

**Reserved/Court No. - 32**

**Case :-** INCOME TAX APPEAL No. - 48 of 2003

**Petitioner :-** The Commissioner, Of Income Tax -11 & Another

**Respondent :-** M/S. Sarin Chemical Laboratory Chilli Int Road Agra

**Petitioner Counsel :-** A.N. Mahajan,A.N.Mahajan,Ashok Kumar,Bharatji Agarwal,D. Awasthihi,G.Krishnana,R.K. Upadhyaya,S.Chopra

**Hon'ble Ashok Bhushan,J.**

**Hon'ble Prakash Krishna,J.**

**(Delivered by Prakash Krishna,J)**

Raising a short dispute with regard to compulsory levy of interest under section 234-B of the Income Tax Act, the revenue has filed the present appeal against the order dated 29.8.2002 passed by the Income Tax Appellate Tribunal, Agra Bench, Agra in ITA No.1506/Del/95 for the assessment year 1991-92.

The assessee is a partnership firm and is engaged in manufacturing of tooth powder and its sale. During the course of the assessment proceeding, the Assessing Officer made certain additions in the income of the assessee on account of unexplained investment in the raw material and sale outside the books, vide order dated 14.5.1990. The matter was carried in appeal before CIT(A), Agra Bench, Agra who allowed the appeal in part by the order dated 18.1.1995. Before him, one of the grounds raised was with regard to charge of interest under sections 234-A, 234-B and 234-C. The assessee contended that the interest could not be charged under the aforesaid sections in the absence of any order to this effect in the assessment order. The CIT(A) took the view that no appeal is provided against charge of interest but the Assessing Officer may levy the interest while giving effect to the appellate order. The assessee carried the matter further in appeal before the Tribunal. The Tribunal accepted the contention of the assessee that the Assessing Officer has failed to mention in the assessment order for charging of any interest and therefore, interest could not be charged from the assessee. The Revenue has challenged the aforesaid finding of the Tribunal and raised the following substantial question of law for consideration

***"Whether on the facts and circumstances of the case the Tribunal is justified in law in directing the A.O not to charge interest under section 234-A, 234-B and 234-C of the Income Tax Act, 1961 in the absence of the any direction by the AO in the assessment order?"***

Heard Shri R.K.Upadhyaya, learned standing counsel for the Department and Shri Suyash Agrawal, learned counsel for the assessee-respondent.

Shri Upadhyaya, learned standing counsel submits that in view of authoritative pronouncement of the Apex Court in the case of *CIT Versus Anjum M.H Ghaswala (2001) 252 ITR 1 (SC)*, charging of interest under sections 234-A, 234-B and 234-C is mandatory. Even Settlement Commission could not waive the charging of interest.

In reply, the learned counsel for the assessee submits that the aforesaid judgment of the Apex Court has been considered by this Court in the case of Income Tax Appeal Nos. 81 of 2002 & 82 of 2002 *CIT-II Kanpur versus M/s Deep Awadh Hotels (P) Ltd., Kanpur* decided on 3.8.2011 and it has been held that the earlier decision given by the Apex Court in the case of *CIT versus Ranchi Club Ltd. (2001) 247 ITR 209 (SC)* still holds the field and unless in the order of Assessing Authority, it is ordered that interest be charged, a notice of demand charging interest cannot be issued.

Considered the respective submissions of the learned counsel for the parties and perused the record.

In the case of *CIT Versus Anjum M.H Ghaswala (2001) 252 ITR 1 (SC)*, a constitution Bench of the Apex Court while interpreting the power of the Settlement Commission to waive charging income of interest under section 234-A, 234-B and 234-C etc. has held that the expression "shall" used in the aforesaid sections cannot be construed as "may". They have noticed that prior to the Finance Act 1987, the corresponding sections pertaining to imposition of interest used the expression "may". The change thus brought about by the Finance Act 1987 is indicative of the intention of the Legislature to make the collection of interest mandatory. The said expression "shall" has been used deliberately.

The relevant portion is extracted below:

***"The expression "shall" used in sections 234-A, 234-B, 234-C cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in Sections 234-A, 234-B and 234-C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may". This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression "may" thereby giving a discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory***

***interest mandatory. "***

At this juncture, the learned counsel for the assessee refers a latest judgment of Division Bench of our Court, in the case of ***CIT-II Kanpur versus M/s Deep Awadh Hotels P Ltd., Kanpur*** (Supra) wherein the following has been held:

***On the third question it is submitted by Shri A.N. Mahajan that in para 16 of the order of the Tribunal the plea that the interest under Section 234 (B) cannot be charged unless it is included in the assessment order or in the extra sheet or additional sheet attached with the assessment order in relation to computation and charging of interest. Shri Mahajan submits that the Tribunal has wrongly relied upon Ranchi Club Ltd. Vs. Commissioner of Income Tax & Ors. is not correct. He submits that the charging of interest under Section 243A, 243B and 243C is mandatory. He has relied upon the judgments in CIT Vs. Anjum M.H. Ghaswala & Ors., 2001 (252) ITR 1, which has been followed by the Kerala High Court in Dr. R.P. Patel Vs. Commissioner of Income Tax, Kottayam, (2009) 182 Taxman 305 (Ker.) and in M/s Nilgiri Sleepers (Pvt.) Ltd. Vs. the Commissioner of Income Tax I, Patna, 2010 Tax LR 105 (Pat.). A perusal of the judgments cited by Shri Mahajan leads to the conclusion that the charging of interest after the amendment of the statute by Direct Tax Laws (Amendment Act), 1987 w.e.f. 1.4.1989 payable under Section 234A, 243B, and 243C is mandatory and no discretion is vested in the assessing officer in this regard. The provisions prior to the amendment gave discretion in regard to waiver of interest. Once interest is mandatory the liability false automatically on the assessee on default. The rest is only working out the amount.***

Further reliance has been placed upon another unreported judgment of Uttrakhand High Court delivered in Income Tax Appeal No.15 of 2006 dated 14.10.2011 in ***Commissioner of Income Tax, Dehradun Versus M/s Dehradun Club Ltd.*** wherein also reliance has been placed on ***Ranchi Club Ltd. versus Commissioner of Income Tax & others 217 I.T.R 72*** and other decisions such as of Punjab & Haryana High Court in ***Vinod Khurana versus Commissioner of Income Tax & another 253 I.T.R 578*** and of Delhi High court in ***Commissioner of Income Tax versus Kishan Lal (HUF) 258 I.T.R 359***, etc.

The Uttrakhand High Court in paragraph 16 of the judgment has said that there is no quarrel with the proposition laid down by the Supreme Court in the case of ***CIT Versus Anjum M.H Ghaswala (2001) 252 ITR 1 (SC)*** but at the same time if the assessment order contained the imposition of interest, only then, a notice of demand of interest could be issued under section 156 of the Act.

Be that as it may, in view of the Division Bench judgment of this Court in the case of

*CIT-II Kanpur versus M/s Deep Awadh Hotels P Ltd., Kanpur (Supra)*, holding that in the absence of any mention of charging of interest in the assessment order, interest cannot be charged by issuing a notice of demand, the contrary argument of the learned standing counsel for the Revenue cannot be accepted. So far as this Court is concerned, we are bound by the Division Bench's pronouncement of this Court, which is based on consideration of two judgments of the Apex Court in the case of *Ranchi Club Ltd. versus Commissioner of Income Tax & others (Supra)* and *CIT Versus Anjum M.H Ghaswala (Supra)*.

The question raised in the appeal is therefore, decided accordingly by holding that the Tribunal committed no illegality in deleting the charge of interest on the facts and circumstances of the case.

The appeal is dismissed. No order as to costs.

(Prakash Krishna,J)

(Ashok Bhushan,J)

**Order Date :-18.5.2012**

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