

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 825 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

GUJARAT APOLLO EQUIPMENTS LTD....Appellant(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE-4....Opponent(s)

Appearance:

MR RK PATEL, ADVOCATE for the Appellant(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Opponent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 12/08/2016

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. This Tax Appeal u/s.260A of the Income-tax Act, 1961 is filed against the order dated 16.01.2009 passed by the Income Tax Appellate Tribunal, Ahmedabad in ITA No.1343/Ahd/2006 raising the following substantial question of law for our determination:

“(1) Whether on the facts, the Tribunal is right in law in interpreting the provisions of Section 80HHC of the Income Tax Act, 1961 by excluding the hiring charges and operating charges from the profits of the business of the Company?

(2) Whether on the facts, when total interest paid is more than the interest receipts and there is deficit in interest account as debited to profit and loss account, whether the Tribunal is right in law in confirming the taxation of interest receipts as income assessable under the Head Income from other sources?

(3) Whether on the facts and on interpretation of Section 80HHC of the Act only the net amount of interest for the purpose of working out the deduction under Section 80HHC of the Act is to be considered for computation of the claim of the appellant company?

(4) Whether on the facts and in the circumstances of the case, the Tribunal has substantially erred in law in interpreting the provisions of Section 234A, 234B and 234C

of the Income Tax Act, 1961 by confirming the levy of interest under the above provisions though the Assessing Officer has not initiated levy or charge of interest in the body of the assessment order?

(5) Whether on the facts, the Tribunal is right in law in confirming levy of interest under Section 234D of the Income Tax Act, 1961 though the provision was inserted with effect from 01.06.2003?"

2. The assessee is a public limited company, engaged in the business of manufacture and sale of road construction and maintenance machineries and spares thereof. On 28.11.2003 the assessee filed its return of income for the A.Y. 2003-04 declaring total income at Rs.8,64,37,864/-. The return was processed and ultimately, the assessment order came to be passed on 30.03.2005 declaring total income at Rs.8,97,96,482/- after making certain additions / disallowances. Against the said order, the assessee preferred appeal before the CIT(A). The said appeal was partly allowed by order dated 09.11.2006. Being dissatisfied with the order of CIT(A), both the assessee and Revenue preferred appeals before the Tribunal. By common order dated 16.01.2009, the appeal preferred by assessee was partly allowed whereas, that of Revenue was allowed. Being aggrieved by the said order, the assessee has preferred the present Tax Appeal.

3. We have heard learned counsel for both the sides and perused the documents on record.

4. Mr. R.K. Patel, learned counsel for the assessee, submitted that Question No.(1) raised in this appeal is already settled by the judgment of this Court in the case of **CIT v. Nirma Ltd., [2012] 367 ITR 12**. Learned Standing Counsel for the Revenue was not in a position to point out any distinguishing feature, which may warrant a different view. Consequently, Question No.(1) is answered in favour of the assessee and against the Revenue.

5. Insofar as Question Nos.(2) & (3) are concerned, learned counsel for the assessee submitted that the same are also settled by the judgment of Apex Court in the case of **ACG Associates Capsules (P.) Ltd. v. CIT, Central-IV, Mumbai, [2012] 343 ITR 89 (SC)** wherein, it has been held that ninety per cent of not the gross rent or gross interest but only net interest or net rent, which has been included in profits of business of assessee as computed under head "Profits and Gains of Business or Professions", is to be deducted under Clause (1) of Explanation (baa) to Section 80HHC for determining profits of

business. Learned Standing Counsel for the Revenue was not in a position to point out any distinguishing feature, which may warrant a different view. Consequently, both Question Nos. (2) & (3) are answered in favour of the assessee and against the Revenue.

6. As regards Question No.(4), the same is already settled by the judgment of Apex Court in the case of **CIT v. Bhagat Construction Co. P. Ltd. & Anr.**, [2016] 383 ITR 09 (SC) wherein, it has been held that under the provisions of Section 234B, the moment an assessee liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 per cent of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. The levy of such interest is automatic when the conditions of Section 234B are met. Learned counsel for the assessee was not in a position to point out any distinguishing feature, which may warrant a different view. Consequently, Question No.(4) is answered in favour of the Revenue and against the assessee.

7. Insofar as Question No.(5) is concerned, the same is already settled by the judgment of this

Court in the case of **CIT-II v. Gujarat State Financial Services Ltd.**, [2014] 49 taxmann.com 221 (Gujarat) wherein, the following observations have been made in Para-5.6 of the said decision:

"5.6 This very issue came up for scrutiny before the Bombay High Court in the case of **Commissioner of Income-tax v. Indian Oil Corporation Ltd.**, reported in 2010 TAXMAN 466 and the Bombay High Court has held that addition of explanation (2) to section 234D of the Act by Finance Act, 2012, with retrospective effect from June 01, 2003, is made applicable even to the period under assessment year 2004-2005. In respect of excess refund granted to the assessee under section 143(1) of the Act, the interest was payable by the assessee even if it was received prior to June 01, 2003, so long as the proceedings of the concerned assessment year for which the refund was granted was completed after June 01, 2003. The Bombay High Court held the explanation 2 to section 234D of the Act as declaratory/ clarificatory in nature. The same being declaratory/ clarificatory, the same was held to be applied with retrospective effect. In the words of the Bombay High Court :

WEB COPY

(21) The question therefore is whether the words in section 234D has a past signification. We think it does. Explanation 2 in fact supports this view. In view of the declaratory amendment to Section 234D of the Act by the addition of Explanation 2 thereto any doubt with regard to the word is having a past signification has been set at rest. In fact the context in which

the word has been used also supports the view that it has a past signification. The Legislature was obviously aware that refunds must have been made in respect of previous assessment years. Despite this, the amendment did not exclude such cases from the operation of the section. A grant of refund under section 143(1) is in the nature of a provisional refund and is subject to the final determination under section 143(3). This grant of refund is pending the conclusion of the final assessment under section 143(3) in respect of the year for which the refund is granted. The classification done in section 234D is on the basis of the date of the completion of assessment proceedings prior to 1/06/2003 on the one hand and post 1/06/2003 on the other. The classification is not on the basis of the date of grant of refund under section 143(1) of the Act. The classification on the basis of the completion of assessment proceedings is not a subject matter of challenge before us. Therefore, the date of grant of refund is immaterial to determine the applicability of section-234D of the Act. In the circumstances the submission of the respondent that section 234D of the Act only applies to refunds granted prior to 1/06/2003 is not acceptable.

(22) It must be borne in mind that refund which is granted under section 143(1) of the Act to an assessee is qua an assessment proceeding for a particular assessment year. The refund granted is qua an assessment year. The refund emanates from assessment proceedings for a particular assessment year. The refund granted cannot be

divorced from the assessment year or the assessment proceeding. Consequently to hold that interest on such refund would only run from 1/06/2003 would be to curtail the plain meaning of Explanation 2 to Section 234D.

(23) Section 143(4) also supports our view. It reads as under :-

"Section 143 Assessment -

xxx xxx xxx

(4) Where a regular assessment under sub section (3) of this section or section 144 is made,-

(a) any tax or interest paid by the assessee under sub-section (1) shall be deemed to have been paid towards such regular assessment;

(b) if no refund is due on regular assessment or the amount refunded under sub section (1) exceeds the amount refundable on regular assessment, the whole or the excess amount so refunded shall be deemed to be tax payable by the assessee and the provisions of this Act shall apply accordingly."

It is clear therefore, that excess refund determined under section 143(3) of the Act is deemed to be tax payable by the assessee. However, as there was no provision of interest on the grant of refund under Section 143(1) of the Act it became necessary to provide for the same by having a charging provision. This was done by section 234D of the Act

in respect of all pending assessments in which refund was given. Thus even if, a refund has already been granted, the same would be subject to the provisions of section 234D of the Act. Under section 234D(1) where the refund under section 143(1) is in excess of the amounts refundable on regular assessment, interest on the excess amount would be payable. In any case after the introduction of Explanation 2 there can be no doubt that even where refund is granted prior to 1/06/2003 the same would carry interest provided the proceedings for assessment are completed after 1/06/2003. The respondent has not contended that the Explanation 2 to section 234D of the Act is not retrospective. Their only contention is that it would not apply to refunds granted prior to 1/06/2003 even in respect of assessments completed after the cut-off date of 1/06/2003. This submission ignores the fact that Explanation 2 which is declaratory in nature clarifies that the section would apply to an assessment year even before 1/06/2003 provided the proceedings in respect of such assessment years are not completed by the cut off date i.e. 1/06/2003.

xxx xxx xxx

(26) A statute could be retrospective in operation being expressly stated or by necessary implication. The case of the revenue is that section 234D as introduced on 1st June, 2003 was retrospective in operation by necessary implication. However, as doubts were raised about its retrospectivity, the same was clarified by adding an explanation to section 234D by Finance

Act, 2012. Under the Act what is brought to tax is not the income of the assessee in the assessment year but the income of the assessee in the previous year. The liability to tax arises on account of the Finance Act which fixes the rate at which the tax is to be paid. The law to be applied is as existing on the 1st day of April of the previous year. In support the Counsel for the respondent relied upon the decision of the Supreme Court in *Karimthuravi Tea Estate Ltd. v. State of Kerala* 60 ITR 262, *Maharajah of Pithapuram v. CIT* 13 ITR 221 (PC) and *CIT v. Scindia Steam Navigation Co. Ltd.* 42 ITR 539. The aforesaid decisions are not relevant for our purpose particularly, in view of the fact that Explanation 2 to section 234D of the Act as introduced by the Finance Act, 2012 being declaratory in nature would be retrospective. This amendment make it clear that it shall apply assessment years even prior to 1/06/2003."

7.1 Learned counsel for the assessee was not in a position to point out any distinguishing feature, which may warrant a different view. Consequently, Question No.(5) is answered in favour of the Revenue and against the assessee.

8. In view of the above, the appeal stands disposed of. No order as to costs.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

Pravin/*

