I-18 to 26

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No.491/2008**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. Jacabs Civil Incorporated ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

\+ **ITA No.209/2009**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

\+ **ITA No.229/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

+ **ITA No.282/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

+ **ITA No.283/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

+ **ITA No.297/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

\+ **ITA No.301/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

\+ **ITA No.316/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with Mr.Utpal Saha, Adv.

versus

M/s. Mitsubishi Corporation ..... Respondent
Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

and

\+ **ITA No.320/2010**

Director of Income Tax ..... Appellant
Through: Mr.Sanjeev Sabarwal, Adv. with

M/s. Mitsubishi Corporation ..... Respondent

Through: Mr.N.Venkatraman, Sr. Advocate, with Mr.Achin Goel, Mr. Satish Kumar, Mr. R.Satish Kumar and Ms. Anjali Chaudhari, Advocates.

% **DATE OF DECISION: August 30, 2010**

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

JUDGMENT (ORAL)
30.08.2010

: A.K.SIKRI, J.

In ITA No. 491/2008, M/s. Jacabs Civil Incorporated is the assessee and in all other appeals, M/s. Mitsubishi Corporation is the assessee/respondent. However, the issue in all the cases is the same which relates to the charge of interest under Section 234B of the Income Tax Act, 1961. We may point out at the outset that both these assessees are non-resident companies. The common question of law which arises for consideration in all these appeals relate to "whether the levy of interest under Section 234B of the Income Tax Act, 1961 for short

sake of convenience, we may look into the facts as they appear in ITA No. 491/2008.

2. The assessee in this case is a company which is incorporated in the United States of America and is executing World Bank finance projects. One of these projects financed by the World Bank is undertaken by the National Highway Authority of India which was also executed by the assessee. For the assessment year 2001-02 the assessee filed its return of income declaring an income of Rs.96,83,278/-. This return was picked up for detailed scrutiny and notice under Section 143(2) of the Income Tax Act, 1961 was issued. Thereafter, the assessment was framed on 26th March, 2004. The Assessing Officer had *inter alia* found that there was short payment of taxes inasmuch as the advance tax was not paid by the assessee on due dates and therefore, the Assessing Officer was of the opinion that the assessee had incurred interest liability under Section 234B of the Act. After giving show cause notice in this behalf, the Assessing Officer added the liability of interest under Section 234B of the Act.

3. We may point out at this stage itself that the plea of the assessee was that all the projects which were being executed by the assessee at the relevant time, it was the obligation and the statutory duty of the National Highway Authority of India to deduct the tax at source and the assessee being a non-resident, 100% tax at source was to be deducted.

tax and thus interest under Section 234B of the Act could not be charged from the assessee. This contention was not acceptable to the Assessing Officer. In his opinion, it was for the assessee to show income from all the projects, compute the tax and take credit of taxes paid either prepaid or otherwise by enclosing the proof of such payment along with return of income. The TDS certificates were to be collected by the assessee even where taxes are borne by the payer. Since the assessee had not disclosed any certificates nor shown proof of payment of taxes, the Assessing Officer held that the assessee was liable to pay interest under Section 234B of the Act. The assessee preferred an appeal before the CIT(A) against the assessment order so passed challenging the levy of interest under the said provision. The assessee was successful in that appeal inasmuch as CIT(A) allowed the appeal vide order dated 29th November, 2004 and set aside the order of the Assessing Officer on this aspect. The Revenue, feeling aggrieved by the order of the CIT(A), approached the Income Tax Appellate Tribunal. However, the plea of the Revenue was not accepted by the ITAT which resulted in dismissal of the said appeal vide impugned orders dated 13th April, 2007.

4. Under similar circumstances, in the assessment orders passed for the various assessment years in case of M/s. Mitsubishi Corporation, interest charged under Section 234B of the Act has been deleted by the Tribunal. In these judgments passed by the Tribunal, the Tribunal has

and the Bombay High Court where the views taken by the said courts that since it was the payer who paid the amount to the assessee to deduct the tax at source, the assessee could not be fastened with the liability of interest. The judgment of the Uttaranchal High Court in the case of ***Commissioner of Income Tax and Anr. vs. Sedco Forex International Drilling Co. Ltd. 264 ITR 320***. After extensively dealing with the identical issue, the court gave the following reasons for holding that the liability of the assessee to pay interest would not arise under these circumstances: -

> "17. Although we agree with the conclusions of the Tribunal, we prefer to give our own reasons in support of our conclusion that on the facts and circumstances of this case, levy of interest under Section 234B on the assessee is not justified. Firstly, the decisions of the Tribunal on the interpretation of the contracts regarding on period and off period salary were conflicting. Ultimately, the Legislature has stepped into clarify the position by the Finance Act of 1999. In this connection, it is important to note that Section 234B imposes interest, which is compensatory in nature and not as a penalty (see Union Home Products ltd, v. [1995]215ITR 758, 766 (Karn)). Secondly, although Section 191 of the Act is not overridden by Sections 192, 208 and 209(1)(a)(d) of the Act, the scheme of Sections 208 and 209 of the Act indicates that in order to compute advance tax the assessee has to, inter alia, estimate his current income and calculate the tax on such income by applying the rates in force. That under Section 209(1)(d) the income-tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which

the Tribunal. A bona fide dispute was pending. The assessee had to estimate his current income. The words used under Section 209(1)(a) make the assessee estimate his current income and since a bona fide dispute was pending, imposition of interest under Section 234B was not justified without hearing and without reasons. Accordingly, we answer this question in the affirmative, i.e., in favour of the assessee and against the Department."

5. This judgment was followed by the Bombay High Court in the case of ***Director of Income Tax (International Taxation) vs. NGC Network Asia LLC 222CTR (Bom) 86***. The Bombay High Court also took note of the judgment of the Madras High Court in the case of ***Commissioner of Income Tax, Tamil Nadu-I, Madras vs. Madras Fertilizers Ltd. 149 ITR 703*** which had taken a similar view. The following observations of the Madras High Court are also worth quoting: -

".....If the tax deductible at source has not been deducted and paid over to the Department, then the banks whose duty it is to make deduction can be treated as the assessee in default under the provisions of s. 201 of the Act. Interest also can be collected along with the amounts which they ought to have deducted but which they did not deduct under s. 201(1A). Therefore, under the provisions of s. 201, that portion of the tax which has not been deducted and paid over to the Department will have to be paid with interest by the banks which are under a duty to make the deduction at the source. We have thus to keep in mind s. 201(1A) of the Act while construing s. 215 of the Act which deals with the interest payable by the assessee in respect of the tax assessed on him

> "215. Interest payable by assessee :-(1) Where, in any financial year, as assessee has paid advance tax under section 212 on the basis of his own estimate and the advance tax so paid is less than seventy-five per cent. of the assessed tax, simple interest at the rate of twelve per cent. per annum from the 1st day of April next following the said financial year up to the date of the regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax."

5. This section provides that when the advance tax paid is less than seventy-five per cent. of the assessed tax, simple interest at the rate of 12 per cent. per annum shall be levied from the 1st day of April next following the said financial year up to the date of the regular assessment, on the amount by which the advance tax falls short of the assessed tax. The "assessed tax" has been defined in s. 215(5) of the Act, as meaning the tax determined on the basis of the regular assessment as reduced by the amount of tax deductible in accordance with the provisions of ss. 192 to 194, s. 194A, etc. As per this definition, "assessed tax" represents the tax determined by regular assessment as reduced by the amount of tax deductible in accordance with the provisions of s. 194A of the Act. Therefore, the expression "assessed tax" used in s. 215(1) of the Act has to be understood as the tax finally assessed as reduced by the amount of tax deductible in accordance with the provisions of s. 194A of the Act. As already stated, that tax is deductible at source on the interest income under s. 194A of the Act cannot be disputed. So long as s. 215 of the Act permits the levy of interest only on the difference between the assessed tax and advance tax actually paid, we have to take note of the amount of tax deductible at source under s. 194A of the Act, and this has been specifically provided in sub-s. (5) of s. 215 of the Act. It is significant to note that normally advance tax is paid either on the basis of the previous year's assessment or on the

before the final assessment and at that stage, there is no question of actual deduction of the tax at source in respect of the interest income and the deduction at source takes place practically at the end of the year when the interest is paid and it is for this reason the statute in sub-s. (5) of the Act uses the expression "deductible" instead of 'deducted'. Therefore, construing sub-s. (5), it is not possible to understand the expression "deductible" occurring therein as possible to understand the expression "deductible" occurring therein as "deducted".

6. Further, the learned counsel for the assessee appears to be right in his submission that in cases where the tax is deductible at source, that will have to be excluded from consideration while the estimate of the income for the payment of advance tax is submitted. Reliance is placed by the learned counsel on the language used in s. 190(1) which is as follows :

> "190. (1) Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction at source or by advance payment, as the case may be, in accordance with the provisions of this Chapter."

7. That section seems to provide that the tax in respect of a regular assessment is payable either by deduction at source or by advance payment, as the case may be, in accordance with the provisions of Chapter XVII. Thus, the deduction of tax at source and payment of advance tax have been treated as two alternative modes of payment in advance. Hence, where the statute provides for deduction of tax at source in respect of a particular income, the concerned assessee need not pay any advance tax in relation to the said income. In this, case, it is not in dispute that in respect of the interest income, deduction of tax at source is contemplate under s. 194A of the Act. However, the deduction at source has not been effected by

of the Act. For the default of compliance with s. 194A the bank can be brought under s. 201 as an assessee in default. Section 201(1A) specifically provides that if a person or authority who is bound to make a deduction of tax at source as contemplated by the statute does not deduct or after deducting fails to pay the tax, then such a person or authority is liable to pay simple interest on the amount of tax not deducted from the date on which such tax was deductible to the date on which the said tax was actually paid. Thus, in respect of interest income on which deduction of tax at source should have been made, the liability to pay interest is fastened on the person or authority who failed to make deduction as required under s. 194A. Therefore, in respect of the tax payable on the said interest income, the assessee also cannot be taken to be liable to pay interest. Otherwise, it will mean that there are two persons under the Act to pay interest on tax on the same income. The Legislature would not have contemplated such a situation where in respect of the tax on interest income, two persons are liable to pay interest for the delayed payment of tax. We are, therefore, inclined to hold that whatever there is a possibility of a deduction of tax at source, the person who had failed to deduct tax at source is liable to pay interest and not the assessee, as otherwise, there will be charging of interest twice on the payment of tax in relation to the same income. Such an interpretation should normally be avoided. In this case, therefore, the Tribunal appears to be right in holding that in terms of s. 215 interest could not be levied on the assessee on the tax which is deductible at source. We answer the said questions referred to us in the affirmative and against the Revenue. The Revenue will pay the costs of the assessee."

6. Mr. Sabharwal, the learned counsel appearing for the Revenue strenuously argued that Section 234B of the Act was an independent and

that Section were satisfied, the liability to pay the interest would arise. Reading the provision of the Section, he argued that since there was a default in payment of advance tax, interest thereupon had to be paid by the assessee as held by the Supreme Court in the case of ***CIT vs. M.H. Anjum Ghaswala and Ors. 252 ITR Page 1.*** He submitted that it was totally unnecessary to look into the other provisions like Sections 191, 195, 201, 209, 215 etc. for determining the liability of payment of interest. His submission was that whereas Section 209(1) (d) uses the expression "deductable or collectable", the Legislature in Explanation 1 (i) of Section 234B of the Act had consciously used the expression "income deducted or collected at source....". Therefore, what was to be seen was whether the tax at source was deducted or collected or not and if it was not actually collected or deducted, the liability to pay interest arose. We are not persuaded by this submission of Mr. Sabharwal. It is stated at the cost of repetition that the liability to deduct or collect the tax at source is that of the payer. Therefore, for the purposes of Section 234B of the Act, the question would be as to whether the payee, i.e. the assessee in this case, had any role in deducting or collecting the tax. Once that is in the negative, and it was not duty of the payee/assessee, the question of payment of any interest would not arise as it cannot be said, in such circumstances, that the assessee is in default for the purposes of Section 234B of the Act. No doubt, as per the judgment in

payment of advance tax, the consequence which is to follow is that the interest becomes payable under Section 234B of the Act. But in the instant case, the provisions of Section 234B of the Act would not be attracted at all.

7. Section 2(1) of the Act defines "advance tax" to mean the advance tax payable in accordance with the provisions of Chapter XVII-C of the Act. These provisions are contained from Section 207 onwards. Section 209 falls under this Chapter. Sub-section (1) thereof deals with four situations under which the advance tax payable by the assessee is to be computed. Admittedly, these cases do not concern with clauses (a) to (c). Clause (d) of sub-Section (1) of Section 209, which is relevant reads as under: -

> "(d) The income-tax calculated under clause (a) or clause (b) or clause (c) shall, in each case, be reduced by the amount of income-tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income (as computed before allowing any deductions admissible under this Act) which has been taken into account in computing the current income or, as the case may be, the total income aforesaid; and the amount of income-tax as so reduced shall be the advance tax payable."

8. This clause categorically uses the expression "deductable or collectable at source" and it is this clause which is incorporated by the Uttaranchal High Court in the said judgment (supra) in the manner already pointed above. The scheme of the Act in respect of non-

i.e. any person responsible for paying to a non-resident, to deduct income tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the non-resident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remedy-less and therefore can take action against the payer under the provisions of Section 201 of the Income Tax Act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non-resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of Section 191 of the Act along with Section 209 (1) (d) of the Act. For this reason, it would not be permissible for the Revenue to charge any interest under Section 234B of the Act.

9. We thus, answer the aforesaid question in favour of the assessee

assessee was not liable to pay any interest under Section 234B of the Act following the judgments of the Uttaranchal and Bombay High Courts.

10. In some of the appeals, which pertains to the assessee-M/S. Mitsubishi Corporation, the additional issue in respect of the interest under Section 234D is raised by the Revenue. The Tribunal has held that the assessee was not liable to pay the interest under the aforesaid provision which was normally charged from the assessee for the assessment years 2002-03 and 2003-04.

11. We find from the order of the Tribunal that the Tribunal was of the opinion that Section 234D was applicable only from the assessment year 2004-05 onwards and not in the earlier assessment years and therefore no interest under that provision could be levied for the period prior to the assessment year 2004-05. For this purpose, the Tribunal has relied upon its own judgment rendered by a Special Bench of the ITAT in the case of ***ITO vs. Ekta Promoters Pvt. Ltd. 305 ITR (1) ITAT.***

12. Mr. Venkatraman, the learned Senior Counsel appearing for the assessee submitted that even if Section 234D related to the charge of interest, it was in the nature of a substantive provision as held by the Supreme Court in the case of ***J.K. Synthetics Ltd. vs. Commercial Taxes Officer 119 CTR 222 SC.*** Thus, he submitted that it could not have retrospective operation, more so when it was not so provided by the Legislature while inserting Section 234D. We find substance in this

Supreme Court has categorically held that the provision for charging interest would be construed as a substantive law. The following discussion in the said judgment is reproduced hereinafter: -

> "7. It is well known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same.[See Whitney vs. IRC 1926 AC 37, CIT vs. Mahaliram Ramjidas (1940) 8 ITR 442 (PC), Indian United Mills Ltd. vs. CEPT (1955) 1 SCR 810 and Gursahai Saigal vs. CIT (1963) 3 SCR 893]. But it must also be realized that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount.[See Bengal Nagpur Railway Co. Ltd. vs. Ruttanji Ramji AIR 1938 PC 67 and Union of India vs. A.L. Rallia Ram (1964) 3 SCR 164 at 185-190]. Our attention was, however, drawn by Mr. Sen to two cases. Even in those cases, CIT vs. M. Chandra Sekhar (1985) 44 CTR (SC) 110 : (1985) 151 ITR 433 (SC) and Central Provinces Manganese Ore Co. Ltd. vs. CIT (1986) 58 CTR (SC) 112: (1986) 160 ITR 961 (SC), all that the

compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the legislature to provide for charging interest, the Court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the Associated Cement Co's case, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the legislature."

13. We are, therefore, of the opinion that the Tribunal was right in deleting the interest under Section 234D of the Act for the period prior to the assessment year 2004-05. As a result, these appeals of the Department are dismissed.

A.K. SIKRI
(JUDGE)

REVA KHETRAPAL
(JUDGE)

August 30, 2010
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