

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 09.04.2018

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The Hon'ble Mr.Justice T.S.Sivagnanam

&

The Hon'ble Mr.Justice N.Seshasayee

T.C.(A).No. 875 of 2008

and

M.P.No.1 of 2008

M/s. Tamilnadu Magnesite Ltd.,
5/53, Omalur Main Road,
Jagir Ammapalayam,
Salem - 636 302.

...Appellant in both Appeals

Vs.

The Deputy Commissioner of Income Tax,
Special Range, Salem.

...Respondent in both Appeals

Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the common order of the Income Tax Appellate Tribunal, 'D' Bench, Chennai, in I.T.A.No.1853/MDS/1995 for the assessment year 1990-91, dated 15.06.2007.

For Appellant : Mr. S.Sriraman

For Respondent : Mr. S.Rajesh
Junior Standing Counsel for
Mr.T.R.Senthilkumar
Senior Standing Counsel

COMMON JUDGEMENT

(Judgement of the Court was delivered by **T.S.Sivagnanam, J.,**)

Heard Mr. S.Sriraman, the learned appearing for the appellant, and Mr.S.Rajesh, the learned Junior Standing Counsel for Mr.T.R.Senthilkumar, the learned Senior Standing Counsel for the respondent.

2. The Appeal filed by the assessee is directed against the order passed by the Income Tax Appellate Tribunal, 'D' Bench, Chennai, (henceforth referred to as 'the Tribunal', for brevity) in I.T.A.No.1853/MDS/199 for the assessment year 1990-91, dated 15.06.2007.

3. The Tax Case Appeal is admitted on the following substantial question of law:-

i) Whether on the facts and circumstances of the case, the Tribunal was justified in law, in upholding the levy of interest under Sections 234B and 234C, while computing the MAT under the deeming provisions of Section 115 J of the Act?

4. The assessment for the year 1990-91 was initially completed by the respondent on 10.01.1995 under Section 143 (3) read with Section 147 of the Act at a total taxable income of Rs.23,16,306/- and in terms of Section 115 J of the Act. The respondent, while completing the assessment, levied interest under Section 234 B of the Act. Challenging the said order, raising several grounds, the assessee preferred an Appeal before the Commissioner of Income Tax (Appeals) [CIT (A)], Coimbatore. So far as the levy of interest under Section 234 B was concerned, the question was answered in favour of the Revenue and against the assessee. Challenging the said finding of the CIT (A), the assessee preferred an Appeal to the Tribunal, contending that, the interest under Section 234 B is inapplicable to tax under Section 115 J. The Tribunal, following the decision of the Division Bench of this Court in **CIT (A) Vs. Geetha Ramakrishna Mills Pvt. Ltd.**, reported in [(2007) 288 ITR 489] held that, interest under Sections 234 A, 234 B and 234 C can be levied even if income is computed under Section 115 J. Challenging the said finding, the present Appeal has been filed by the assessee.

5. Mr.S.Sriraman, the learned counsel appearing for the appellant/assessee submitted that, after the decision of the Division Bench

of this Court in the case of **Geetha Ramakrishna Mills Pvt. Ltd** (supra), the Hon'ble Supreme Court considered the very same issue in **Joint Commissioner of Income Tax Vs. Rolta India Ltd. [(2011) 330 ITR 0470]** and by relying upon the said decision, the learned counsel submitted that the decision rendered by the Division Bench of this Court in **Geetha Ramakrishna Mills Pvt. Ltd.,** (supra) does not lay down the correct legal principle and requires reconsideration and the decision, which holds the field on the said issue is the decision of the Karnataka High Court in **Kwality Biscuits Ltd., Vs. CIT [(2000) 243 ITR 0519: (2000) 110 TAXMAN 0047 (Kar)]**, which was affirmed by the Hon'ble Supreme Court in **CIT Vs. Kwality Biscuits Ltd [(2006) 284 ITR 0434 (SC)]**.

6. Further, the learned counsel pointed out that there are other decision of the High Courts, which have held that no interest is payable under Sections 234 B and 234 C, as book profits under Section 115 J can be determined only after the end of the relevant financial year. Therefore, it is submitted that the provisions of Sections 207, 208 or 209 cannot be made applicable and accordingly, interest under Section 234 B and C cannot be charged. The decisions relied upon by the learned counsel for the appellant are as follows:-

- i) **Ester Industrie Ltd., Vs. CIT [(2006) 206 CTR 0260] (Delhi);**
- ii) **DCIT Vs. Associated Crown Closures Pvt. Ltd., (2009) 315 ITR 0291(Gujaraj)**
- iii) **DCIT Vs. Farmson Pharmaceuticals Gujarat Ltd., (2012) 347 ITR 0394 (Gujarat)**
- iv) **DCIT Vs. Madhusudar Industries Ltd., (2010) 322 ITR 0438 (Gujarat)**
- v) **CIT Vs. Nilgiris Tea Estate Ltd., (2009) 312 ITR 0161 (Kerala)**
- vi) **J.K. Synthetics Ltd., Vs. CIT (2017) 395 ITR 0647 (Allahabad)**

7. We may, at this juncture, take a note of the decision of the Division Bench of the High Court of Gujarat, in **DCIT Vs. Sabarmati Paper Udyog Ltd., [(2017) 85 taxmann.com 356 (Gujarat)]**. The said case arose out of an application filed by the Revenue to review the order passed by the Court dismissing the assessee's appeal and answering the question in favour of the Revenue, holding that the interest is chargeable under Sections 234 B and 234C when the total income is assessed to tax under Section 115 J. The Division Bench reviewed the earlier order by allowing the assessee's Appeal and consequently dismissing the revenue's Appeal.

8. The learned Standing Counsel for the Revenue submitted that the decision of the Division Bench of this Court in the case of **Geetha Ramakrishna Mills Pvt. Ltd.** (supra) squarely applies to the facts of the present case and in the said decision, the Division Bench considered the judgment of the Karnataka High Court in **Kwality Biscuits** (supra) but followed the decisions of other High Courts, in Guwathi, Madhya Pradesh, Bombay, Punjab and Haryana, and therefore, held that even where the assessment was made under Section 115 J, interest could be levied.

9. We have heard the learned counsel appearing for the parties and perused the materials placed on records.

10. The Hon'ble Supreme Court, in the case of **Rolta India Ltd.,** (supra) considered the correctness of an order passed by the Karnataka High Court in the case of **Kwality Biscuits** (supra) and the question, which arose for determination is as to whether interest under Section 234 B could be charged on the tax calculated on book profits under Section 115 JA. In the said case, the Tribunal had dismissed the Appeal filed by the assessee on the ground that the case fell under Section 115 JA and not 115 J and the decision of the Karnataka High Court in the case of **Kwality Biscuits Ltd.** (supra) was not applicable. The Hon'ble Supreme Court took into

consideration various decisions of the other High Courts and held that the decision of the Karnataka High Court in the case of **Kwality Biscuits Ltd.** (supra) stood affirmed by the intra Court and held that interest under Sections 234 B and 234 C shall be payable on failure to pay advance tax in respect of tax payable under Section 115 JA/115 JB. The operative portion of the decision is as follows:-

"9. The question which remains to be considered is whether the assessee, which is a MAT Company, was not in a position to estimate its profits of the current year prior to the end of the financial year on 31st March. In this connection the assessee placed reliance on the judgment of the Karnataka High Court in the case of **Kwality Biscuits Ltd. v. CIT** reported in (2000) 243 ITR 519 and, according to the Karnataka High Court, the profit as computed under the **Income Tax Act, 1961** had to be prepared and thereafter the book profit as contemplated under **Section 115J** of the Act had to be determined and then, the liability of the assessee to pay tax under **Section 115J** of the Act arose, only if the total income as computed under the provisions of the Act was less than 30% of the book profit. According to the Karnataka High Court, this entire exercise of computing income or the book profits of the company could be done only at the end of the financial year and hence the provisions of **Sections**

207, 208, 209 and 210 (predecessors of Sections 234B and 234C) were not applicable until and unless the accounts stood audited and the balance sheet stood prepared, because till then even the assessee may not know whether the provisions of Section 115J would be applied or not. The Court, therefore, held that the liability would arise only after the profit is determined in accordance with the provisions of the Companies Act, 1956 and, therefore, interest under Sections 234B and 234C is not leviable in cases where Section 115J applied. This view of the Karnataka High Court in Kwaliti Biscuits Ltd. was not shared by the Gauhati High Court in Assam Bengal Carriers Ltd. v. CIT reported in (1999) 239 ITR 862 and Madhya Pradesh High Court in Itarsi Oil and Flours (P.) Limited v. CIT reported in (2001) 250 ITR 686 as also by the Bombay High Court in the case of CIT v. Kotak Mahindra Finance Ltd. reported in (2003) 130 TAXMAN 730 which decided the issue in favour of the Department and against the assessee. It appears that none of the assessee challenged the decisions of the Gauhati High Court, Madhya Pradesh High Court as well as Bombay High Court in the Supreme Court. However, it may be noted that the judgment of the Karnataka High Court in Kwaliti Biscuits Ltd. was confined to Section 115J of the Act. The Order of the Supreme Court dismissing the Special Leave

Petition in limine filed by the Department against Kwaliti Biscuits Ltd. is reported in (2006) 284 ITR 434. Thus, the judgment of Karnataka High Court in Kwaliti Biscuits stood affirmed. However, the Karnataka High Court has thereafter in the case of [Jindal Thermal Power Company Ltd. v. Dy. CIT](#) reported in (2006) 154 TAXMAN 547 distinguished its own decision in case of Kwaliti Biscuits Ltd. (supra) and held that [Section 115JB](#), with which we are concerned, is a self-contained code pertaining to MAT, which imposed liability for payment of advance tax on MAT companies and, therefore, where such companies defaulted in payment of advance tax in respect of tax payable under [Section 115JB](#), it was liable to pay interest under [Sections 234B](#) and [234C](#) of the Act. Thus, it can be concluded that interest under [Sections 234B](#) and [234C](#) shall be payable on failure to pay advance tax in respect of tax payable under [Section 115JA/115JB](#). For the aforesaid reasons, Circular No. 13/2001 dated 9.11.2001 issued by CBDT reported in 252 ITR(St.)50 has no application. Moreover, in any event, para 2 of that Circular itself indicates that a large number of companies liable to be taxed under MAT provisions of [Section 115JB](#) were not making advance tax payments. In the said circular, it has been clarified that [Section 115JB](#) is a self-contained code and thus, all companies were liable for payment of advance tax under [Section](#)

115JB and consequently provisions of Sections 234B and 234C imposing interest on default in payment of advance tax were also applicable."

11. In the aforementioned decision, (i.e. **Rolta India Ltd.**) the Hon'ble Supreme Court pointed out that the order passed by the Karnataka High Court in the case of **Kwality Biscuits Ltd.** (supra) stood affirmed by the intra Court, as the Special Leave Petition filed by the Department was dismissed in *limine*, as reported in (2006) 284 ITR 0434 (SC). As rightly pointed out by the learned counsel for the assessee, the decision of the Hon'ble Supreme Court in **CIT Vs. Kwality Biscuits Ltd.**, (supra) was rendered in Civil Appeal Nos.1284 and 1285 of 2001, dated 26.04.2006, thereby, confirming the decision of the Karnataka High Court in the case of **Kwality Biscuits Ltd. Vs. CIT** (supra).

12. Thus, in the light of the law laid down by the Hon'ble Supreme Court in the case of **Rolta India Ltd.**, (supra) and taking note of the fact that the decision of the Karnataka High Court in the case of **Kwality Biscuits Ltd.**, (supra) as confirmed by the Hon'ble Supreme Court reported in (2006) 284 ITR 0434 (SC)., whereby, the Civil Appeals filed by the Revenue are dismissed in favour of the assessee, we have to necessarily hold that the Division Bench of this Court in the case of **Geetha**

Ramakrishna Mills Pvt. Ltd. (supra), does not lay down the correct legal principle. We may hasten to add that the Division Bench in **Geetha Ramakrishna Mills Pvt. Ltd's case** (supra), opined that the Appeal filed by the Revenue against the judgement of the Karnataka High Court in the case of **Kwality Biscuits Ltd., (supra)** was dismissal simpliciter and would not be a declaration of the law. However, as pointed out by us earlier, it were the Civil Appeals, which were dismissed by the Hon'ble Supreme Court and not the Special Leave Petitions. In this regard, useful reference may be made to the decision of the Hon'ble Supreme Court in the case of **Kunhaymed and others Vs. State of Kerala and another** reported in **(2000) 245 ITR 360 (SC)**, wherein, it is held as follows :-

“ i) Where an appeal or revision is provided against an order passed by a Court, Tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision by the subordinate forum merges in the decision by the superior forum and it is the latter, which subsists, remains operative and is capable of enforcement in the eye of law.

ii) The jurisdiction conferred by Art. 136 of the Constitution is divisible into two stages. First

stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

iii) Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Art.136 of the Constitution, the Supreme Court may reverse, modify or affirm the judgment, decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can, therefore, be applied to the former and not to the later.

iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either cases, it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the

order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

v) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then, the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of the Art.141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the Court, Tribunal or Authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the Country. But, this does not amount to saying that the order of the Court, Tribunal or Authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

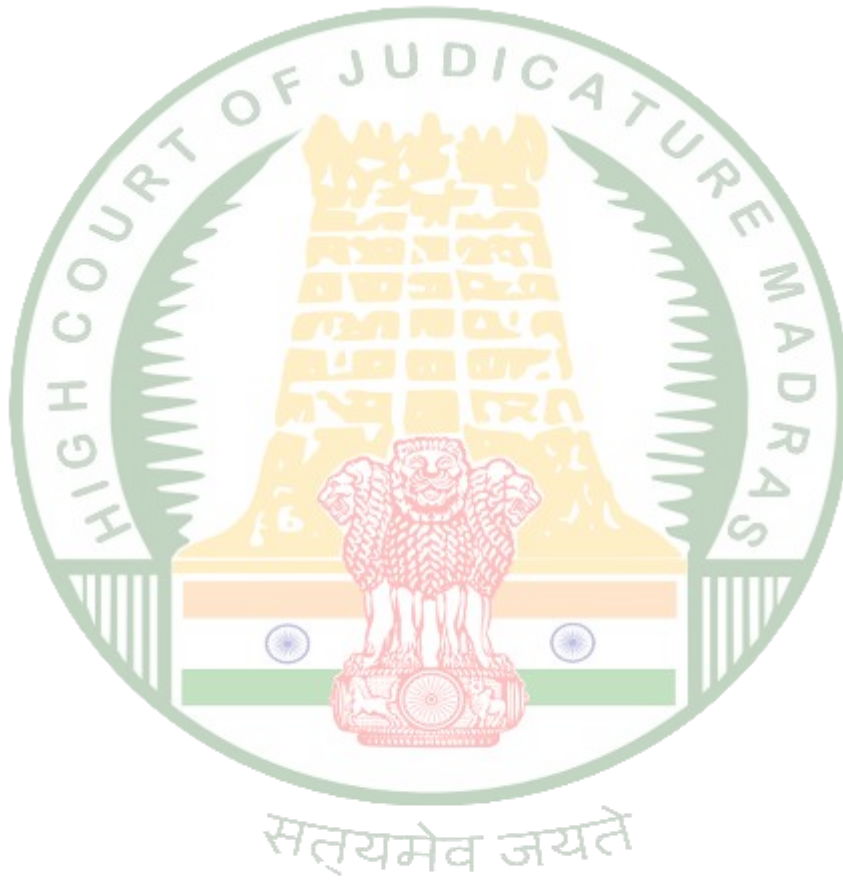
vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would

attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter, as provided by sub-r (1) of r(1) of O.47 of the CPC.”

13. In the light of the above, the decision of the Division Bench of this Court in **Geetha Ramakrishna Mills Pvt. Ltd's case** (supra) is no longer good law. We note that, in the case of **Rolta India Ltd., (supra)**, the Hon'ble Supreme Court took note of the contrary views taken by the other High Courts, viz., Guwathi, Madhya Pradesh, Bombay, Punjab and Haryana High Courts to the decision of the Karnataka High Court in **Kwality Biscuits** (supra). However, it appears that the decision rendered by the Division Bench of this Court in **Geetha Ramakrishna Mills Pvt. Ltd., case** (supra) was not brought to the notice of the Hon'ble Supreme Court and the Hon'ble Supreme Court having held that the law laid down by the Karnataka High Court in the case of **Kwality Biscuits Ltd., (supra)** having been confirmed by the Hon'ble Supreme Court as correct legal principle, the decision of the Division Bench in **Geetha Ramakrishna Mills Pvt. Ltd.**

case (supra) stands impliedly overruled.



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14. Thus, for the above reasons, the Tax Case Appeal filed by the appellant/assessee is allowed and the substantial question of law as framed is answered in favour of the appellant/assessee and against the Revenue.

No costs.

T.S.S.J., N.S.S.J.,

09.04.2018

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Index : yes/no

Speaking Order/Non speaking

To

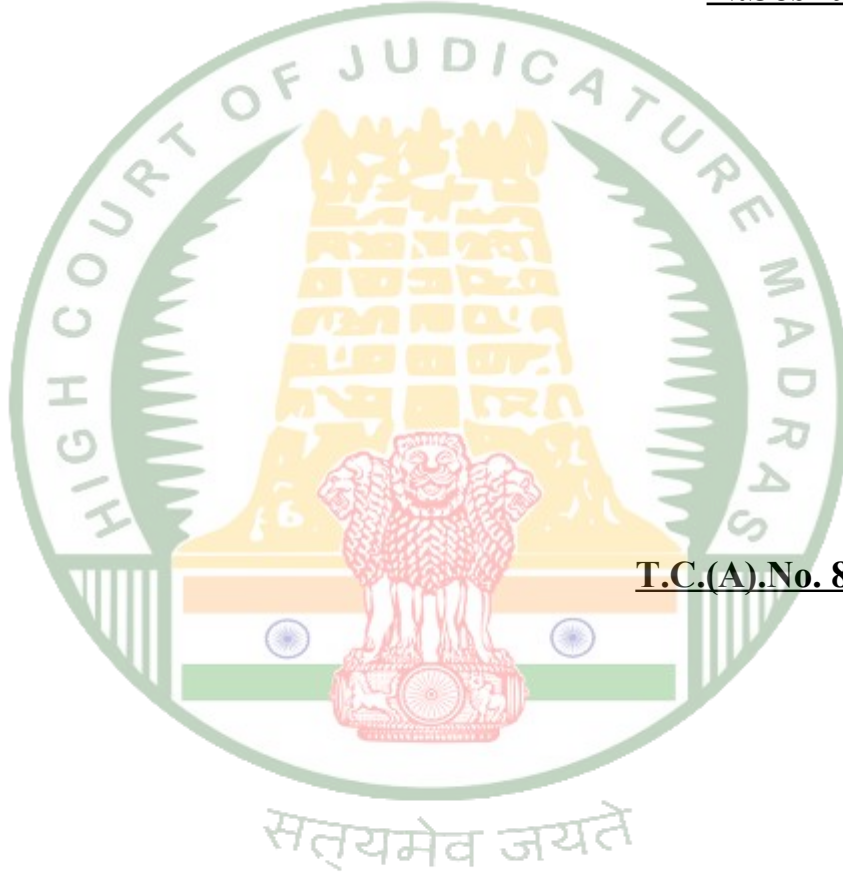
1. The Income Tax Appellate Tribunal,
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