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

Reserved on: 17.12.2009
% Pronounced on : 22.01.2010

1) **ITA No. 119 of 2002**

Commissioner of Income Tax, Delhi-IV . . Appellant
through : Mr. N.P. Sahini and Mr.P.C. Yadav, Advocates.

VERSUS

M/s. Insilco Ltd. . .Respondent
through: Mr. V.P. Gupta and Mr. Basant Kumar, Advocates

2) **ITA No. 247 of 2003**

Commissioner of Income Tax ...Appellant
through: Mr. Sanjeev Sabharwal, Advocate.

Versus

M/s. Saw Pipes Ltd. …..Respondent
through: Ms. Kavita Jha, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. In both these appeals, the identical question of law was framed, which relates to charging of interest under Section 234B of the Income Tax Act (hereinafter referred to as 'the Act'). For answering this questions, we can take note of the facts of ITA No.119 of 2002.

2. The respondent assessee was incorporated on 19.10.1988 to manufacture and import and export silco and donatives thereof. It filed its return for the first time on 31.12.1990 which related to the assessment year 1990-91 declaring 'Nil' income. In this return the

aggregate interest of Rs.6,48,190/- received by the asse certain deposits was set off against interest paid on deferred payment facility amounting to Rs.12,03,993/-. The Assessing Officer refused to allow this set off in his assessment order dated 26.2.1992. His view was that the interest income earned by the assessee during the period of construction is chargeable to tax under the head "Income from other sources". The interest paid, on the other hand, was not directly relatable to interest received by the assessee and therefore, interest income could not be set off against interest paid. The AO also, *inter* alia, gave direction for charging interest under Sections 234B and 234 of the Income Tax Act, similar direction to charge interest under Section 234B of the Act was given by the Assessing Officer while passing the assessment order in respect of the year 1991-92 under similar circumstances.

3. The assessee filed appeals before the CIT(A) against the orders of the AO in respect of both these assessment years, who dismissed these appeals. The assessee approached the Income-Tax Appellate Tribunal (ITAT) by filing further appeal. In these appeals the assessee also took the plea that provisions of Section 234B were not applicable in the case of the assessee. The ITAT has decided both these appeals vide impugned order dated 5.11.2001. In respect of assessment year 1990-91 the appeal is decided against the assessee holding that the same is covered by the decision of the apex court in the case of ***Tuticorin Alkali Chemicals & Fertilizers Ltd.*** (222 ITR 172 SC). However, for the assessment year 1991-92 the ITAT ordered that the AO would allow to set off income earned against interest paid and the net amount would be taken for the purpose of taxation. The ITAT also held that interest under Section 234B of the Act cannot be charged in

the case of the assessee as the assessee held a bona fide be there was no income chargeable to tax because interest paid exceeded the receipt of interest and that the decision of ***Tuticorin Alkali Chemicals*** (supra) was not applicable in the relevant assessment year 1991-92.

4. In this appeal filed by the assessee we are concerned with only this aspect of Section 234B and the appeal was admitted on the following question of law:-

> "Whether the Tribunal was correct in law in deleting interest charged under section 234-B of the Income Tax Act, 1961 in respect of assessment year 1991-92?"

5. Section 234B of the Act, inter alia, stipulates that where an assesssee, who is liable to pay advance tax under Section 208, has failed to pay such tax, the assessee shall be liable to pay simple interest @ 1% for every month or part of a month comprised in the period from the first day of April next following such financial year to the date of determination of total income under sub-Section (1) of Section 143 and where a regular assessment is made, to the date of such regular assessment. In the present case, as per the ITAT, in the assessment order passed for the year 1991-92 only direction given was to "charge interest" and no Section under which interest is chargeable was specified. For this reason, the Tribunal held that since there was no specific direction to charge interest under Section 234B, levy of interest was not permissible under the provision in view of the judgment of Patna High Court in the case of ***CIT* v.*Ranchi Club Limited***, 222 ITR 44 affirmed by the apex court in ***Smt. Tejkumari* v. *CIT***, 247 ITR 210. Other reason for deleting the interest was that

the assessee held bona fide belief that no advance tax was under Section 208 of the Act.

6. Mr. Sahni, learned counsel appearing for the Revenue, submitted that interest under Section 234B was chargeable on account of non-deposit of the advance tax, which was compensatory in nature. Therefore, whether it was a bona fide mistake or otherwise, was immaterial. The moment there was "default" in making payment of advance tax, provisions of Section 234B stand attracted and interest become payable. He submitted that the law as contained in section 234B of the Act has undergone a change through Finance Act 1987 with effect from 01.04.1989 making it mandatory for the assessing authority to charge the interest chargeable under section 234A, 234B and 234C of the Act. The expression 'shall' used in the said section cannot be construed as 'may'. In fact, this issue has been examined at length by the Five Judges Constitutional Bench of the apex court in the case of ***Anjum M.H. Ghawswala & Others*** reported in 252 ITR 1 (though in the context of power of Settlement Commission to reduce or waive the interest) and it is held that the assessing authority has no power to reduce or waive interest statutorily payable under the said sections. As regards non-mentioning of Section 234B of the Act in the assessment order, submission of Mr. Sahni was that the AO has clearly given a general direction for charging interest and thereafter proceeded to charge the interest chargeable under section 234A and 234B of the Act in the computation sheet. The assessment order and computation sheet are of the same date and both are under section 143(3) of the Act as clearly indicated on the same. To support this plea he furnished the copies of the computation sheet. It is on the basis of the assessment order and the computation sheet

that the demand notice under section 156 is prepared and is the assessee to pay the demand. In this connection, reliance is placed on the decision of the Supreme Court in the case of ***Kalyan Kumar Roy v. Commissioner of Income Tax*****,** 191 ITR 634 (SC).

7. Learned counsel for the respondent, on the other hand, made his submissions on the lines of reasoning adopted by the Tribunal. He argued that unless there was a "default" within the meaning of Section 208 and 209 of the Act, no interest could be payable. Further, there had to be a specific order determining whether interest is to be paid under Section 234B of the Act or not. Therefore, it was necessary for the Assessing Officer to give specific direction for charging of interest under Section 234B of the Act inasmuch as the assessment order was like court order and ITNS 150 (Tax Computation Form) is like a decree as held in ***Uday Mishthan Bhandar* v. *CIT***, 222 ITR 44. Dilating on this submission, he argued that the Assessing Officer was required to determine various points for charging interest under the aforesaid provision, namely, (a) the assessee was liable to pay advance tax under Section 208 and had failed to pay such tax or advance tax paid is less than 90% of assessed tax; (b) the assessee was liable to pay advance tax under Section 208 of the Act read with Section 209(1)(a) on estimated current income. Income-Tax calculated thereon is to be reduced by the amount of tax, which would be deductible or collectable at source. A person liable to pay advance tax is supposed to pay the same on or before each of the due date specified under Section 211. Therefore, a finding was also required to be recorded that the tax was not paid by the stipulated due dates. Since the assessee is to pay the advance tax under Section 208 of the Act, equal to the amount of tax

calculated on his estimated current income, it is also to be r that such estimate was not bona fide.

8. His further submission was that period for which interest is chargeable was also required to be determined which exercise was not undertaken in the present case. Learned counsel made a fervent plea to the effect that the judgment of the Supreme Court in ***Anjum M.H. Ghawswala*** (supra) was not applicable as that case related to the powers of the Settlement Commission to waive the interest charged and in that context the Supreme Court held that interest is mandatory and cannot be waived by the Settlement Commission. According to him, this case did not relate to the modality of charging interest. On this aspect, he submitted, the judgment of the Supreme Court in ***CIT* v.*Ranchi Club Limited*** (supra), as affirmed by ***Smt. Tejkumari* v. *CIT*** (supra) was clearly applicable. On the same analogy the learned counsel tried to distinguish the judgment of the Supreme Court in ***Kalyan Kumar Roy v. Commissioner of Income Tax*** (supra).

9. We have given our due consideration to the aforesaid submissions of the counsel on the either side. The important fact which is to be borne in mind in the present case is that no advance tax was paid by the assessee at all in the assessment year in question on the plea that such tax was not payable as the assessee had set off the interest income earned by it against the interest paid. This move of the assessee was held to be not a proper course of action while passing the assessment order. It was held that the interest earned by the assessee during the period of construction is to be treated as income

challenged. Therefore, we have to proceed on the basis th was income earned by the assessee in the relevant year in the form of interest under the head "Income from other sources", which was liable to tax and on this, advance tax was also payable. Another material fact which is to be borne in mind is that while passing the assessment order, the Assessing Officer proceeded to charge the interest, *inter alia*, under Section 234B of the Act in the computation sheet. The assessment order and computation sheet are of the same date and both are under Section 143(3) of the Act.

10. In this background, when the interest is calculated as per the provisions of Section 234B of the Act on the same, non-mentioning of the provisions of Section 234B of the Act specifically, would not make any difference. Admittedly, the specific direction was given to "charge interest" and then simultaneously on the same date, in computation sheet, interest under Section 234B is added. Reading the two documents together, it can safely be inferred that the Assessing Officer meant that such interest is to be charged under Section 234B of the Act. Not mentioning this Section in particular in the assessment order, therefore, would not be of much consequence.

11. Further as no advance tax was paid at all by the assessee during the assessment year in question, argument that the Assessing Officer was required to determine various aspects before charging the interest under Section 234B, as pointed out by the learned counsel, would not be applicable in the instant case.

12. With this, we proceed to determine as to whether non-payment of the advance tax under the bona fide belief that it was not payable would

exonerate the assessee of its liability to pay interest under 234B of the Act. As pointed out above, the Tribunal has set aside the orders holding that no interest could be charged under Section 234B of the Act only on the ground that the assessee had held a belief, which on the face of it, is a bona fide belief that it had no tax chargeable to tax and relied upon the judgment of Patna High Court in ***CIT* v. *Ranchi Club Limited*** (supra), which has been affirmed by the Supreme Court in ***Smt. Tejkumari* v. *CIT*** (supra).

13. In ***CIT* v. *Ranchi Club Limited*** (supra) the question was as to whether levy of interest under Section 234A was justified. Liability under this provision arises where the assessee fails to file the return of income either under Section 139(1) or (4) or Section 142(1) of the Act pursuant to the notices issued there under or files the same after the due date. In this context, the Patna High Court was of the opinion that where return is filed within time, but a particular item of income is in dispute as being includible within tax income or not, the mere issue of notice under Section 142 will not confer jurisdiction upon the authority to levy interest under Section 242A of the Act. Section 234B of the Act, on the other hand, authorizes the Revenue to charge interest in case no advance tax is paid or short paid. Sub-Section (1) thereof read as under:-

> "(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of one and one half per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year 1927 to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.

Explanation 1 : In this section, "assessed tax" means, - (a) for the purposes of computing the interest payable under section 140A, the tax on the total income as declared in the return referred to in that section;

(b) In any other case, the tax on the total income determined under sub-section (1) of section 143 or on regular assessment, as reduced by the amount of tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income 1928.

Explanation 2 : Where, in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3 : In Explanation 1 and in sub-section (3), "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143."

14. From the facts already narrated above, it cannot be disputed that it ultimately turned out that tax was payable on the interest income earned by the assessee and thus, the assessee was liable to pay advance tax as well under Section 208 of the Act, inasmuch as the tax payable on the said income earned was more than ten thousand rupees. In normal course, therefore, he was to compute the said advance tax and pay the same in the manner stipulated in Section 209 and 210 of the Act. Thus, we have to hold that there is a default in payment of advance tax. This leaves us with the question as to whether an assessee would be absolved of payment of such interest if the default was bona fide. For this purpose one will have to go into the character of interest payable under this provision. This was precisely the scope of discussion by the Constitution Bench of the Supreme Court in ***Anjum M.H. Ghawswala*** (supra). No doubt, the Supreme Court was concerned with the powers of Settlement Commission in granting waiver of interest. However, answer to this depended upon the character of interest payable under the provisions of Section 234A, 234B and 234C. The Court, in no uncertain terms,

held that the interest payable under those provisions is compensatory in nature. The Court read the provisions as mandatory in character holding that after the amendment in the provisions in the Finance Act, 1987 with the use of the expression "shall" therein, the Legislature clearly indicated that its intention was to make the collection of statutory interest mandatory. It is for this purpose the Court proceeded to decide that even the Settlement Commission, which was vested with the vast power, had no power to waive the interest payable under these provisions. Going by this interpretation to the provisions of Section 234A, 234B and 234C, as given by the Constitution Bench of the apex court, it is clear that interest is payable in case advance tax is not paid by stipulated dates and there is a 'default'. It would be immaterial whether such a default is intentional or bona fide because of the reason that the provision is compensatory in nature inasmuch as the Revenue is deprived of such payment which should have been made on an earlier dated and therefore, becomes entitled to charge the interest, backed by the aforesaid statutory provision for the period of delay in receiving the payment of tax. The plea of *bona fide* default, therefore, would be totally alien. We, thus, answer the question posed in favour of the Revenue and against the assessee. Accordingly, the orders of the Tribunal in both these appeals are set aside. There shall, however, be no orders as to costs.

(A.K. SIKRI)
JUDGE

(SIDDHARTH MRIDUL)
JUDGE

January22, 2010