
(2009) 10 BOM CK 0107

In the Bombay High Court

Case No : Income-tax Appeals (Lodging) No's. 3821, 3823 and 3826 of 2008 and Income Tax Appeals No's. 2244, 2245, 2246, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2499,

Commissioner of Income Tax

APPELLANT

Vs

Emilio Ruiz Berdejo

RESPONDENT

Date of Decision : 15-10-2009

Acts Referred:

Finance Act, 2000 — Section 2

Income Tax Act, 1961 — Section 115JAA, 139(1), 139(4), 14, 140A

Citation : (2010) 320 ITR 190 : (2010) 186 TAXMAN 390

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Vimal Gupta, for the Appellant; F.V. Irani and A.K. Jasani, for the Respondent

Final Decision : Dismissed

Judgement

V.C. Daga, J.—All these appeals filed u/s 260A of the Income Tax Act, 1961, ("the Act" for short) are against the order dated June 27, 2008, of the Income Tax Appellate Tribunal ("ITAT" for short), Pune Bench, Pune, in the Income Tax appeals arising from assessments meant for the assessment year 2001-02 and raising three questions of law.

2. Counsel appearing for the appellant and respondent agree that the first two questions sought to be raised in all these group of appeals are covered against the Revenue by virtue of the judgments of the hon'ble Supreme Court. The first question stands answered in the case of Hindustan Coca Cola Beverage Pvt. Ltd. Vs. Commissioner of Income Tax, , whereas the second question stands answered by the decision of the apex court in the case of Commissioner of Income Tax and Another Vs. Pranoy Roy and Another, . On this backdrop the first two questions can hardly be said to be substantial questions of law warranting consideration afresh at the hands of this court.

3. Having said so, we are now required to consider the third question, which revolves around the interpretation of Sections 234B and 234C of the Act resulting from the failure on the part of the assessee to pay advance tax which, in our view, needs consideration. Hence, the appeal stands admitted to adjudicate upon the third question reading as under:

(iii) Whether, on the facts and in the circumstances of the case and in law, the hon'ble Income Tax Appellate Tribunal erred in not appreciating that the assessee had failed to pay advance tax and, hence, Sections 234B and 234C were rightly invoked?

4. The learned Counsel for the respondent has waived service in all the appeals. The group of appeals involving identical question is heard finally by consent of the parties. All these appeals involve common question of law based on identical facts, as such the factual matrix is drawn from I.T.A. (L) No. 3823 of 2008 (CIT v. Mr. Emilio Ruiz Berdejo) for considering the rival submissions.

5. Having heard the rival parties, before considering the aforesaid question, it is necessary to draw the factual matrix giving rise to the above question.

Factual matrix:

6. The respondent is an assessee under the provisions of the Act. The relevant assessment year is 2001-02. The respondent-assessee an individual is an employee of M/s. Tetra Pak International SA. He was deputed to India for working in M/s. Tetra Pak (India) Ltd. for the previous year ended on March 31, 2001, relevant to the assessment year 2001-02.

7. The assessee filed his original return of income for the assessment year 2001-02 on July 26, 2001, declaring total income in the sum of Rs. 34,69,150. The assessee had received from outside India an amount of Rs. 90,50,970 from M/s. Tetra Pak International SA, which he did not disclose in his original return of income, filed by him. In the opinion of the Assessing Officer, the income chargeable to tax had escaped assessment within the meaning of Section 147 of the Act. A notice u/s 148 of the Act was issued on November 10, 2006. It was served on the assessee on November 17, 2006. In response thereto, the assessee filed a revised return of income on June 26, 2007, showing his income at Rs. 1,25,20,120. An assessment was completed u/s 143(3) read with Section 147 of the Act, vide order dated September 14, 2007, determining the total income of the assessee in the sum income of Rs. 1,25,20,120 by making an addition of Rs. 90,50,970 on account of addition of the amount which the assessee had received from outside India, i.e., from M/s. Tetra Pak International SA with further order directing levy of interest under Sections 234A, 234B and 234C of the Act.

8. The assessee, not satisfied with the action of the Assessing Officer levying interest under Sections 234A, 234B and 234C on the income determined u/s 143(3) read with Section 147 of the Act preferred an appeal before the

Commissioner of Income Tax (Appeals)-III, Pune, which was dismissed by an order dated February 28, 2008, affirming the order of the Assessing Officer.

9. Aggrieved by the aforesaid order of the Commissioner of Income Tax (Appeals)-III, Pune, dated February 28, 2008, an appeal was carried by the respondent to the Income Tax Appellate Tribunal, Pune Bench (B), Pune. The Income Tax Appellate Tribunal, vide its order dated June 27, 2008, allowed the appeal holding that the issue of interest under Sections 234B and 234C of the Act is covered by the Special Bench decision in the case of (2008) 112 ITD 1 , wherein the Special Bench relying upon another decision of the Special Bench in the case of Motorola Inc. v. Deputy CIT [2005] 95 ITD 269 had ruled that interest under Sections 234B and 234C of the Act could not have been levied, since the assessee's employer had paid interest for the delayed payment under Sections 234B and 234C of the Act. It was further held that in view of the apex court judgment in the case of Prannoy Roy and Another Vs. Commissioner of Income Tax and Another, the interest u/s 234A was not leviable in a case where there was delay in filing of return provided the entire tax liability paid. On these findings the Tribunal, vide its order dated June 27, 2006, was pleased to hold the levy of interest under Sections 234A, 234B and 234C of the Act was not permissible.

10. Being dissatisfied with the aforesaid order of the Tribunal, the Revenue is before this court u/s 260A of the Act, raising the third substantial question of law extracted herein above warranting consideration on the rival submissions sketched hereinbelow.

Rival submissions:

11. Shri Gupta, learned Counsel for the appellant/Revenue, urged that the Income Tax Appellate Tribunal has erroneously concluded that the imposition of two compensatory levies by way of interest under Sections 234B and 234C are operating in the same field for the identical lapse for the same lapse. In his submission, the lapse on the part of the assessee/employee, having failed to pay advance tax made them liable to pay interest, being compensatory levy under Sections 234B and 234C of the Act for delayed payment. He further submits that the payment made by the deducting company (employer) after issuance of notice u/s 147 read with 148 of the Act cannot be considered as payment towards tax deducted at source. Such payment can only be considered as other payment made on behalf of the assessee. He further submits that it was obligatory on the part of the assessee to make payment of the advance tax u/s 191 of the Act, as stipulated under Sections 207 and 208 of the Act in respect of amounts on which tax had not been deducted at source in accordance with the provisions of Chapter XVII of the Act. He further urged that, on the facts and circumstances of the case, the Tribunal has ignored the fact that the central issue was not of interest but was that of non-payment of advance tax eventually attracting compensatory levy of interest under Sections 234B and 234C of the Act. In his concluding submission, Mr. Gupta submits that the order of the Tribunal is

palpably erroneous, wrong and perverse based on misinterpretation of the provisions of Sections 234A, 234B and 234C of the Act warranting inference at the hands of this court.

12. Per contra, Mr. Irani, learned Counsel appearing with Mr. Jasani, for the respondents urged that the interest under Sections 234B and 234C of the Act can be levied only if an assessee is liable to pay advance tax but defaults in payment thereof. According to him, in the present case, the assessee was not liable to pay advance tax at all as such there was no question of his being liable to pay interest either u/s 234B or u/s 234C of the Act.

13. According to Mr. Irani, two steps are required to be taken in determining an assessee's liability to pay advance tax; in the first step the assessee's current income is required to be estimated and Income Tax thereon at the prescribed rate is required to be calculated as per Section 209(1)(a); and in the second step, Income Tax deductible at source is required to be reduced from the figure arrived at in the first step above, and it is only if any balance is remaining then only the assessee would be liable to pay advance tax u/s 209(1)(d).

14. Mr. Irani further submits that the entire tax on the estimated salary income of an employee is required to be deducted by his employer. The employee is not liable to pay advance tax. Hence, the assessee-employee cannot be subjected to interest liability u/s 234B and Section 234C of the Act. Reliance is placed on Section 192(1) of the Act, which lays down that, every employer, who is responsible for paying to an employee, income chargeable under the head "Salaries", is obliged to deduct tax therefrom at the "average rate of income tax".

15. In the submission of Mr. Irani, the expression "average rate of income tax" is defined in Section 2(10) of the Act to mean the rate arrived at by dividing the amount of Income Tax calculated on the total income. Thus, an employer, u/s 192(1) of the Act, has to deduct, by way of tax deducted at source, the entire tax on the income of the employee. In other words, the entire tax on the employee's salary income would be deductible by the employer, and, as such, there would be no liability on the part of the employee to pay advance tax and, consequently, no liability on the part of the employee to pay interest u/s 234B and Section 234C. He submits that these propositions are fully supported by the decision of this court in the case of *The Director of Income Tax (International Taxation) Vs. NGC Network Asia LLC*, .

16. In the submission of Mr. Irani, the Revenue's argument that Section 192 of the Act does not apply to a non-resident company stands negated by the decision of the Supreme Court in the case of *Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Pvt. Ltd.*, where the apex court has held that Section 192 of the Act applies equally to non-resident companies.

17. Mr. Irani, alternatively, without prejudice to his above submission, submits that in any event, considering the fact that the first step requires an estimation of current income, it, thus, follows that if two views are possible regarding the

taxability of a receipt in an employee's hands and if the employee, under a bona fide belief regarding its non-taxability, excludes it from the estimate of his current income, there can be no question of his being in default of payment of advance tax and, consequently, he cannot be made liable for interest u/s 234B/234C of the Act. In support of this submission, reliance is placed on the judgment of the Uttaranchal High Court in Commissioner of Income Tax and Another Vs. Sedco Forex International Drilling Co. Ltd., followed by this court in The Director of Income Tax (International Taxation) Vs. NGC Network Asia LLC, .

18. Lastly, Mr. Irani submits that in any event, the employer-company having already paid interest u/s 201(1A) of the Act on account of non-deduction, by it, of tax deducted at source, the employee-respondent cannot be subjected to interest liability u/s 234B/234C of the Act. In his submission, it is now well settled that interest payable under the Act is compensatory in nature and hence there cannot be a double recovery of interest by the Revenue. Reliance is placed on the judgment of the Supreme Court in the case of Hindustan Coca Cola Beverage Pvt. Ltd. Vs. Commissioner of Income Tax, to contend that deduction of tax at source by a payer and direct payment of tax by the payee were alternative and not cumulative methods of tax recovery, so that once there is direct payment of tax by the payee, the liability of the payer for interest u/s 201(1A) of the Act for default in deducting tax at source would cease.

19. On the above premise, the submission advanced by Mr. Irani is that, once the Revenue has received and accepted tax and interest from the employer, in respect of non/short deduction of tax deducted at source on the employees' salary, the Revenue cannot seek to recover tax or interest in respect of the same salary from the employee. He has also reiterated that the interest u/s 201(1A) of the Act having been paid by the employer and accepted by the Revenue is in the sum of Rs. 8,62,41,956 whereas the demand of interest raised by the Revenue on the various nonresident employees was Rs. 7,74,23,326 as such the employer has actually paid interest more than the demand made.

Relevant provisions of the Act:

192. (1) Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct Income Tax on the amount payable at the average rate of Income Tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year.

(1A) Without prejudice to the provisions contained in Sub-section (1), the person responsible for paying any income in the nature of a perquisite which is not provided for by way of monetary payment, referred to in Clause (2) of Section 17, may pay, at his option, tax on the whole or part of such income without making any deduction therefrom at the time when such tax was otherwise deductible under the provisions of Sub-section (1).

(1B) For the purpose of paying tax under Sub-section (1A), tax shall be

determined at the average of Income Tax computed on the basis of the rates in force for the financial year, on the income chargeable under the head "Salaries" including the income referred to in Sub-section (1A), and the tax so payable shall be construed as if it were, a tax deductible at source, from the income under the head "Salaries" as per the provisions of Sub-section (1), and shall be subject to the provisions of this Chapter.

(2) Where, during the financial year, an assessee is employed simultaneously under more than one employer, or where he has held successively employment under more than one employer, he may furnish to the person responsible for making the payment referred to in Sub-section (1) (being one of the said employers as the assessee may, having regard to the circumstances of his case, choose), such details of the income under the head "Salaries" due or received by him from the other employer or employers, the tax deducted at source therefrom and such other particulars, in such form and verified in such manner as may be prescribed, and thereupon the person responsible for making the payment referred to above shall take into account the details so furnished for the purposes of making the deduction under Sub-section (1).

201.(1) Where any person, including the principal officer of a company,-

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in Sub-section (1A) of Section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that no penalty shall be charged u/s 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

(1A) without prejudice to the provisions of Sub-section (1), if any such person, principal officer or company as is referred to in that Sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at one per cent, for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid and such interest shall be paid before furnishing the statement in accordance with the provisions of Sub-section (3) of Section 200.

207. Liability for payment of advance tax. - Tax shall be payable in advance during any financial year, in accordance with the provisions of Sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as current income.

209. Computation of advance tax.- (1) The amount of advance tax payable by an assessee in the financial year shall, subject to the provisions of Sub-sections (2) and (3), be computed as follows, namely:

(a) where the calculation is made by the assessee for the purposes of payment of advance tax under Sub-section (1) or Sub-section (2) or Sub-section (5) or Sub-section (6) of Section 210, he shall first estimate his current income and Income Tax thereon shall be calculated at the rates in force in the financial year;....

(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.

234A. (1) Where the return of income for any assessment year under Sub-section (1) or Sub-section (4) of Section 139, or in response to a notice under Sub-section (1) of Section 142, is furnished after the due date, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent, for every month or part of a month comprised in the period commencing on the date immediately following the due date, and,

(a) where the return is furnished after the due date, ending on the date of furnishing of the return; or

(b) where no return has been furnished, ending on the date of completion of the assessment u/s 144,

on the amount of the tax on the total income as determined under Sub-section (1) of Section 143, and where a regular assessment is made, on the amount of the tax on the total income determined under regular assessment, as reduced by the amount of,

(i) advance tax, if any, paid;

(ii) any tax deducted or collected at source;

(iii) any relief of tax allowed u/s 90 on account of tax paid in a country outside India;

(iv) any relief of tax allowed u/s 90A on account of tax paid in a specified territory outside referred to in that Section;

(v) any deduction, from the Indian Income Tax payable, allowed u/s 91, on account of tax paid in a country outside India; and

(vi) any tax credit allowed to be set off in accordance with the provisions of

Section 115JAA.

Explanation 1. - In this section, "due date" means the date specified in Sub-section (1) of Section 139 as applicable in the case of the assessee.

Explanation 2. - In this sub-section, "tax on the total income as determined under Sub-section (1) of Section 143" shall not include the additional Income Tax, if any, payable u/s 143.

Explanation 3. - Where, in relation to an assessment year, an assessment is made for the first time u/s 147 or Section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 4....

(2) The interest payable under Sub-section (1) shall be reduced by the interest, if any, paid u/s 140A towards the interest chargeable under this section.

(3) Where the return of income for any assessment year, required by a notice u/s 148 or Section 153A issued after the determination of income under Sub-section (1) of Section 143 or after the completion of an assessment under Sub-section (3) of Section 143 or Section 144 or Section 147, is furnished after the expiry of the time allowed under such notice, or is not furnished, the assessee shall be liable to pay simple interest at the rate of one per cent, for every month or part of a month comprised in the period commencing on the day immediately following the expiry of the time allowed as aforesaid, and,

(a) where the return is furnished after the expiry of the time aforesaid, ending on the date of furnishing the return; or

(b) where no return has been furnished, ending on the date of completion of the reassessment or recomputation u/s 147 or reassessment u/s 153A,

on the amount by which the tax on the total income determined on the basis of such reassessment or recomputation exceeds the tax on the total income determined under Sub-section (1) of Section 143 or on the basis of the earlier assessment aforesaid.

Explanation....

(4) Where as a result of an order u/s 154 or Section 155 or Section 250 or Section 254 or Section 260 or Section 262 or Section 263 or Section 264 or an order of the Settlement Commission under Sub-section (4) of Section 245D, the amount of tax on which interest was payable under Sub-section (1) or Sub-section (3) of this Section has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable, and such notice of demand shall be deemed to be a notice u/s 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this Section shall apply in respect of assess assessment for the assessment year commencing on the 1st day of April, 1989, and subsequent assessment years.

234B. (1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax u/s 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 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 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 the tax on the total income determined under Sub-section (1) of Section 143 and where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of,

(i) any 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;

(ii) any relief of tax allowed u/s 90 on account of tax paid in a country outside India;

(iii) any relief of tax allowed u/s 90A on account of tax paid in a specified territory outside India referred to in that Section;

(iv) any deduction, from the Indian Income Tax payable, allowed u/s 91, on account of tax paid in a country outside India; and

(v) any tax credit allowed to be set off in accordance with the provisions of Section 115JAA.

Explanation 2. - Where, in relation to an assessment year, an assessment is made for the first time u/s 147 or Section 153A, 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 u/s 143.

(2) Where, before the date of determination of total income under Sub-section (1) of Section 143 or completion of a regular assessment, tax is paid by the

assessee u/s 140A or otherwise,

(i) interest shall be calculated in accordance with the foregoing provisions of this Section up to the date on which the tax is so paid, and reduced by the interest, if any, paid u/s 140A towards the interest chargeable under this Section;

(ii) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax so paid together with the advance tax paid falls short of the assessed tax.

(3) Where, as a result of an order of reassessment or recomputation u/s 147 or Section 153A, the amount on which interest was payable under Sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of one per cent, for every month or part of a month comprised in the period commencing on the day following the date of determination of total income under Sub-section (1) of Section 143 and where a regular assessment is made as is referred to in Sub-section (1) following the date of such regular assessment and ending on the date of the reassessment or recomputation u/s 147 or Section 153A, on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under Sub-section (1) of Section 143 or on the basis of the regular assessment aforesaid.

Explanation....

(4) Where, as a result of an order u/s 154 or Section 155 or Section 250 or Section 254 or Section 260 or Section 262 or Section 263 or Section 264 or an order of the Settlement Commission under Sub-section (4) of Section 245D, the amount on which interest was payable under Sub-section (1) or Sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice u/s 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this Section shall apply in respect of assessment for the assessment year commencing on the 1st day of April, 1989, and subsequent assessment years.

234C. (1) Where in any financial year,- (a) the company which is liable to pay advance tax u/s 208 has failed to pay such tax or-

(i) the advance tax paid by the company on its current income on or before the 15th day of June is less than fifteen per cent, of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of

September is less than forty five per cent, of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than seventy five per cent, of the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one per cent, per month for a period of three months on the amount of the shortfall from fifteen per cent, or forty five per cent, or seventy five per cent., as the case may be, of the tax due on the returned income;

(ii) the advance tax paid by the company on its current income on or before the 15th day of March is less than the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one per cent, on the amount of the shortfall from the tax due on the returned income:

Provided that if the advance tax paid by the company on its current income on or before the 15th day of June or the 15th day of September, is not less than twelve per cent, or, as the case may be, thirty-six per cent, of the tax due on the returned income, then, it shall not be liable to pay any interest on the amount of the shortfall on those dates;

(b) the assessee, other than a company, who is liable to pay advance tax u/s 208 has failed to pay such tax or,-

(i) the advance tax paid by the assessee on his current income on or before the 15th day of September is less than thirty per cent, of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than sixty per cent, of the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent, per month for a period of three months on the amount of the shortfall from thirty per cent, or, as the case may be, sixty per cent, of the tax due on the returned income;

(ii) the advance tax paid by the assessee on his current income on or before the 15th day of March is less than the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent, on the amount of the shortfall from the tax due on the returned income:

Provided that nothing contained in this Sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of underestimate or failure to estimate (a) the amount of capital gains; or (b) income of the nature referred to in Sub-clause (ix) of Clause (24) of Section 2,

and the assessee has paid the whole of the amount of tax payable in respect of income referred to in Clause (a) or Clause (b), as the case may be, had such income been a part of the total income, as part of the remaining installments of advance tax which are due or where no such installments are due, by the 31st day of March of the financial year:

Provided further that nothing contained in this Sub-section shall apply to any

shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge u/s 2 of the Finance Act, 2000 (10 of 2000), as amended by the Taxation Laws (Amendment) Act, 2000 (1 of 2001), and the assessee has paid the amount of shortfall, on or before the 15th day of March, 2001, in respect of the installment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000, and the 15th day of December, 2000:

Provided also that nothing contained in this Sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge u/s 2 of the Finance Act, 2000 (10 of 2000), as amended by the Taxation Laws (Amendment) Act, 2001 (4 of 2001), and the assessee has paid the amount of shortfall on or before the 15th day of March, 2001, in respect of the installment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000, and 15th day of December, 2000.

Explanation. - In this section, "tax due on the returned income" means the tax chargeable on the total income declared in the return of income furnished by the assessee for the assessment year commencing on the 1st day of April immediately following the financial year in which the advance tax is paid or payable, as reduced by the amount of,-

(i) any tax deductible or collectible 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;

(ii) any relief of tax allowed u/s 90 on account of tax paid in a country outside India;

(iii) any relief of tax allowed u/s 90A on account of tax paid in a specified territory outside India referred to in that Section;

(iv) any deduction, from the Indian Income Tax payable, allowed u/s 91, on account of tax paid in a country outside India; and

(v) any tax credit allowed to be set off in accordance with the provisions of Section 115JAA.

(2) The provisions of this Section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989, and subsequent assessment years.

Consideration:

20. Having heard both parties and having examined the provisions of the Act relevant for the purpose of deciding the issues involved in the present appeal, one has to turn to Chapter XVII of the Act which provides for collection and recovery of tax. Chapter XVII is divided into various Parts A to F. Part A provides for deduction at source and advance payment with which presently we are

concerned for deciding the appeal. Section 190(1), *inter alia*, provides that notwithstanding 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 (or collection) at source (or by advance payment or by payment under Sub-section (1A) of Section 192), as the case may be, in accordance with the provisions of Chapter XVII. Section 191 provides that in the case of income in respect of which provision is not made under Chapter XVII for deducting Income Tax at the time of payment, and in any case where Income Tax has not been deducted in accordance with the provisions of this Chapter, Income Tax shall be payable directly by the assessee. Part B of Chapter XVII consists of group of Sections which provide for deduction of tax at source. Section 192 provides for deduction of tax on income chargeable under the head "Salary" by any person responsible for paying any income chargeable under the head "Salaries". Section 4(2), *inter alia*, provides in respect of income chargeable under Sub-section (1), Income Tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of the Income Tax Act, 1961. Section 192 is a machinery provision. It deals with collection and recovery of tax, this provision is referable to Section 4(2). The scheme of tax deduction at source, not only applies to the amount paid, such as salaries, etc., but the said provisions also apply to gross sums, the whole of which may not be income or profits in the hands of the recipient, such as payment to contractors and sub-contractors. The purpose of the tax deduction at source the provisions in Chapter XVII-B is to see that the sum which is chargeable u/s 4 for levy and collection of Income Tax, the payer should deduct tax thereon at the rates in force. The said tax deduction at source provisions are meant for tentative deduction of Income Tax subject to regular assessment.

21. The aforesaid provisions and the scheme of the Act vis-a-vis tax deduction at source were the subject-matter of consideration by the apex court in the case of Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Pvt. Ltd., . The apex court, while considering the question "Whether the tax deducted at source provisions in Chapter XVII-B, which are in the nature of machinery provisions enabling collection and recovery of tax are at all applicable to payments made abroad by the foreign company/head office which had seconded the expatriate(s) for rendering services in India to the tax deductor-assessee (employer)" was pleased to hold that Section 192 of the Act is very much applicable even to a non-resident company and observed as under (page 245):

Therefore, if a sum that is to be paid to the non-resident is chargeable to tax, tax is required to be deducted. The sum which is to be paid may be income out of different heads of income mentioned in Section 14, that is to say, income from salaries, income from house property, profits and gains of business, capital gains and income from other sources. The scheme of the tax deducted at source provisions applies not only to the amount paid, which bears the character of "income" such as salaries, dividends, interest on securities, etc., but the said provisions also apply to gross sums, the whole of which may not be income or

profits in the hands of the recipient, such as payment to contractors and sub-contractors. The purpose of the tax deducted at source provisions in Chapter XVTI-B is to see that the sum which is chargeable u/s 4 for levy and collection of Income Tax, the payer should deduct tax thereon at the rates in force, if the amount is to be paid to a non-resident. The said tax deducted at source provisions are meant for tentative deduction of Income Tax subject to regular assessment, see *The Transmission Corporation of A.P. Ltd. and Anr Vs. The Commissioner of Income Tax, A.P.*, at page 594).

The apex court further observed (page 246):

Applying the above test, we are of the view that if the payments of home salary abroad by the foreign company to the expatriate has any connection or nexus with his rendition of service in India, then such payment would constitute income which is deemed to accrue or arise to the recipient in India as salary earned in India in terms of Section 9(1)(ii) (which is one of the heads of income). Section 9(1)(ii) lays down that income which falls under the head "Salaries", if it is earned in India, shall be deemed to accrue or arise in India. In fact, Section 9 explains the expression "is deemed to accrue or arise to him in India" used in Section 5(2)(b). Section 9 is not only a machinery section, it has the effect of rendering a person liable to tax on incomes which do not accrue or arise or are not received in India but which are deemed to be taxable by virtue of Section 9 which applies to residents and non-residents. Section 9 is, therefore, a typical example of a combination of a machinery provision which also provides for chargeability .

22. It is thus, clear that if a sum is to be paid to the non-resident is chargeable to tax, tax is required to be deducted.

23. Having seen the aforesaid scheme of the Act and law laid down by the apex court, the further question which needs consideration is: the consequences of failure to deduct advance tax in whole or part or after deducting, one fails to pay the tax under the Act, then such person is made liable to pay simple interest at certain percentage for every month or part of a month on such amount from the date on which such tax was deductible to the date on which such tax is actually paid in accordance with the provisions of Sub-section (3) of Section 200. The said Section 200 creates an obligation on the person deducting tax to pay the same within the prescribed time to the credit of the Central Government or as the Board may direct. Section 201 provides for consequences of failure to deduct or to pay tax, whereas Sub-section (1A) of Section 201 provides for liability to pay interest. Now, liability to pay interest as stated u/s 201 is on the person who fails to deduct advance tax. As against this, if one turns to the Chapter XVII of the Act, it provides for chargeability of interest in certain cases. Section 234A provides for payment of interest for defaults in furnishing return of income, whereas Section 234B provides for payment of interest for defaults in payment of advance tax and Section 234C provides for payment of interest for deferment of advance tax. All these three Sections create liability on the assessee to pay

interest for the default committed by him in the circumstances mentioned in the said sections.

24. The apex court also had an occasion to consider the very same question with regard to the nature of liability of interest in the case of *Prannoy Roy and Another Vs. Commissioner of Income Tax and Another*, wherein the apex court was pleased to hold that interest charged u/s 234A of the Act is not by way of penalty. It is levied to compensate the Revenue in order to avoid from being deprived of payment of tax on the due date. Interest is held to be payable where the tax had not been deposited prior to the due date of filing of the Income Tax return. In other words, it was held that where the tax already paid by the assessee was not less than the tax payable on the returned income which was accepted, the question of levy of interest u/s 234A does not arise.

25. Section 234B which provides for interest for defaults in payment of advance tax was also a subject-matter of scrutiny at the hands of the Uttarakhand High Court in the case of *Commissioner of Income Tax and Another Vs. Sedco Forex International Drilling Co. Ltd.*, wherein the court was pleased to hold that Section 234 which imposes interest is compensatory in nature and not as a penalty. The very same view holds good for Section 234C of the Act.

26. The Division Bench of this court had an occasion to consider the very same issue in the case of *The Director of Income Tax (International Taxation) Vs. NGC Network Asia LLC*, wherein this court ruled as under (page 190 of 313 ITR):

We are in respectful agreement with the view taken in the case of *Commissioner of Income Tax and Another Vs. Sedco Forex International Drilling Co. Ltd.*, by the Uttarakhand High Court. We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee-assessee.

27. The aforesaid view of the Division Bench is in consonance with the view taken by the apex court in the case of *Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Pvt. Ltd.*, and *Prannoy Roy and Another Vs. Commissioner of Income Tax and Another*.

28. At this juncture, it is also relevant to mention that the apex court also had an occasion to consider the effect of payment of tax deducted at source by the deductor u/s 201(1A) of the Act and consequences thereof in the case of *Hindustan Coca Cola Beverage Pvt. Ltd. Vs. Commissioner of Income Tax*, wherein the apex court was pleased to hold that once the deductor has satisfied, the officer-in-charge of tax deducted at source, that taxes due have been paid by the deductee-assessee, then the assessee has to pay only interest for late payment u/s 201(1A) and then no tax can further be recovered. The apex court has also considered the effect of circular dated January 29, 1997 issued by the Central Board of Direct Taxes, which declares that (page 230 of 293 ITR):

no demand visualized u/s 201(1) of the Income Tax Act should be enforced after

the tax deductor has satisfied the officer-in-charge of tax deducted at source, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest u/s 201(1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty u/s 271C of the Income Tax Act.

29. In the instant case, the deductor has already discharged the tax liability with interest payable u/s 201(1A) of the Act. As such no further interest can be claimed by the Revenue from the respondents either u/s 234A or 234B or 234C of the Act. The view taken by the Tribunal for the reasons stated cannot be faulted.

30. In the result, all these appeals are without any substance. All these appeals are dismissed with no order as to costs. The subject question referred to hereinabove is thus, answered in favour of the assessee and against the Revenue.