

आयकर अपीलीय अधिकरण “ए” न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL “A” BENCH, MUMBAI
BEFORE SHRI SANJAY ARORA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./I.T.A. No. 2573/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2008-09)

Ashish Fiscal Services Pvt. Ltd. 115, Maker Chambers-III, Nariman Point, Mumbai-400 021	बनाम/ Vs.	Dy. CIT-3(1), Aayakar Bhavan, M. K. Marg, Mumbai-400 020
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAACA 3319 F		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Jitendra Jain
प्रत्यर्थी की ओर से/Respondent by	:	Ms. Arju Garodia

सुनवाई की तारीख / Date of Hearing	:	05.5.2016
घोषणा की तारीख / Date of Pronouncement	:	02.8.2016

आदेश / O R D E R

Per Sanjay Arora, A. M.:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-5, Mumbai (‘CIT(A)’ for short) dated 15.1.2014, dismissing the Assessee’s appeal contesting its assessment u/s.143(3) of the Income Tax Act, 1961 (‘the Act’ hereinafter) for the assessment year (A.Y.) 2008-09 vide order dated 16.11.2010.

2. The only issue arising in this appeal by the assessee is whether the Assessing Officer (AO) has correctly given effect to the direction by the first appellate authority in the first round, i.e., in respect of the charge of interest u/s. 234C(1)(6) read with first *proviso* thereto. Section 234C, reading as under,

provides for mandatory charge of interest on the shortfall in the instalment/s of advance tax falling due during the relevant previous year, i.e., with reference to the defined rates of advance tax at which it is to be paid:

'234C. Interest for deferment of advance tax.

(1) Where in any financial year,-

(a) the company which is liable to pay advance tax under section 208 has failed to pay such tax or-

(i).....

(ii).....

(b) The assessee, other than a company, who is liable to pay advance tax under section 208 has failed to pay such tax or, -

Provided that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of under-estimate or failure to estimate—

(a) the amount of capital gains; or

(b) income of the nature referred to in sub-clause (ix) of clause (24) of section 2,

and the assessee has paid the whole of the amount of tax payable in respect of income referred to in clause (a) or clause (b), as the case may be, had such income been a part of the total income, as part of the remaining instalments of advance tax which are due or where no such instalments are due, by the 31st day of March of the financial year.'

The first *proviso* thereto, however, excludes, application of section 234C, where and to the extent the shortfall in the payment of advance tax on the relevant income is on account of underestimation or failure to estimate:

- a) amount of capital gain; or
- b) amount referred to in section 2 (24) (ix);

and that the assessee pays the whole of the tax payable in respect of the income referred to in clause (a) or clause (b) as part of the remaining instalments of advance tax due (after the date/s of income), and where no such instalment is due, by 31st of March of the relevant year.

3. The AO found that no part of the advance tax, due at Rs.179.79 lacs, was paid during the year, and the same was paid by way of self-assessment tax only,

on 28.8.2006. The assessee was, accordingly, not entitled to any benefit of the first *proviso* to section 234C(1)(b), which was thus rendered inapplicable, further noting that the Apex Court had in *Jt. CIT vs. Rolta India Ltd.* [2011] 330 ITR 470 (SC) held that sections 234B and 234C is applicable on income deemed under the MAT provisions. His order being confirmed in first appeal, the assessee is in second appeal.

4. We have heard the parties, and perused the material on record.

We find no substance in the assessee's case. The first appellate authority in the first round, on the assessee submitting before him that almost the entire book profit of Rs.15.94 crores is comprised of capital gain (Rs.15.92 crore), found force in the assessee's argument, even as he, adverting to *Rolta India Ltd.* (supra), repelled the assessee's charge of section 234C being not applicable where the income is assessed on book profit basis and, accordingly, directed as under:

'4.3.ii. However, the submission of the appellant has force. Therefore, the A.O. is directed to compute interest under section 234C in accordance with the proviso 1 to section 234C after verification of facts from the records.'

The first appellate authority did not examine the facts of the case, where upon it was found (by the A.O.) that the first *proviso* to s. 234C(1)(b) is not applicable in the admitted and undisputed facts of the case. He did not issue any definite finding, and his direction to the A.O. must therefore be read to mean, i.e., in the context of the argument/s raised before him, as well as the facts brought to his notice, that the AO shall consider the assessee's case with reference to the applicability of the first *proviso* (supra), which was *prima facie* applicable. *He, in fact, even did not verify the assessee's contention of almost the entire income as comprised of capital gain.* It is, on the contrary, the assessee, who is to be charged for not furnishing the full facts before the first appellate authority, whereupon the assessee's claim for non-charge of interest u/s. 234-C, in view of the first *proviso* thereto, becomes untenable.

In fact, the ld. Authorized Representative (AR) also could not before us point out any fallacy on the merits of the AO's decision, based on *Rolta India Ltd.* (supra) and the clear language of the relevant provision of law. There is, it is to be appreciated, no estoppel against law. As explained by the Hon'ble Apex Court in *CBI vs. Keshub Mahindra & Others* [in Curative Petition Nos. 39-42 of 2010 in Criminal Appeal Nos. 1672-1675 of 1996], that no court, itself included, could read the law or be construed to have read it in a manner to defeat the clear provision of law. To quote (occurring at para 4 of the said decision dated 11/5/2011):

'No decision by any court, this court not excluded, can be read in the manner as to nullify the express provisions of an Act or the Code and the 1996 judgment never intended to do so.'

The assessee's argument before us of the decision by the Apex Court in *Rolta India Ltd.* (supra) being dated 07.1.2011, i.e., after the end of the relevant previous year, and could not therefore be acted upon by the assessee (during the relevant year), is misconceived. A decision by the Apex Court settles the law as it always stood, and thus operates retrospectively. Rather, by that token, the decision in *Snowcam India Ltd vs. Jt. CIT* (in Income Tax Appeal No. 238 of 2006 dated 05.1.2009/copy on record), being after the close of the relevant previous year, would also not apply. Per the said decision, the Hon'ble Bombay High Court, following the decision in *CIT vs. Quality Biscuits Ltd.* [2000] 284 ITR 434 (SC), appeal against which stands dismissed by the Apex Court, decided against the applicability of sections 234B and 234C in case of computation of income u/s. 115 JB of the Act, i.e., as per the book profit. The said decision would clearly be of no assistance in view of the decision by the Hon'ble Apex Court in *Rolta India Ltd.* (supra), noted by the first appellate authority in the first round, reproducing there-from, and which in fact the assessee did not contest/appeal against.

In view of the foregoing, the ld. CIT(A) in the second round has correctly appreciated the facts of the case, so that we are in complete agreement with his order. We decide accordingly.

5. In the result, the assessee's appeal is dismissed.
परिणामतः निर्धारिती की अपील खारिज की जाती है ।

Order pronounced in the open court on August 02, 2016

Sd/-
(Ram Lal Negi)

न्यायिक सदस्य / Judicial Member

Sd/-
(Sanjay Arora)

लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 02.08.2016

व.नि.स./Roshani, Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT - concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**