, whereas the CIT(A) has merely held that the same was required to be adjusted from 01.07.2008 as an advance tax against the income offered and surrendered to tax on 29.4.2008 during search and seizure operation.

50. The ld. Counsel for the assessee vehemently contended that the findings of the CIT(A) are partially erroneous in so far as the issue of interest levied u/s 234B of the Act is concerned because the CIT(A) ought to have held that no interest u/s 234B of the Act was leviable from 29.4.2008 when the cash amount was seized and was prayed to be adjusted against the income declared and accepted as the income for the A.Y. 2008-09.

51. Replying to the above the ld. DR submitted that the provision of section 234B of the Act prescribe the levy of interest for default in payment of advance tax but after the retrospective insertion of Explanation 2 to section 132B of the Act, the legislature has removed the doubt and declared that the "existing liability" does not included advance tax payable in accordance with the provisions of part 'C' of Chapter XVII of the Act. By the earlier part of this order, we have held that the amount cash seized on 29.4.2008 was adjustable u/s 132B of the Act against the " existing liability" which does not include advance tax therefore, submissions and contentions of the assessee is not acceptable and we reject the same.

52. Since the issue of levy of interest u/s 234B of the Act is consequential and the same is required to be calculated by the AO at the time of giving effect to this order. Therefore, the AO is directed to adjudicate the issue of levy of interest u/s 234B of the Act in accordance with our earlier directions and order on the main issue. With these directions to the AO cross objection of the assessee are deemed to be allowed for statistical purposes.

53. In the result, appeal of the Revenue is partly allowed on ground no. 1 and deemed to be partly allowed for statistical purpose on ground no. 2 and Cross-objection of the assessee are also deemed to be allowed for statistical purposes with the directions to the AO as indicated above.

Order pronounced in the open Court on 17/10/2014.

Sd/-	**Sd/-**
(R.S. SYAL)	**(C. M. GARG)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 17/10/2014

AK VERMA

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR