

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

+ **ITA No.1890 of 2010**

% *Reserved On: April 18, 2011*
Pronounced On: May 11, 2011

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Ms. P.L. Bansal, Sr. Advocate
with Mr. Deepak Anand,
Advocate.

VERSUS

BHARAT ALUMINIUM CO. LTD. . . .RESPONDENT

through: Mr. M.S. Syali, Sr. Advocate
with Ms. Madhavi Swaroop,
Advocate and Mr. Mayank
Nagi, Advocate.

CORAM :-

**HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA**

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. This appeal was admitted on the following substantial questions of law:

"Whether ITAT was correct in law in allowing interest u/s 244A of the Act to the assessee if the advance tax paid by the assessee was in excess of MAT credit available to the assessee?"

2. We may first recapitulate, in brief, the events which have led to the aforesaid question. For the Assessment Year 1998-99, the respondent/assessee filed return of income tax declaring income at ₹153.97 crores. Tax payable on this income worked out to ₹53,89,06,594/-. The assessee had paid advance tax of ₹55.65 crores and in addition thereto against the tax deducted at source (TDS), a credit of ₹29,86,273/- was also claimed. In this way, the total amount paid worked out to ₹ 55,94,86,273/- . While processing the return under Section 143(1)(a), the AO had also charged interest under Section 234C at ₹55,52,656/-. Thus, the total tax and interest payable on the income returned worked out to ₹54,44,59,250/- as per the normal provisions of the Act.
3. Later on, the case was selected under scrutiny and during the course of assessment, various additions, disallowances and additional claims were made and ultimately after the Income Tax Appellate Tribunal's (hereinafter referred to as 'the Tribunal') order, the total income under the normal provisions was worked out by the AO in terms of order dated 20.11.2007 under Section 254 of the Act at ₹147,14,95,301/-. However, subsequently while determining the income for the Assessment Year 1997-98 giving the appeal effect for those very years (Assessment Years 1991-92, 1994-95), the income finally

assessable worked out less than the income assessable under the MAT provisions under Section 115JA of the Income Tax Act ('the Tax' for brevity). Accordingly, the MAT credit in terms of Section 115JA of the Act of the Assessment Year 1997-98 was available for adjustment in Assessment Year 1998-99 at ₹9,61,45,549/- in terms of Section 115JAA of the Act.

4. In order to set off the MAT credit available to the appellant in respect of the tax paid under MAT for 1997-98, the AO rectified the order for Assessment Year 1998-99 under Section 154 of the Act on 15.02.2008, thereby allowing the MAT credit of ₹9,61,05,549/- brought forward from Assessment Year 1997-98 and recalculated the tax, but no recalculation in respect of the interest under Section 234C of the Act charged by the AO at the time of processing the return under Section 143(1)(a) of the Act on 13.11.1998 at ₹55,52,656/- was made. In this way, the AO had worked out a refund of ₹9,61,45,549/- to the appellant vide order dated 15.02.2008. On this refund, the AO had not allowed the interest under Section 244A of the Act in view of proviso to sub-Section (2) of Section 115JAA of the Act.
5. Thus, in the order dated 15.02.2008 passed by the AO under Section 154 of the Act the AO neither charged interest under Section 234C of the Act which was earlier charged at

₹55,52,656/- nor granted any interest under Section 244A of the Act.

6. Against this order of the AO, the assessee went in appeal before the CIT (A) with the plea that the assessee was entitled to interest under Section 244A of the Act on the amount of refund of advance tax which had become payable to it on the basis of orders of the Tribunal. The assessee also objected to the action of the AO for not recalculating interest chargeable under Section 234C of the Act.
7. As per the provisions of Section 244A of the Act, where refund of any amount becomes due to the assessee, *inter alia*, on account of advance tax, the assessee is entitled to interest at the rate prescribed in the said provision from the first of April of the assessment year to the date on which the refund is granted. Thus, the interest is payable if refund is due out of advance tax paid by the assessee. The plea of the assessee was that while paying advance tax, the assessee was entitled to adjust the MAT credit, as the MAT credit was not set off and the amount was paid as the advance tax. After the MAT credit was allowed to the assessee, it is the excess advance tax which became payable and therefore, the provisions of Section 244A were applicable and the assessee was entitled to interest thereupon. The assessee had relied upon the judgment of the

jurisdictional High Court, i.e., this Court in the case of ***Commissioner of Income Tax Vs. Jindal Exports [314 ITR 137]***. The plea of the assessee was accepted by the CIT (A) holding that the amount which became refundable to the assessee was on account of advance tax paid in excess by the assessee and therefore, Section 244A of the Act was attracted and the assessee was entitled to interest under the said provision on the amount of refund of ₹9,61,45,549/-. As a consequence, while hearing the appeal of the assessee, the CIT (A) directed the AO to recalculate the interest chargeable under Section 234C of the Act as well as after adjustment of set off of MAT credit available to the appellant.

8. The Revenue, dissatisfied with the aforesaid outcome, approached the Tribunal challenging the said order of the CIT (A). However, the rationale given by the CIT(A) in taking the aforesaid view has been accepted in entirety by the Tribunal vide impugned order dated 19.02.2010 resulting into the dismissal of the appeal of the Revenue. It is under these circumstances, the present appeal is preferred under Section 260A of the Act before this Court challenging the aforesaid order of the Tribunal.
9. When this appeal came up for hearing, after notice, on 18.04.2011, it was admitted on the question of law already

formulated above. Immediately thereupon, even the final arguments were heard, as the counsel for both the parties were willing for the same.

10. As per the Revenue, MAT credit in respect of earlier assessment years became available only when appeal for Assessment Year in question, i.e., 1998-99 was filed. Thus, the assessee was required to deposit the advance tax as per the normal provisions contained in the Income Tax Act. Thus, the amount which became refundable as per the Revenue, was not on account of advance tax, but when the adjustment of MAT credit was to be given on the basis of decision of the Tribunal in respect of Assessment Year 1997-98 and in a situation like this, provisions of Section 244A were not attracted and no such interest under the said provision was payable to the assessee. In support of this submission, reliance is placed on Proviso to sub-Section (2) of Section 115JAA of the Act.
11. This contention of the Revenue cannot be accepted having regard to the ratio of the judgment of this Court in ***Jindal Exports (supra)***. In that case, interpreting the scheme of charging interest under Section 234B and 234C of the Act on advance tax not paid in conjunction with the MAT credit, the Division Bench of this Court held that the minimum alternate

tax credit under Section 115JAA is nothing but credit for tax paid under Section 115JA of the Act. Minimum alternate tax credit is granted for tax already paid under Section 115JA. Thus, the sum represented by the available minimum alternate tax credit would fall within the expression "tax already paid under any provisions of this Act". This means that the expression "such tax" referred to in Section 140A(1) would mean the tax payable on the basis of the return minus, *inter alia*, the available minimum alternate tax credit which represents the tax already paid under the provision of Section 115JA of the Act. The adjustment or set off in respect of the available minimum alternate tax credit is implicit in the meaning of "such tax". The Court was also of the opinion that the amendment introduced by the Finance Act, 2006, with effect from April 1, 2007 in Explanation 1 after Section 234B of the Act merely clarifies and makes explicit what was already implicit. Even if the amendment had not been introduced, the expression "such tax" as appearing in Section 140A would have reference to the tax payable on the basis of the returns minus the minimum alternate tax credit claimed to be set off in accordance with the provisions of Section 115JAA of the Act. This Court categorically decided that the tax due to the extent of available minimum alternate tax credit stood paid. The

Revenue had the amount representing the minimum alternate tax credit at the very beginning of the year. The Revenue was not put to any loss. There was no case made out for compensation. Unless it could be shown that the interest sought to be charged was by way of compensation of loss suffered by the Revenue, such "interest" could not be regarded as interest under Sections 234B and 234C. The interest under Sections 234B and 234C was to be charged after the tax credit (minimum alternate tax) available under Section 115JAA was set off against tax payable on the total income of the year in question.

12. Since it is categorically held that the MAT credit is available for adjustment and set off on the first date of the previous year even before the installment of advance tax is due on the current income and accordingly, the advance tax liability has to be worked out on the current income only after the adjustment and set off the MAT credit brought forward from earlier years. It would mean that the AO had to first set off the MAT credit out of the income tax worked out on the total assessable income and then the credit of advance tax paid by the assessee as well as the TDS and tax collection has to be allowed. When the matter is looked into from this angle, what becomes payable to the assessee is the refund of advance tax given in

excess and interest thereupon under Section 244A of the Act.

Relevant portion of Section 244A of the Act reads as under:

"Section 244A: Interest on refunds

(1) Where refund of any amount becomes due to the assessee under this Act 1963], he shall, subject to the provisions of this section, be entitled to receive, in addition to the said amount, simple interest thereon calculated in the following manner, namely :-

(a) Where the refund is out of any tax collected at source under section 206C or 1964 paid by way of advance tax or treated as paid under section 199, during the financial year immediately preceding the assessment year, such interest shall be calculated 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 of the assessment year to the date on which the refund is granted.

Provided that no interest shall be payable if the amount of refund is less than ten per cent of the tax as determined under sub-section (1) of section 143 or on regular assessment;

(b) In any other case, such interest shall be calculated at the rate of one per cent for every month or part of a month comprised in the period or periods from the date or, as the case may be, dates of payment of the tax or penalty to the date on which the refund is granted.

Explanation : For the purposes of this clause, "date of payment of tax or penalty" means the date on and from which the amount of tax or penalty specified in the notice of demand issued under section 156 is paid in excess of such demand."

13. In ***Jindal Exports (supra)***, this Court held that the amount which was paid as advance tax, it is that amount which becomes refundable, as MAT credit was available which was to

be adjusted first. The Court relied upon the earlier Division Bench's judgment of this Court in the case of **Dr. Prannoy Roy Vs. Commissioner of Income Tax [2002] 254 ITR 755** to which one of us (A.K. Sikri, J.) was a Member of the Bench. In that case, the provisions of Section 234A were in issue. The question before the Court was whether interest could be charged under Section 234A when, though the return had not been filed in time, the tax had been paid. The argument raised on behalf of the Revenue that such payment of tax did not strictly comply with the meaning of advance tax and would, therefore, have to be disregarded for the purposes of charging interest under Section 234A, was rejected. The Court also held that interest under Section 234A was compensatory in nature and unless any loss was caused to the Revenue, the same could not be charged from the assessee. In the process, the Court dealt with the expression "advance tax". Explaining the interpretation given to the aforesaid expression, the Division Bench made the following observations in **Jindal Exports (supra)**:

"54. We feel that it would be fruitful to remember what was said by Sinha C.J. (as his Lordship then was), while speaking for a Division Bench of this Court in Dr. Prannoy Roy v. CIT (supra), with regard to the interpretation to be placed on the term "advance tax" as defined in Section 2(1) of the said Act. It was observed that an interpretation

clause, as is well-known, is not a positive enactment. It was specifically noticed that Section 2 of the said Act began with the words "unless the context otherwise requires". The Division Bench held that though "advance tax" has been defined to mean the advance tax payable in accordance with the provisions of Chapter XVII-C, such a definition is not an exhaustive one and that "advance tax", apart from being used only for the purpose of Chapter XVII-C, may be held to be tax paid in advance before its due date. In other words, the term "advance tax" is not restricted to mean the advance tax payable in accordance with the provisions of Chapter XVII-C. If the context requires, "advance tax" may extend beyond the territory of Chapter XVII-C and could very well refer to any tax paid in advance before its due date. MAT credit represents that portion of MAT which was not actually payable by the company assessee but, has all the same, been collected by the Government. It represents the tax paid before it is due. In our view, the MAT credit which is available for set off in a year falls within the meaning of "advance tax" because the context requires us to give such a purposive meaning."

14. The issue raised by the Revenue would no more survive and is put beyond the pale of controversy by a recent judgment of the Apex Court in the case of ***Commissioner of Income Tax Vs. Tulsyan NEC Ltd.*** **330 ITR 226**. In that judgment, it has been authoritatively held that MAT credit admissible in terms of Section 115JAA has to be set off against the tax payable (assessed tax) before calculating interest under Sections 234A, 234B and 234C of the Act. Discussing the scheme of tax payable by the companies under MAT provision, the Court held that as per provisions of Section 115JA, a company is liable to pay tax on 30% of book profits, if the income computed under normal provisions of the Act is less than 30% of the book

profits. Thus, the Assessee is required to compute income chargeable to tax on two alternative basis - (i) income computed under normal provisions of the Act and (ii) 30% of book profits as disclosed in the P & L Account prepared in accordance with Parts II and III of Schedule VI to the Companies Act, 1956, subject to the adjustments specified in the Explanation to Section 115JA. The higher of the two computations is deemed to be the "total income" chargeable to tax and tax is payable accordingly. Thus, Section 115JA enacts a deeming fiction by deeming 30% of book profits to be the "total income" chargeable to tax. The amount of tax paid under Section 115JA is held to be a "tax" payable under the Act, as defined in Section 2(43). (See ***National Thermal Power Corporation Ltd. v. Union of India* 192 ITR 187 (Delhi)**).

15. Again in no uncertain terms, the Apex Court laid down that when tax is paid by the assessee under Section 115JA, he becomes entitled to claim the credit of such tax in the manner prescribed and:

".....Such a right gets crystallized no sooner the tax is paid by the assessee under Section 115JA, as per the return of income filed by the assessee for a previous year (say, year one)...."

(emphasis supplied)"

16. The scheme of Section 115JA and 115JAA (relating to tax credit) has been explained by the Court in the following manner:

"We have discussed hereinabove the scheme of Section 115JA(1) and Section 115JAA. The entire scheme of Sections 115JA(1) and 115JAA shows that if an Assessee is entitled to a tax credit as a consequence of the Assessee making payment of tax under Section 115JA(1) in the year one, then, the set off of such tax credit follows as a matter of course once the conditions mentioned in Section 115JAA are fulfilled and the grant of such credit is not dependent upon determination by the A.O. save and except that the ultimate amount of tax credit to be allowed will be dependent upon the final determination of the total income for the first assessment year. There is no provision under Section 115JAA which postpones the right of the Assessee to claim set off to the determination of the total income by the A.O. in the first assessment year. Entitlement/right to claim set off is different from the quantum/quantification of that right. Entitlement of MAT credit is not dependent upon any action taken by the Department. However, quantum of tax credit will depend upon the assessment framed by the A.O. Thus, the right to set off arises as a result of the payment of tax under Section 115JA(1) although quantification of that right depends upon the ultimate determination of total income for the first assessment year. Further, an Assessee has a right to take into account the set off even while estimating its liability to pay advance tax on the "current income" in accordance with the provisions of Chapter XVII-C."

17. The Court also specifically dealt with the question of calculating advance tax when the company has MAT credit. Following answer is provided:

"The issue which crops up for decision is - how should the advance tax be calculated when the Company has MAT credit?

To answer, we need to look at Section 234B. Under that section, "assessed tax" means the tax on the total income determined under Section 143(1) or on regular assessment under Section 143(3) 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. The definition, thus, at the relevant time excluded MAT credit for arriving at assessed tax. This led to immense hardship. The position which emerged was that due to omission on one hand MAT credit was available for set off for five years under Section 115JAA but the same was not available for set off while calculating advance tax. This dichotomy was more spelt out because Section 115JAA did not provide for payment of interest on the MAT credit. To avoid this situation, Parliament amended Explanation 1 to Section 234B by Finance Act, 2006 w.e.f. 1.4.2007 to provide along with tax deducted or collected at source, MAT credit under Section 115JAA also to be excluded while calculating assessed tax.

From the above, it is evident that any tax paid in advance/pre-assessed tax paid can be taken into account in computing the tax payable subject to one caveat, viz, that where the Assessee on the basis of self computation unilaterally claims set off or MAT credit, the Assessee does so at its risk as in case it is ultimately found that the amount of tax credit availed was not lawfully available, the Assessee would be exposed to levy of interest under Section 234B on the shortfall in the payment of advance tax. We reiterate that we cannot accept the case of the Department because it would mean that even if the Assessee does not have to pay advance tax in the current year, because of his brought forward MAT credit balance, he would nevertheless be required to pay advance tax, and if he fails, interest under Section 234B would be chargeable. The consequence of adopting the case of the Department would mean that MAT credit would lapse after five succeeding assessment years under Section 115JAA(3); that no interest would be payable on such credit by the Government under the proviso to Section 115JAA(2) and that the Assessee would be liable to pay interest under Sections 234B and C on the shortfall in the payment of advance tax despite existence of MAT credit standing to the account of the Assessee. Thus, despite MAT credit standing to the account of the Assessee, the liability of the Assessee gets increased instead of it getting reduced."

18. It is clear from the above that the provision of Section 115JAA has been inserted by the Legislature only for the purpose of

adjustment and set off of MAT credit in respect of the tax paid by the assessee in earlier years on the income which was not otherwise taxable under the law. As per the provision of Section 115JAA, the MAT credit in respect of the tax paid in earlier years is available for set off against the tax liability arisen on the total income computed as per the normal provisions of law in subsequent year. As per the provision of sub-Section (3) of Section 115JAA, the amount of tax credit of a particular year is available to be set off upto the fifth assessment year immediately succeeding the assessment year in which tax credit becomes allowable under sub-Section (1) of Section 115JAA of the Act.

19. Having interpreted the provisions in the aforesaid manner, we are clear in mind that Proviso to sub-Section (2) of Section 115JAA of the Act will have no application to the facts situation prevailing in the instant case. This proviso will have limited application only in those cases where tax credit is allowed to be set off under sub-Section (1) of Section 115JAA of the Act. On the other hand, Section 244A of the Act deals with altogether different situation. Once we take into account the interpretation given by the Supreme Court in ***Tulsyan NEC Ltd. (supra)***, viz., the MAT credit is available on the very first day and such a right gets crystallized no sooner the tax is

payable to the assessee under Section 115JA of the Act which is to be adjusted first, then what becomes refundable after adjustment of MAT credit is the excess advance tax, which was paid by the assessee. On such advance tax, which becomes refundable, interest under Section 244A of the Act has to be calculated and paid.

20. We, thus, answer the question formulated above, in favour of the assessee and against the Revenue and dismiss this appeal.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MAY 11, 2011

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