

(2004) 10 CAL CK 0003

Calcutta High Court

Case No: A.P.O.I. No. 502 of 2004 and G.A. No. 3370 of 2004 and W.P. No. 2445 of 2003

Commissioner of Income Tax

APPELLANT

Vs

Mukundray Kumar Shah

RESPONDENT

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**Date of Decision:** Oct. 1, 2004**Acts Referred:**

- Income Tax (Appellate Tribunal) Rules, 1963 - Rule 35A
- Income Tax Act, 1961 - Section 132, 132(5), 132(A), 132B, 132B(1)

**Citation:** (2005) 199 CTR 633 : (2005) 278 ITR 425 : (2006) 150 TAXMAN 151**Hon'ble Judges:** Asit Kumar Bisi, J; Altamas Kabir, J**Bench:** Division Bench**Advocate:** Shibdas Banerjee and B. Samaddar, for the Appellant; N.K. Poddar and Debashis Mitra, for the Respondent**Final Decision:** Dismissed

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**Judgement**

Altamas Kabir, J.

This appeal at the instance of the Revenue is directed against the judgment and order dated April 5, 2004 (see [Mukundray K. Shah Vs. Director General of Income Tax \(Investigation\) and Others,](#) ), passed by the learned single judge on the writ application filed by respondent No. 1 herein, being W. P. No. 2445 of 2003. By the said judgment and order the learned single judge disposed of the writ petition and directed the Revenue authorities to release to the writ petitioner/ respondent 9 per cent. R. B. I. Relief Bonds, valued at Rs. 7.2 crores which had been seized during the search and seizure operation u/s 132 of the Income Tax Act, 1961, conducted at the residence of the writ petitioner/respondent No. 1, 2/2, Justice Dwarkanath Road, Kolkata 700 020, on August 24, 2000.

2. An application for stay of the said directions contained in the order of the learned single judge has been filed in the appeal and has been taken up for consideration upon due notice to the writ petitioner/respondent. As will appear from the facts

disclosed during the course of the hearing and also set out in the stay application, after the search and seizure operation, the assessing authority initiated assessment proceedings against the writ petitioner/respondent, hereinafter referred to as "the assessee", by issuing notice u/s 158BC of the Income Tax Act, 1961, hereinafter referred to as the "said Act". The assessment proceedings were initiated not only against the assessee but also in the names of several members of his family. Pursuant to the said notice, the assessee filed a block return showing nil undisclosed income on March 14, 2001.

3. The block assessment against the assessee was completed on November 29, 2002, wherein the Assessing Officer assessed the undisclosed income of the assessee at Rs. 6,57,73,867 and additional demand of Rs. 4,70,96,716 was raised. The income assessed included addition of a sum of Rs. 5,99,00,000 on account of 9 per cent. RBI Relief Bonds held by the assessee as deemed dividend in accordance with the provisions of section 2(22)(e) of the said Act.

4. The assessee filed an appeal before the Commissioner of Income Tax (Appeals) against the said assessment order and by an order dated February 21, 2003, the appellate authority deleted the addition of Rs. 6,57,73,867 including addition of Rs. 5,99,00,000 on account of the deemed dividend in respect of 9 per cent. RBI Relief Bonds, 1999.

5. Being aggrieved by the said order of the Commissioner of Income Tax (Appeals), the Revenue has preferred an appeal before the Income Tax Appellate Tribunal, Calcutta. The said appeal is pending and is yet to be disposed of by the Appellate Tribunal.

6. Immediately after the appellate order was passed by the Commissioner of Income Tax (Appeals) in favour of the assessee, he made various representations before the appellants herein for release of the said 9 per cent. RBI Relief Bonds which had been seized in the course of search and seizure operation u/s 132 of the said Act, on August 24, 2000. As the matter relating to the additions made in the assessment proceedings was pending before the Income Tax Appellate Tribunal, the appellants did not release to the assessee the aforesaid bonds valued at Rs. 7.2 crores. Inasmuch as, the Revenue did not release the said bonds to the assessee after the appellate order passed by the Commissioner of Income Tax (Appeals) the assessee filed a writ petition in this Court, being W. P. No. 2445 of 2003, which came up for hearing before the learned single judge on April 5, 2004 (see [Mukundray K. Shah Vs. Director General of Income Tax \(Investigation\) and Others](#) ), and was disposed of with a direction to the Revenue to release the seized 9 per cent. RBI Relief Bonds to the assessee within a period of eight (8) weeks from the date of communication of the order.

7. On behalf of the Revenue it was submitted that the learned single judge had erred in directing release of the securities during the pendency of the appeal

preferred by the Revenue before the Income Tax Appellate Tribunal as in the event the appeal succeeds the Revenue will be prevented from realising its dues from the seized security. It was also urged on behalf of the Revenue that a regular assessment u/s 143(3) had been made by the Assessing Officer for the assessment year 2000-01, and in the said assessment order no addition had been made with regard to the deemed dividend u/s 2(22)(e) of the aforesaid Act. Inasmuch as, the said order was prejudicial to the interests of the Revenue, the Commissioner of Income Tax initiated proceedings u/s 263 of the aforesaid Act for inclusion of the deemed dividend income in the total income of the assessee. A second writ application was filed by the assessee challenging the initiation of the proceedings u/s 263 of the Act. By an order dated January 21, 2004, the learned single judge gave liberty to the Commissioner of Income Tax to proceed with the notice issued u/s 263 and to pass orders thereupon, but not to give effect to the same without the leave of the court.

8. On behalf of the Revenue it was further urged that since the block assessment order which had been set aside by the appellate order of the Commissioner of Income Tax (Appeals) had not yet reached finality and was the subject-matter of the present appeal before the Income Tax Appellate Tribunal, the direction given by the learned single judge to release the seized bonds was erroneous since in case the Revenue succeeds in the appeal it will find it difficult to realise the assessed tax from the assessee.

9. In support of his aforesaid submissions, Mr. Banerjee placed reliance on a Bench decision of the Allahabad High Court in the case of [Bhagwat Prasad Vs. Commissioner of Income Tax and Another](#), wherein while answering the question as to whether the seized assets could be retained for the liability determined on completion of fresh assessment after remand, it was held that the assessment after the remand of the case would be either regular assessment or an ex parte assessment and for the amount of liability determined on completion of the same, the seized assets retained would be liable to be utilised. The Division Bench also observed that it could not be said that the assessment for the year under consideration had been completed or the proceedings had been quashed. The assets retained u/s 132(5) would, therefore, have to be retained to be dealt with in the manner provided u/s 132B.

10. It was urged that, although, the learned single judge had observed in the judgment under appeal that the Revenue should have made an application for stay to withhold the security before the Appellate Tribunal, there is no provision under the Income Tax (Appellate Tribunal) Rules, 1963, which enables the Revenue to make such an application. It was urged that Rule 35A of the said Rules provides that application for stay can be made before the Appellate Tribunal in respect of recovery of tax, interest, etc., but the same does not provide for the Revenue to make an application for withholding the seized securities. It was also submitted that the

language used in Rule 35A of the said Rules indicates that the same applies only in respect of an assessee against whom a demand is raised and the learned single judge was, therefore, in error in disposing of the writ petition by directing release of the securities without giving any protection to the Revenue authorities in the matter of realisation of tax in respect of the assessment which was the subject-matter of appeal before the Appellate Tribunal. It was urged that the learned single judge ought to have made release of the security dependant upon the final outcome of the pending appeal before the Appellate Tribunal.

11. Appearing for the writ petitioner/respondent No. 1, Mr. N. K. Poddar, learned senior counsel, submitted that the appeal preferred by the Revenue was without any merit whatsoever and was liable to be dismissed. It was urged by him that the question of retention of the seized R. B. I. Bonds would have to be considered keeping in mind the fact that the seized Bonds were disclosed assets and could not be retained for the purposes of Section 132B of the Income Tax Act, 1961.

12. Mr. Poddar urged that the provisions of Section 132B had no application as such in respect of the seized bonds, inasmuch as, there was no existing liability on account of which the said bonds could be retained for recovery of any dues. Referring to the provisions of Clause (i) of Section 132B(1) of the Income Tax Act, Mr. Poddar submitted that the said provision contemplates recovery in respect of the seized assets in relation to any existing liability either under the Income Tax Act, the Wealth-tax Act, the Expenditure-tax Act, the Gift-tax Act and/or the Interest-tax Act and the amount of liability determined on completion of the assessment u/s 153A or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be, and in respect of which such person is in default or is deemed to be in default. Mr. Poddar submitted that there was no existing liability within the meaning of Clause (i) of Section 132B(1) of the Income Tax Act, as far as the appellant was concerned, inasmuch as, the block assessment which had been made by the Assessing Officer on November 29, 2002, in respect of the seized bonds had been set aside in appeal by the Commissioner of Income Tax (Appeals) by his order dated February 21, 2003, deleting the addition of Rs. 6,57,73,867 including addition of Rs. 5,99,00,000 made on account of deemed dividend in respect of the seized bonds. Mr. Poddar urged that although an appeal was pending before the Income Tax Appellate Tribunal against the order of the Commissioner of Income Tax (Appeals) there was no existing liability on account whereof the seized bonds could be retained by the Revenue.

13. In this connection Mr. Poddar also referred to the two provisos to Clause (i) of Section 132B(1) of the Income Tax Act, 1961, which read as follows :

"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 the assets 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 Chief 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 u/s 132 or for requisition u/s 132A, as the case may be, was executed ;"

14. Mr. Poddar urged that the second proviso was, in fact, substituted in place of Section 132(5) of the above Act whereunder the Income Tax Officer could previously make an interim assessment regarding the undisclosed income in respect of the seized goods and to calculate the amount of tax on the income so estimated, together with interest and penalty payable thereupon, and specify the amount that would be required to satisfy any existing liability and retain in his custody such assets or part thereof as was in his opinion sufficient to satisfy the aggregate of the amounts referred to and to release the remaining portion, if any, of the assets to the person from whose custody they were seized. Mr. Poddar submitted that the second proviso to Clause (i) of Section 132B(1) contemplates release of any seized asset or portion thereof within one hundred and twenty days from the date on which the last of the authorisations for search u/s 132 was executed. Mr. Poddar urged that, in any event, even if the seized articles were not disclosed assets, the Income Tax authorities were under an obligation to release the same within the period specified under the second proviso.

15. Mr. Poddar submitted that in the instant case even the said provision was not applicable, inasmuch as, the Income Tax authorities were not entitled to retain the bonds under the provisions of Section 132B since the same were not related to any undisclosed asset but formed part of the disclosed assets of the writ petitioner/respondent which could not be the subject-matter of seizure.

16. Mr. Poddar submitted that with the setting aside of the block assessment by the Commissioner of Income Tax (Appeals), the retention of the seized bonds became legally incompetent, inasmuch as, the said bonds could no longer be related to any proceeding u/s 132B of the Income Tax Act, 1961.

17. In support of his aforesaid submissions, Mr. Poddar referred to a Bench decision of the Allahabad High Court in the case of [Hariharnath Agarwal and Sons \(HUF\) Vs. Commissioner of Income Tax and Others](#), wherein in somewhat similar circumstances a writ application was filed for a mandamus to direct the respondents to release the entire seized assets and money of the petitioner and to refund the various amounts. In the said case proceedings were taken u/s 132(5) of the Income Tax Act. However, the regular assessment of the petitioner for the assessment year 1989-90 was completed and an assessment order was passed. Against the said

order the petitioner appealed before the Commissioner of Income Tax who allowed the appeal and deleted certain additions and allowed certain claims which the Assessing Officer had omitted to allow. Thereafter, the Department filed a second appeal before the Income Tax Appellate Tribunal which was pending, but there was nothing on record to show that any stay order had been passed by the Tribunal. The petitioner who was aggrieved by an order dated October 19, 1993, directing him to furnish a bank guarantee of Rs. 20 lakhs for the release of the seized goods worth Rs. 17,29,292 filed the writ application wherein the Division Bench held that the impugned order was vitiated in law because once the regular assessment had been completed the proceedings u/s 132(5) automatically lapsed.

18. Mr. Poddar contended that similarly in the instant case in the absence of any stay order from the Income Tax Appellate Tribunal the Revenue had no legal authority to retain the seized bonds.

19. Reference was also made to a Bench decision of the Punjab and Haryana High Court in the case of [Naresh Kumar Kohli Vs. Commissioner of Income Tax and Another](#), in which the provisions of Sub-section (3) of Section 132B of the Income Tax Act were under consideration and it was held that once the amount assessed u/s 158BC was paid by the assessee, even if an appeal had been preferred from the order u/s 158BC, the same could not be a ground for retention of the seized assets. It was observed that no provision had been brought to the notice of the court whereunder the Revenue could keep the release of the seized assets in abeyance during the pendency of an appeal, revision or reference filed by the Revenue.

20. Since the question regarding obtaining a stay from the Income Tax Appellate Tribunal was one of the points raised during the hearing of the appeal, Mr. Poddar submitted that the submission made on behalf of the Revenue that the rules did not provide for any stay application to be filed by the Department was incorrect and that the said question had been considered and settled by the hon'ble Supreme Court as far back as in 1968, in the case of [Income Tax Officer Vs. M.K. Mohammed Kunhi](#), . Mr. Poddar submitted that at the relevant point of time there was no provision at all in the Income Tax (Appellate Tribunal) Rules, 1963, for an application to be made to the Tribunal either by the assessee or the Department for stay pending the disposal of an appeal. Mr. Poddar submitted that it was in such background that the hon'ble Supreme Court observed that the statutory power u/s 254 of the Income Tax Act, which conferred on the Appellate Tribunal powers of the widest amplitude in dealing with appeals before it, carried with it the duty in proper cases to make such orders for staying recovery proceedings pending appeal before the Tribunal so that the appeal, if successful, was not rendered nugatory. Mr. Poddar submitted that the hon'ble Supreme Court also observed in no uncertain terms that an express grant of statutory power carries with it by necessary implication the authority to use all reasonable means to make such grant effective.

21. Mr. Poddar submitted that the aforesaid decision of the hon'ble Supreme Court led to the amendment of the Appellate Tribunal Rules, 1963, and the inclusion of Rule 35A which indicates the procedure for filing and disposal of stay petitions. Mr. Poddar submitted that, although, on a reading of Rule 35A it would seem to appear that the said rule had been incorporated only for stay of recovery of demands, in fact, there was nothing in the said rule to suggest that the Revenue would not also be entitled to make an application for stay in appropriate cases. According to Mr. Poddar, such an interpretation would be in harmony with the observations made by the hon'ble Supreme Court in [Income Tax Officer Vs. M.K. Mohammed Kunhi](#) .

22. Mr. Poddar submitted that the said decision of the hon'ble Supreme Court had thereafter been consistently followed as would be evident from a Bench decision of the Andhra Pradesh High Court in the case of [Income Tax Officer, J-Ward Vs. Khalid Mehdi Khan \(represented by father and guardian\)](#) . In this connection Mr. Poddar also referred to the decision of the hon'ble Supreme Court in [Commissioner of Income Tax Vs. Bansi Dhar and Sons](#) , where too it was observed that pending a reference before the High Court the Tribunal retained the jurisdiction to grant stay. It was reiterated that the power to grant stay is incidental and ancillary to appellate jurisdiction.

23. A further submission was made by Mr. Poddar in connection with the said branch of his submissions to the effect that orders passed by the appellate authorities are binding on all the Revenue authorities and that the principles of judicial discipline require that the order of the higher appellate authorities should be followed unreservedly by the subordinate authorities. Mr. Poddar contended that once the Income Tax Commissioner (Appeals) had set aside the block assessment, and a regular assessment had followed, it was no longer open to the authorities of the Revenue to contend that the seized bonds were liable to be retained in the case of future liability of the assessee.

24. It was then urged by Mr. Poddar that there was no provision under the Income Tax Act or the various rules framed thereunder and in connection therewith which permitted the Revenue authorities to retain the seized bonds, which were disclosed assets for realisation of future dues, if any. Mr. Poddar submitted that such an interpretation of Section 132B, would render Clause (i) of Section 132B completely otiose.

25. Mr. Poddar submitted that the filing of the appeal by the Revenue before the Income Tax Appellate Tribunal could not operate as a stay on return of the seized bonds without any formal order of stay in the pending appeal merely on account of the pendency of the appeal. It was submitted that in the absence of any provision which empowered the Revenue to retain the disclosed assets of an assessee, the said authorities were under an obligation to return the seized bonds on the setting aside of the block assessment.



26. In this regard, Mr. Poddar submitted that pursuant to the leave granted by the learned single judge in the other writ application in which the proceedings u/s 263 of the aforesaid Act had been challenged a regular assessment had been made for the assessment year 2000-01, but the same had been kept in abeyance as per the orders in the said writ application. However, in the said order of assessment it had been observed that the deemed dividend income purportedly u/s 2(22)(e) of the Income Tax Act had no connection with the search and seizure action conducted in the assessee's case and the said deemed dividend income was rightly taxable in the regular assessment of the assessee made u/s 143(3) of the above Act. Mr. Poddar submitted that the RBI Bonds had been purchased out of the funds which the writ petitioner/respondent had withdrawn from the partnership concerns in which he had an interest and the same was not at all taxable.

27. Mr. Poddar submitted that, in any event, the said question had no relevance as far as the present case is concerned and the observations made in the order only go to show that the case made out by the Revenue before the learned Tribunal was without any substance. Mr. Poddar submitted that the pendency of the appeal before the learned Tribunal could not, therefore, be cited on behalf of the Revenue as a reason for retention of the seized bonds.

28. Mr. Poddar submitted that under no circumstances could the seized bonds be retained by the Revenue authorities in relation to the search and seizure conducted in the residence of the writ petitioner/respondent No. 1 on August 24, 2000, and the judgment and directions of the learned single judge did not warrant any interference whatsoever.

29. We have carefully considered the submissions made both on behalf of the Revenue and the assessee and the decisions cited and we find considerable force in Mr. Poddar's submission that Clause (i) of Section 132B(1) contemplates detention of seized goods in respect of an existing liability and not otherwise.

30. In the instant case there is no existing liability as far as the assessee is concerned and the pendency of the appeal filed by the Revenue before the Income Tax Appellate Tribunal against the order of the Commissioner of Income Tax (Appeals) cannot be a ground for retention of the seized bonds by the Revenue. As has been pointed out by Mr. Poddar, after the block assessment had been set aside by the Commissioner of Income Tax (Appeals), a regular assessment followed. Even in the assessment made in the proceedings u/s 263, it had been indicated by the Assessing Officer that the deemed dividend relating to the seized bonds had no connection with the search and seizure conducted in the assessee's case and the deemed dividend income was rightly taxable in the regular assessment of the assessee made u/s 143(3) of the Income Tax Act, 1961. In fact, the said observation of the Assessing Officer makes it quite clear that there is no nexus between the search and seizure for the purposes of block assessment and the seizure of the bonds. There can, therefore, be no justification for the Revenue to retain the said bonds in connection



with future liability, if any, of the assessee on account of payment of tax.

31. The submissions relating to the second proviso to Clause (i) of Section 132B(1) are not relevant to the outcome of the instant case since the seized bonds do not form part of the assessee's undisclosed assets which would have attracted the said provision, but is the assessee's disclosed assets in respect whereof the provisions of Section 132B can have no application.

32. In our view, once the block assessment in respect of the seized bonds was set aside by the Commissioner of Income Tax (Appeals) the right of the Revenue to retain the said bonds ceased, unless, of course, an appropriate order of stay had been obtained by the Revenue in the pending appeal before the Income Tax Appellate Tribunal. The judgment of the Allahabad High Court in [Bhagwat Prasad Vs. Commissioner of Income Tax and Another](#), relied upon by Mr. Banerjee cannot have any application in the facts of this case in the absence of any existing tax liability of the assessee. The observations made by the hon'ble Supreme Court in [Income Tax Officer Vs. M.K. Mohammed Kunhi](#), and in [Commissioner of Income Tax Vs. Bansi Dhar and Sons](#), leave no manner of doubt that the appellate forum is vested with powers which are incidental and ancillary to the appellate jurisdiction, including the power to grant stay in appropriate cases, so that the decision in the appeal is not ultimately rendered infructuous in case the appeal succeeds. The Revenue has not, however, taken any steps under Rule 35A of the Appellate Tribunal Rules, 1963.

33. We, therefore, see no reason to interfere with the judgment and order under appeal and the appeal and the application are both dismissed, but without any order as to costs.

34. The time to comply with the directions of the learned single judge for return of the seized bonds is extended till October 31, 2004.

35. All parties to act on the xerox signed copy of the operative portion of the judgment on the usual undertakings.

36. If an urgent xerox certified copy of this judgment is applied for, the same is to be supplied to the applicant expeditiously, subject to compliance with all the required formalities.