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Seized Cash - Like a monkey on assessee's back**DR. RAJ K. AGARWAL**

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Introduction

1. Finance Act, 2013 has inserted *Explanation 2* to section 132B which reads as under:-

"For the removal of doubts, it is thereby declared that the 'existing liability' does not include advance tax payable in accordance with the provision of Part C of Chapter XVII".

Section 132B of the Income-tax Act prescribes the provisions regarding the application of seized assets, including cash seized during the course of income-tax search conducted under section 132 or requisitioned under section 132A of the Act. It prescribes, *inter alia*, that the seized assets/cash can be utilized for the purpose of recovery and adjustment of the amount of any *existing tax liability* and the amount of the liability determined on completion of the assessment in pursuance of search under section 153A.

Earlier to the insertion under reference, there used to be a controversy as to whether '*existing tax liability*' would include the advance tax payable by the assessee relating to the year of search? In several judicial decisions rendered by the Courts, it was held that cash seized could be adjusted towards the advance tax payable by the assessee on request to this effect to be made by the assessee. In such cases, it was further held that interest under sections 234B and 234C had not been charged from the assessee from the date, such request for adjustment of the seized cash towards advance tax liability was made by the assessee. Reference may be made to the cases of *CIT v. Arun Kapoor [2012] 20 taxmann.com 431 (Punj. & Har.)*, *Vishwanath Khanna v. Union of India [2012] 20 taxmann.com 828 (Delhi)* and *CIT v. K. K. Marketing [2005] 278 ITR 596 (Delhi)*.

It seems that the Finance Act, 2013 has inserted the above referred to *Explanation 2* to section 132B, to nullify the effect of the above judicial decisions consistently rendered by various benches of the Tribunal & the different High Courts.

The impact of the above amendment as inserted by the said *Explanation 2* shall, however, be quite harsh on the assessee who have been searched under section 132 of the Act or in respect of whom requisition has been made under section 132A.

The above *Explanation* shall have the effect that the seized cash cannot be claimed as payment of advance tax by the searched person in the return of income to be filed under section 153A/139. He shall be required to pay tax separately towards the tax liability relating to the undisclosed income declared during the course of search.

After the insertion of the above *Explanation*, even in a case, say when cash of Rs. 10 crores is found and seized during the course of search which is declared by assessee as his undisclosed income during the statement recorded under section 132(4), the searched person shall be required to pay tax separately on the above amount of undisclosed income of Rs.10 crores to be declared in his return of income. The cash seized during search shall not be permitted to be adjusted towards tax liability relating to such undisclosed income declared during the course of search. It would imply that cash seized shall remain as an additional security with the income-tax department to be adjusted against any other tax demand which may be created on completion of assessments of search cases.

The *Explanation 2* to section 132B is quite harsh

2. The above provision is quite harsh in nature. It will discourage the searched person from making declaration of the undisclosed income during the course of search. On the one side there remains a lot of persuasion/pressure from the search team for making declaration of the undisclosed income during the course of search as has been practically observed, whereas on the other side insertion of such an *Explanation* would discourage the searched person from making a declaration of the undisclosed income which may ultimately prove the search not to be so productive to the income-tax department and may further increase the litigation.

In case the assessee makes declaration of the undisclosed income during the course of search and the unaccounted assets including cash are seized by the search team, a practical problem would arise as to wherefrom the assessee may bring further funds to pay the tax liability relating to such undisclosed income?

In the case of *Asstt. CIT v. Raghu Nandan Lal [2002] 82 ITD 436 (Chd.)*, bench of Hon'ble Tribunal has held that the seizure of asset is certainly a recovery from the assessee. There is no basic difference between "payment" or "recovery" through seizure and other modes of recovery provided in the statute.

From the standpoint of the income-tax department, there may be justification for all this inasmuch as the assets in kind seized during the course of search are not applied and adjusted towards the advance tax liability. Amount of cash seized is also of the same character and, therefore, cash should also not be permitted to be adjusted towards advance tax.

Income-tax return to be treated as Defective Return under section 139(9) for non-payment of tax

3. The Finance Act, 2013 has simultaneously made amendment to sub-section (9) of section 139 by way of insertion of clause (aa) providing that Income-tax Return filed by the assessee shall be regarded as defective in case the tax together with interest, if any, payable in accordance with the provision of section 140A, has not been paid on or before the date of furnishing of the return. Further, section 139(9) provides in case of defective return that if the defect is not cured within the time-limit allowed by the Assessing Officer, the return shall be treated as invalid return and provisions of this Act shall apply as if the assessee has failed to furnish the return.

It would now imply in view of the insertion of the *Explanation 2* to section 132B that in case assessee files his return of income after search under section 153A/139 and claims adjustment of cash seized as advance tax paid and adjusts the cash seized towards his tax liability and does not pay the tax separately, it shall be treated as if no return has been filed by the assessee for the particular assessment year and he will have to face all the consequences for non-filing of return of income as prescribed under the Income-tax Act.

Enhanced penalty under section 271AAB

4. In the case of income-tax search under section 132 initiated on or after 1st July, 2012, assessee would be covered by the penalty provision relating to *Specified Previous Year* as contained under section 271AAB. This section provides, *inter alia*, that in case of declaration of the undisclosed income by the searched person during statement recorded under section 132(4) and further fulfilling other conditions as prescribed therein, penalty at the rate of 10 per cent of the undisclosed income is leviable. This *concessional* rate of penalty is applicable only when assessee pays the tax in respect of the undisclosed income and furnishes the return of income declaring such undisclosed income therein, on or before due date of filing of return of income under section 139/153A.

In case assessee does not pay the tax due in respect of the undisclosed income before the due date of filing of return of income, he may be liable to pay penalty at the rate of 30 per cent to 90 per cent of the undisclosed income.

It would now imply in view of the *Explanation 2* to section 132B that in case assessee files his return of income claiming adjustment of the cash seized towards the advance tax liability, penalty under section 271AAB, even in a case when the declaration of undisclosed income is made during the course of search and other conditions mentioned as prescribed therein having been complied with, may be imposed at the rate of 30 per cent to 90 per cent of the undisclosed income.

Whether applicability of *Explanation 2* is prospective or retrospective?

5. *Explanation 2* as inserted by the Finance Act, 2013 has been made applicable with effect from 1-6-2013. The said *Explanation* has been inserted in the form of a clarification stating that for the removal of doubts, it is hereby declared that the 'existing liability' does not include advance tax payable. It may imply that the said *Explanation* is clarificatory in nature and shall be applicable as if it was there right from the date when section 132B was brought on the statute.

Such an interpretation will create further complications for the assesseees in whose cases income-tax search was held in the past and cash seized was claimed in the return of income as advance tax paid. In such cases, assesseees may be liable to be penalized under section 271AAA or 271AAB or other provisions of the Act in much harsher manner, as explained in earlier part of this article. In our opinion, there is a need to bring clarification stating that the above *Explanation* shall be applicable prospectively, *i.e.*, in respect of searches conducted on or after 1-6-2013.

Whether "existing liability" would include self assessment tax?

6. *Explanation 2* to section 132B states that the existing liability does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII. A question may arise as to whether self assessment tax payable can be distinguished from the advance tax payable and whether the above *Explanation* shall be applicable for self assessment tax also, meaning thereby as to whether existing liability under section 132B may include self assessment tax payable by the assessee at the time of filing of return of income or not?

Under the Income-tax Act, 1961, provisions regarding payment of self assessment tax are contained in Chapter XIV under section 140A, whileas the provisions regarding payment of advance tax are contained in Part C of Chapter XVII under section 207 to section 219. The requirement of payment of advance tax before the end of the relevant Financial Year is on estimated income relating to that F.Y. while as self assessment tax is paid after the end of the F.Y. at the time of filing of return of income for that F.Y. on the basis of actual tax liability determined by the assessee relating to the income earned during the previous year. Thus, the nature of self assessment tax and advance tax is different and the said *Explanation 2* has specifically referred to and covered only advance tax payable. Therefore, it can be argued that self assessment tax is of distinct nature and cannot be brought within the ambit of the said *Explanation 2* to section 132B.

In case the above argument is accepted and the Courts read down the interpretation of *Explanation 2* in the above manner, particularly keeping in view the harshness of the provision as discussed earlier, the searched person can still get the benefit of adjustment of cash seized to be adjusted as self assessment tax paid at the time of filing of the return of income. In such a situation, the assessee shall be adversely affected only regarding extra burden of interest, since credit of self assessment tax can be taken not from the date of cash seized but can be taken at the time of filing of the return of income.

On the other hand an argument from the side of Revenue may be advanced that advance tax payable and self assessment tax payable are of the similar nature which are determined by the assessee himself and cannot be covered within the meaning of existing liability under section 132B. Existing liability envisaged under section 132B is the liability outstanding which was earlier determined by the tax authorities by passing any order under the Income-tax Act or other allied Acts. When the Legislature has excluded advance tax payable from the scope of existing liability, self assessment tax payable can also not be part of existing liability.

Conclusion

7. The above discussion shows that the new provision would create fresh line of litigation. Until suitable clarification is made in this regard, the assessee would remain in dilemma as to whether cash seized should even be adjusted as tax paid at the time of filing of return.

A provision such as *Explanation 2* to section 132B under the Income-tax Act providing that cash seized during search representing the undisclosed income of the assessee cannot be treated as advance tax paid by the assessee, may stand to the test of constitutional validity, but having regard to harsh nature and consequences flowing therefrom, the High Courts may read down the above provision so as to mitigate the impact of such a harsh provision.

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• DT - Secs. 132A, 132B, 139, 153A, 234B, 234C & 271AAB