

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

ITA No. 239 of 2017 (O&M)
Date of decision: 13.7.2017

Principal Commissioner of Income Tax-Faridabad

.....Appellant

Vs.

M/s NHPC Limited, Sec-33, NHPC Complex, Faridabad.

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE ANIL KSHETARPAL**

Present: Mr. Tajender K. Joshi, Senior Standing Counsel.
for the appellant-revenue.

Ajay Kumar Mittal,J.

1. The delay in refiling the appeals is condoned.
2. This order shall dispose of ITA Nos. 238, 239 and 240 of 2017 as according to the learned counsel for the appellant-revenue, the issue involved in all these appeals is identical. However, the facts are being extracted from ITA No. 239 of 2017.
3. ITA No. 239 of 2017 has been preferred by the appellant-revenue under Section 260A of the Income Tax Act, 1961 (in short, "the Act") against the order dated 08.02.2016, Annexure.IV, passed by the Income Tax Appellate Tribunal, New Delhi (in short, "the Tribunal") in ITA No. 433/DEL/2013, for the assessment year 2004-05, claiming following substantial questions of law:-

(i)“Whether on the facts and in circumstances of the case and in law, the Hon’ble ITAT was right in law in deleting the interest charged under Section 234B amounting to ₹ 76,52,089/- even though the interest charged under Section 234B was consequential in nature?

(ii) Whether on the facts and in circumstances of the case and in law, the Hon’ble ITAT was right in law in deleting the interest charged under Section 234D amounting to ₹ 3,11,509/- and withdrawal of interest under Section 244A amounting to ₹ 10,78,208/- even though the interests charged were consequential in nature and as per provisions of law?

4. A few facts relevant for the decision of the controversy involved as narrated in ITA No.239 of 2017 may be noticed. The respondent assessee filed its original return of income on November 1, 2004 declaring a loss of ₹ 124,66,88,768/- which was processed under Section 143(1) of the Act, on 13.12.2004 at the declared book profit of ₹ 284,21,60,970/-. Subsequently, the assessee revised its return of income on 23.12.2005, declaring a loss of ₹ 173,16,33,768/- and the book profit of ₹ 374,06,15,970/-.The revised return was accepted by passing an order under Section 154 of the Act and finally regular assessment under Section 143(3) of the Act was framed vide order dated 29.12.2007 determining a book profit of ₹ 483,33,60,110/-.The assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [CIT(A)] and obtained relief of ₹ 109,27,44,140/- and thus the book profit was determined at ₹ 374,06,15,970/-. Thereafter, Section 115JB of the Act was amended by Finance Act, 2009. The amendment was made effective w.e.f. 1st April 2001. In view of the amendment and to recompute the book profit of the assessee company, the Assessing Officer issued notice under Section 154 of

the Act dated 15.3.2011 which was served upon the assessee to represent his case on 23rd March 2011. Vide letter dated 23rd March 2011, the assessee filed the details of provisions made for doubtful debts. As per the details, the assessee made provision for doubtful debts amounting to ₹ 28,28,14,257/- which had been reflected in Schedule XIV relating to (Generation, Administration and Other Expenses) to profit and loss account. Out of this provision of ₹ 28,28,14,257/-, the assessee had used/adjusted ₹ 19,51,55,078/- and thus, the balance amount of ₹ 8,76,59,179/- was added to the book profit of the assessee company. The tax was calculated accordingly. Aggrieved by the interest levied under Sections 234B, 234D of the Act and withdrawal of the interest under Section 244A of the Act, the assessee filed appeal before the CIT(A). Vide order dated 22.10.2012, the CIT(A) allowed the appeal of the assessee partly. Not satisfied with the order, the department as well as the assessee filed appeals before the Tribunal. Vide order dated 08.02.2016, Annexure A.IV, the Tribunal dismissed the appeal filed by the revenue and allowed the one filed by the assessee. It was held that rectification provisions invoked by the Assessing Officer were not correct. Thus, the order passed by the CIT(A) on this count was reversed. It was further held that the Assessing Officer was not empowered to invoke the provisions of Section 154 of the Act on the matter already decided by the CIT(A) under Section 154 (1A) of the Act and therefore, interest under Section 234D of the Act and interest withdrawal under Section 244A of the Act were consequential in nature. It was held that no interest shall be chargeable under Section 234B of the Act on tax liability arising on the assessee by virtue of retrospective amendment under Section 115 JB of the Act. Hence, the instant appeals by the appellant-revenue.

5. We have heard the learned counsel for the appellant-revenue.

6. The assessee-company is paying taxes under Section 115JB of the Act. For the assessment year 2004-05, the assessee had debited an amount of ₹ 8,76,59,179/- in the provision made for doubtful debts. This amount was sought to be added back by the Assessing Officer vide assessment order dated 28/29.12.2006 (Annexure A.1), in computing the book profit for working out book profit tax under Section 115JB of the Act by invoking clause (c) of the Explanation (1) to Section 115JB of the Act. Aggrieved by the said assessment order, the assessee preferred appeal to the CIT(A) who deleted the addition on account of provision for bad and doubtful debt. Thereafter, Finance Act, 2009 through retrospective amendment effective from 1.4.2001 vide clause (i) in Explanation 1 to Section 115JB of the Act inter alia provided that “the amount or amounts set aside as provision for diminution in the value of any asset” shall be added to the profits as shown in the statement of profit and loss for the relevant previous years prepared under sub section (2) for ascertaining the ‘book profit’ under the said Section. Whereupon, the Assessing Officer initiated proceedings under Section 154 of the Act and made addition to the book profit of the assessee on account of provision for bad and doubtful debts by applying clause (i) to Explanation 1 to Section 115JB of the Act holding that the amounts set aside as provision for diminution in value of the assets covers this item of expenditure/deduction and is thus required to be added. An appeal was carried to CIT(A) urging that order passed under Section 154 of the Act was invalid. The CIT(A) upheld the action of the Assessing Officer holding that rectification was done in view of retrospective amendment which was not available when CIT(A) had decided the issue and also that the original addition was made by invoking

clause (c) of Explanation 1 to Section 115JB of the Act whereas rectification was being done by applying clause (i) of Explanation 1 to Section 115JB of the Act. On appeal by the assessee to the Tribunal on this issue, the Tribunal relying upon sub section (1A) of section 154 of the Act adjudicated the issue in favour of the assessee. Further, once the primary issue was decided in favour of the assessee, it was held that interest under Sections 234B and 234D of the Act being consequential in nature could not have been charged by the revenue.

7. Though the revenue has filed these appeals claiming substantial questions of law as quoted in para 3 but in our opinion, the following issues would require consideration by the Court:-

- (a) Whether in the facts and circumstances of the case as noticed above, the Assessing Officer was justified in invoking power under Section 154 of the Act to rectify an order on an issue which was subject matter of appeal before CIT(A) though the action under Section 154 of the Act was sought to be initiated in view of retrospective amendment made by Finance Act, 2009 to clause (i) in Explanation 1 to Section 115JB of the Act effective from 1.4.2001?
- (b) Whether in the facts and circumstances of the case, interest under Sections 234B and 234D of the Act could be charged and recovered from the appellant-assessee?

8. Examining question (a) noticed above, it would be expedient to refer to sub sections (1) and (1A) to Section 154 of the Act which would be relevant. It reads as under:-

“154. Rectification of mistake

(1) With a view to rectifying any mistake apparent from the record an income- tax authority referred to, in section 116 may,-

(a) amend any order passed by it under the provisions of this Act;

(b) amend any intimation sent by it under sub- section (1) of section 143, or enhance or reduce the amount of refund granted by it under that sub- section.

(1A) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub- section (1), the authority passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub- section in relation to any matter other than the matter which has been so considered and decided.”

9. The object of Sub section (1) of Section 154 of the Act is to rectify any mistake apparent from the record. Under the said provision, the income tax authority is empowered to rectify any mistake apparent on the record and amend any order passed by it under the provisions of the Act. However, this power is circumscribed by certain restriction which is contained in sub section (1A) of Section 154 of the Act. The language of Section 154(1A) of the Act is abundantly clear whereby any matter which is considered and decided by the appellate authority cannot be reopened or rectified by the authority passing such order. In other words, an authority is empowered to amend or rectify an order passed by it in relation “to any matter other than the matter which has been considered and decided” in appeal or revision. The principle on the basis of which this provision has been incorporated is the doctrine of merger.

10. Applying on the touchstone of the above enunciated principle to the factual matrix involved herein, it may be noticed that the issue relating to deduction of provisions of bad and doubtful debts was the matter which was considered and decided by the CIT(A). In view of Section

154(1A) of the Act, an authority can rectify/reappraise an order where there is a “mistake apparent from record” only on the issues which had not been the subject matter of appeal or revision before the appellate/revisonal authority. The provision of Section 154 of the Act had been invoked by the Assessing Officer. In such circumstances, the rectification could be carried out by the appellate/revisonal authority. Thus, the rectification in the present case was within the domain of the appellate authority, i.e. CIT(A) only and not by the Assessing Officer as the matter of allowability of provision of bad and doubtful debts while working out book profit tax under Section 115 JB of the Act had already been decided by CIT(A). It has been correctly recorded by the Tribunal that only CIT(A) was competent to assume jurisdiction under Section 154 of the Act. The rectification provisions, thus, invoked by the Assessing Officer herein were in violation of Section 154(1A) of the Act. The Tribunal had, thus, rightly adjudicated the said issue in favour of the assessee with the following observations:-

“Therefore in view of above facts, the issue of provision for deduction of provisions of bad and doubtful debts has been considered and decided by Commissioner of Income Tax (Appeals), then rectification is also required to be made by the Commissioner of Income Tax (Appeals) only and not by the Assessing Officer as the matter of allowability of provision of bad and doubtful debts while working out book profit tax under Section 115 JB of the Act has already been decided by CIT(A). Admittedly, in this case, the provisions of Section 154 have been invoked by the Assessing Officer, which he is not competent to do. Clarifying the facts that retrospective amendment made under Section 115 JB of the Act is no doubt a mistake apparent from the record but issue was whether AO can do that when on the same item of expenditure debited in the books of accounts CIT(A) has decided the issue. In our

opinion it is only CIT(A) who is competent to assume jurisdiction under Section 154 of the Act.

9. In the case of India Tin Industries Private Limited (1987) 166 ITR 454 their Lordships of the Karnataka High Court came to hold that sub-section (1A) of Section 154 specifically provides that any matter which has not been considered and decided in any proceeding by way of appeal or revision, may be amended by the authority passing such an order in exercise of its power under Section 154(1). Their Lordships further came to hold that the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by an inferior Tribunal and the other by a superior Tribunal passed in an appeal or revision, there is a fusion or merger of the two orders irrespective of the subject matter of the appeal. The order of assessment made by the Income Tax Officer merges in the order of the Commissioner in so far as it relates to items considered and decided by the Commissioner. That part of the order of assessment, which relates to items not forming the subject-matter of the appellate order and left untouched does not merge in the order of the Commissioner. Even after an appeal from an order of assessment is decided by the Commissioner, a mistake in that part of the order of assessment which was not the subject-matter of the appeal and was thereafter left untouched by the Commissioner, can be rectified by the Income Tax Officer.”

11. Taking up issue at (b) noticed above, the question has two facets. Firstly, once it is held that invoking of power of rectification under Section 154 of the Act was unjustified, the consequential conclusion would be that the chargeability of interest under Sections 234B and 234D of the Act would not arise. To put it differently, since the Assessing Officer is not empowered to invoke the provisions of Section 154 of the Act, on the matter already decided by CIT(A) under Section 154(1A) of the Act,

therefore, interest under Sections 234B and 234D of the Act was consequential in nature. Viewing from another angle, Section 234B of the Act provides for recovery of interest for default in payment of advance tax. The assessee is liable to pay simple interest where he is unable to pay advance tax under Section 208 of the Act but has failed to pay such tax or where the advance tax paid is less than 90% of the assessed tax. Where the advance tax is based on the law prevailing on the date on which tax was due and payable, then in that eventuality any liability created by way of amended provisions subsequently incorporated would not attract payment of interest as there was no default on the date of payment of advance tax. Thus, it cannot be said that the approach of the Tribunal was erroneous or perverse in holding that interest under Section 234B of the Act was not chargeable. The Tribunal placing reliance on the decision of the Bombay High Court in *The Commissioner of Income Tax, Mumbai Vs. JSW Energy Limited* (2015) 379 ITR 36 had correctly decided the issue relating to charging of interest under Section 234B of the Act in favour of the assessee with the following observations:-

“22. Even on merits of the appeal of revenue issue is decided against the revenue. On identical issue considering levy of interest under section 234B of the Act on retrospective amendment in section 115JB of the Act Honourable Bombay High Court in (2015) 60 taxmann.com 303 (Bombay) Commissioner of Income Tax, Mumbai vs. JSW Energy Limited has held that interest under section 234B of the Act cannot be charged when liability on the assessee has arisen because of retrospective amendment in the Act. Honourable High Court has held as under:-

“11. Then Mr. Tejveer Singh vehemently contended that in relation to question No.2, the findings require detailed probe by this Court. He submits that the Tribunal was not

right in law when it held that no interest under Section 234B of the IT Act can be levied. Though several items have to be calculated while computing book profit and in terms of explanation to section 115JB of the IT Act, that explanation has been brought on the statute book and with retrospective effect from 1st April 2001, therefore, this calculation of the Tribunal is erroneous in law.

12. However, Mr. Kaka, learned senior counsel invited our attention to section 234B of the IT Act to submit that this is provision to recover interest for default in payment of advance tax. It directs payment of simple interest and in terms of this provision provided any assessee who is liable to pay advance tax under section 208 has failed to pay such tax or where the advance tax paid is less than 90% of the assessed tax. Thus, this is a provision where under interest could be recovered wherein advance tax for the assessment year fails to take note of the amendment to the Income Tax Act which is brought in subsequently. When the Parliament stepped into to amend the Act though with retrospective effect but in 2008, then there is no default in payment of advance tax for the assessment year 2006-07. The computation of income based on which the advance tax was paid was in tune with the law prevailing on the date on which tax was due and payable. Any further addition in the income by way of amended provisions and which were incorporated subsequently, therefore, does not attract payment of interest as there is no default.

13. Mr. Kaka also invited our attention to section 115JB and particularly, insertion of clause (h) in Explanation (1). That clause reads as under: ‘(h) The amount of deferred tax and the provision therefor.’

14. This clause has been substituted by Finance Act, 2008 with retrospective effect from 1st April 2001. Prior to the same it read as under:- ‘4. Substituted for the portion beginning with the words ‘if any amount referred’ and

ending with the words “as reduced by” by the Finance Act, 2008 w.r.e.f 1.4.2001.”

Prior to its substitution, read as under:

“If any amount referred to in clauses (a) to (g), is debited to the profit and loss account, and as reduced by...’

15. The Tribunal in this regard noticed rival contentions and the admitted facts. It also relied upon and followed the judgment of Hon’ble Calcutta High Court’s judgment has been extracted. The Calcutta High Court, therefore, found that the provisions would indicate that they are mandatory. There is no scope for waiving of the provision. However, in order to attract the provisions contained in section 234B and 234C of the Act, it must be established that the assessee had the liability to pay advance tax as provided under Sections 207 and 208 of the IT Act within the time prescribed under section 211 of that Act. Noting the rival contentions, the Calcutta High Court proceeded to hold that the last date of relevant financial year was 31st March 2001 and on that date, admittedly, the appellant before it had no liability to pay any amount of advance tax in accordance with the then law prevailing in the country. Consequently, the appellant paid no advance tax and submitted its regular returns on 31st October 2001, within the time fixed by law wherein it declared its total income and the book profit both as Nil. The amendment to section 115JB by virtue of finance Act, 2002 and which was referred to in the Calcutta High Court judgment has retrospective effect from 1st April 2001.

17. In the present case, what the assessee has pointed out is that some of the amounts included in the book profits as per Explanation (h) to section 115JB were brought in by the Finance Act, 2008 with retrospective effect from 1st April 2001. The assessee cannot be held to be liable for failing to make a provision for payment of advance tax which was not possible on the last date as per the law then prevailing. Thus, clause (h) which is reproduced above having been

brought in with retrospective effect but by Finance Act 2008, the advance tax computation by the assessee for the year 2006-07 cannot be faulted and it cannot be said that the assessee is in default and therefore, there is any liability to pay interest in terms of section 234B of the Income Tax Act, 1961.

18. In the case of *Star India (P) Limited vs. CCE* (2006) 280 ITR 321/150 Taxman 128 the Hon'ble Supreme Court held that the service of "broadcasting" was made a taxable service with effect from July 16, 2001, by the Finance Act, 2001. The appellant disputed its liability to make any payment for service tax on the ground that it did not broadcast. The Commissioner, however held against the appellant. The matter was carried before the Commissioner of Income Tax (Appeals) and during pendency of appeal the Finance Act, 2001 was amended by the Finance Act, 2002. The effect of amendment, inter alia was to make an agent, such as the appellant, before the Supreme Court, liable to pay service tax as broadcaster.

19. The Supreme Court noted that the appellants' appeal pending before the Commissioner was rejected by him on the basis of this amendment. The Tribunal also maintained this order and that part of the order passed by the Commissioner was not challenged in appeal. However, the appellant was aggrieved by the fact that the Tribunal held it liable to pay interest on the amount which it was required to pay by reason of the 2002 amendment. The assessee contended that once the amendment was brought in, pending the appeal, there was no question of applying section 234B or any analogues provision and payment of interest. It is in that regard that the Hon'ble Supreme Court held as under:-

"7. In any event, it is clear from the language of the validation clause, as quoted by us earlier, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective

effect. It is well established that while it is permissible for the legislature to retrospectively legislate, such retrospectivity is normally not permissible to create an offence retrospectively. There were clearly judgments, decrees or orders of courts and Tribunals or other authorities, which required to be neutralized by the validation clause. We can only assume that the judgments, decree or orders, etc. had, infact held that persons situate like the appellants were not liable as service providers. This is also clear from the explanation to the valuation section which says that no act or acts on the part of any person shall be punishable as an offence which would not have been so punishable if the section had not come into force.

8. The liability to pay interest would only arise on default and is really in the nature of a quasi punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect.”

20. The Supreme Court held that the liability to pay interest would only arise on default and is really in the nature of a quasi punishment. The liability to tax although credited retrospectively could not entail the punishment of payment of interest with retrospective effect. It is this principle which has been laid down which is followed by the Calcutta High Court. It is that principle relied upon by the Calcutta High Court which has been applied by the Tribunal to the facts and circumstances of the present case. We do not think that the assessee before us can be called upon to pay interest in terms of section 234B, once the explanation was introduced or brought in with retrospective effect but by Finance Act, 2008. Then there was no liability to pay interest in terms of this provision. That was because the assessee cannot be termed as defaulter in payment of advance tax. The advance tax computation on the basis of the unamended (sic) provision therefore could not have been entertained.

21. We do not see any broader or wider question arising for our determination as the view taken even on this question is neither perverse or neither vitiated by any error of law apparent on the face of the record.”

23. Therefore, respectfully following the decision of Hon’ble Bombay High Court we also hold that no interest shall be chargeable under section 234B of the Act on tax liability arising on the assessee by virtue of retrospective amendment under section 115JB of the Act.”

12. Learned counsel for the appellant-revenue has not been able to point out any illegality or perversity in the findings recorded by the Tribunal warranting interference by this Court. Thus, no substantial question of law arises. Consequently, all three appeals stand dismissed.

(Ajay Kumar Mittal)
Judge

July 13, 2017
‘gs’

(Anil Kshetarpal)
Judge

Whether speaking/reasoned

Yes

Whether reportable

Yes