आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH : CHENNAI

श्री एन.आर.एस. गणेशन, न्यायिक सदस्य एवं
श्री अब्राहम पी. जॉर्ज, लेखा सदस्य के समक्ष।
[BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND
SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER**]**

आयकर अपील सं./I.T.A. Nos. 1311/Mds/2006, 164/Mds/07, 1507/2010 & 1722/Mds/2011
निर्धारण वर्ष **/**Assessment years : 2002-03, 2003-04, 2007-08 & 2008-09

M/s. Verizon Communications Singapore PTE Ltd, C/o. S.R. Batliboi & Co., TPL House, II floor, 3, Cenotaph Road, Teynampet, Chennai 600 018.	**Vs.**	The Income Tax Officer, International Taxation –I, Chennai.
(अपीलार्थी/Appellant)		**(प्रत्यर्थी/Respondent)**

C.O.Nos. 20 & 21/Mds/ 2009
(in I.T.A. Nos. 1311/Mds/2006, 164/Mds/07)
निर्धारण वर्ष **/**Assessment years : 2002-03 & 2003-04

The Income Tax Officer, International Taxation –I, Chennai	**Vs.**	M/s. Verizon Communications Singapore PTE Ltd, C/o. S.R. Batliboi & Co., TPL House, II floor, 3, Cenotaph Road, Teynampet, Chennai 600 018. **[PAN AADCM 6355L]**
(अपीलार्थी/Appellant)		**(Cross Objector)**

Assessee by **:** Shri. N. Venkatraman, Advocate
Revenue by **:** Shri. G.M. Doss, IRS,CIT.

सुनवाई की तारीख/Date of Hearing **:** 21-11-2016
घोषणा की तारीख /Date of Pronouncement **:** 30-11-2016

आदेश / O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

These are appeals filed by the assessee and Cross objections by the Revenue. These appeals as well as Cross objection were earlier disposed of by this Tribunal vide orders dated 07.01.2011, 13.1.2011 and 10.01.2011. The assessee had carried the matter in further appeal to the Jurisdictional High Court u/s.260A of the Income Tax, Act 1961(herein referred as ''the Act''). The Jurisdictional High Court while confirming the order of the Tribunal in so far as it related to the issue of Royalty, had remanded the question regarding levy of interest u/s.234A, 234B and 234D back to this Tribunal for consideration on merit and in accordance with law. Relevant para of the judgment of Hon'ble Jurisdictional High Court in T.C. Nos.147 to 149/2011 and 230/2012 is reproduced hereunder:-

> *''106. In the circumstances, we affirm the order of the Tribunal holding that the consideration paid by the customer to the assessee is 'royalty' within the meaning of Explanation 2(iva) or in the alternative under Explanation 2(iii) of Section 9(1) (vi) of the Income Tax Act and Article 12(3) of the DTAA between India and Singapore. With regard to levy of interest under section 234A, 234B and 234D of the Income Tax Act, as the case may be, we remand this issue alone to the Income Tax Appellate Tribunal for its consideration on merits and in accordance with law. Accordingly, the above Tax Case (Appeals) are disposed of. No Cost. Consequently, connected Miscellaneous petitions are closed''.*

2. Accordingly, when the matter was taken up today, ld. Counsel for the assessee submitted that he had no arguments to advance in so far as it related to interest u/s.234A and 234D of the Act. However, according to him, interest u/s.234B of the Act could not be levied, since assessee was a Non Resident with its registered office in Singapore and could not make any advance payment of tax on sums received by it. According to ld. Authorised Representative where the payer was responsible to deduct tax at source under the Act, on a particular type of payment, a non-resident recipient would stand absolved of the liability to pay advance tax. As per ld. Authorised Representative assessee which was based in Singapore had received payments from Indian customers for providing Bandwidth/ Telecom services outside India. It was for the Indian customers to deduct tax at source on such payments, if they considered the payments effected to the assessee as royalty for the use of or the right to use equipment. Relying on the judgment of Jurisdictional High Court in the case of *CIT vs. Madras Fertilisers Ltd 149 ITR 703*, ld. Authorised Representative submitted that legislature never contemplated a situation where in respect of tax on a particular income, two persons were liable. Reliance was placed on the judgment of Bombay High Court in the case of *DIT(IT) vs. NGC Network Asia LLC (2009) 313 ITR*

0187, that of Hon'ble Delhi High Court in the case *of DIT vs. Jacabs Civil Mitsubishi Corporation 330 ITR 578, and DIT vs. GE Packaged Power Inc. (2015) 373 ITR 65* and that of Hon'ble Uttaranchal High Court in the case of *DIT* vs. *Maersk Co. Ltd 334 ITR 79.* Ld. Authorised Representative also relied on the decision of the Co-ordinate Bench in the case of *De Beers UK Ltd vs. DDIT (2012) 53 SOT 319.*

3. Per contra, ld. Departmental Representative submitted that levy of interest u/s.234B of the Act was mandatory in nature.

4 We have considered the rival contentions and perused the orders of the authorities below. Jurisdictional High Court had upheld the order of the Tribunal affirming the view taken by the ld. Assessing Officer that payments received by the assessee from its Indian customers was royalty under Sec. 9(1)(vi) of the Act as well as article 12(3)(b) of the treaty. Hence, liability to deduct TDS on payments effected to the assessee was with Indian customers. With regard to question whether there could be levy of interest for non-payment of advance-tax, on such amounts by the recipients, we find that Hon'ble Jurisdictional High Court in the case of *Madras Fertilisers Ltd (supra) had held at para 7 of its judgment as under:-*

> *''7. That section seems to provide that the tax in respect of a regular assessment is payable either by deduction at source or by advance payment, as the*

case may be, in accordance with the provisions of Chapter XVII. Thus, the deduction of tax at source and payment of advance tax have been treated as two alternative modes of payment of tax in advance. Hence, where the statute provides for deduction of tax at source in respect of a particular income, the concerned assessee need not pay any advance tax in relation to the said income. In this case, it is not in dispute that in respect of the interest income, deduction of tax at source is contemplated under s. 194A of the Act. However, the deduction at source has not been effected by the banks which paid the interest to the assessee which they should have done as per the provisions of the Act. For the default of compliance with s. 194A, the bank can be brought under s. 201 as an assessee in default. Section 201(1A) specifically provides that if a person or authority who is bound to make a deduction of tax at source as contemplated by the statute does not deduct or after deducting fails to pay the tax, then such a person or authority is liable to pay simple interest on the amount of tax not deducted from the date on which such tax was deductible to the date on which the said tax was actually paid. Thus, in respect of interest income on which deduction of tax at source should have been made, the liability to pay interest is fastened on the person or authority who failed to make deduction as required under s. 194A. Therefore, in respect of the tax payable on the said interest income, the assessee also cannot be taken to be liable to pay interest. Otherwise, it will mean that there are two persons under the Act to pay interest on tax on the same income. The Legislature would not have contemplated such a situation where in respect of the tax on interest income, two persons are liable to pay interest for the delayed payment of tax. We are, therefore, inclined to hold that wherever there is a possibility of a deduction of tax at source, the person who had failed to deduct tax at source is liable to pay interest and not the assessee, as otherwise, there will be charging of interest twice on the payment of tax in relation to the same income. Such an interpretation should normally be avoided. In this case, therefore, the Tribunal appears to be right in holding that in terms of s. 215 interest could not be levied on the

assessee on the tax which is deductible at source. We answer the said questions referred to us in the affirmative and against the Revenue. The Revenue will pay the costs of the assessee''.

Hon'ble Delhi High Court in the case of *DIT vs. Jacabs Civil Mitsubishi Corporation (supra)* in relation to a similar issue had held as under at para 7 to 9 of its judgment.

7. Section 2(1) of the Act defines "advance tax" to mean the advance tax payable in accordance with the provisions of Chapter XVII-C of the Act. These provisions are contained from section 207 onwards. Section 209 falls under this Chapter. Sub-section (1) thereof deals with four situations under which the advance tax payable by the assessee is to be computed. Admittedly, these cases do not concern with clauses (a) to (c). Clause (d) of sub- section (1) of section 209, which is relevant reads as under :

> *"(d) The Income-tax calculated under clause (a) or clause (b) or clause (c) shall, in each case, be reduced by the amount of Income-tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income (as computed before allowing any deductions admissible under this Act) which has been taken into account in computing the current income or, as the case may be, the total income aforesaid ; and the amount of Income-tax as so reduced shall be the advance tax payable."*

8. This clause categorically uses the expression "deductible or collectible at source" and it is this clause which is incorporated by the Uttaranchal High Court in the said judgment (supra) in the manner already pointed above. The scheme of the Act in respect of non-residents is clear. Section 195 of the Act puts an obligation on the payer, i.e., any person responsible for paying to a non-resident, to deduct Income-tax at

source at the rates in force from such payments excluding those incomes which are chargeable under the head "Salaries". Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the nonresident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remedy-less and therefore can take action against the payer under the provisions of section 201 of the Income-tax Act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the nonresident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of section 191 of the Act along with section 209(1)(d) of the Act. For this reason, it would not be permissible for the Revenue to charge any interest under section 234B of the Act''.

Judgment of Hon'ble Delhi High Court in the case of *DIT vs. GE Packaged Power Inc. (supra)* is also very relevant. Para 10 of this judgment is reproduced hereunder:-

'The position in law, therefore, was that the assessee was entitled to, in its computation of its advance tax liability, take a tax credit of that amount which was deductible or collectible, regardless of whether the amount was actually deducted or collected. As Jacabs Civil Incorporated/ Mitsbishi Corporation (supra) noted, the reason for this was because, advance tax is to be computed either based on the previous year's assessment, or on an estimate of the income to be earned that year which

> *is to be made much before the final assessment. There is no possible way in which the provision could allow a tax credit of the amount deducted or collected, because the actual deduction takes place at a later point in time i.e. at the point at which the payment is actually made to the assessee.*

5. We find that similar view was also taken by Mumbai Bench of this Tribunal in the case *of De Beers UK Ltd (supra)* at para 7 of its order.

> *'' The ground No.6 is against charging of interest u/s.234B. We find that this ground is covered by the judgment of the Hon'ble Jurisdictional High Court in the case of DIT (International Taxation) vs. NGC Network Asia LLC (2009) 313 ITR 187 (Bom) holding that interest u/s.234B cannot be charged where tax is deductible at source in relation to royalty and FTS. The Tribunal in assessee's own case for the immediately preceding year has directed the Assessing Officer to compute interest u/s.234B, if any, after reducing the amount of tax deductible at source in relation to royalty and FTS from the advance tax payable. Respectfully following the precedent, we hold accordingly".*

6. Thus, we are of the opinion that assessee was not liable for interest u/s.234B of the Act. However, in respect of interest u/s.234A & 234D of the Act, ld. Counsel for the assessee fairly admitted that these were statutory levies for default in furnishing return of income and on excess refund granted to the assessee. Accordingly, we are of

the opinion that levy of interest u/s.234A and 234D were justified. Interest levied u/sec. 234B of the Act is cancelled.

7. Cross objection being not concerned with the remitted issue are technically treated as dismissed.

8. In the result, appeals of the assessee are treated as partly allowed whereas Cross objections are dismissed.

Order pronounced on Wednesday, the 30th day of November, 2016, at Chennai

Sd/-	Sd/-
(एन.आर.एस. गणेशन))	**(अब्राहम पी. जॉर्ज)**
(N.R.S. GANESAN)	**(ABRAHAM P. GEORGE)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated:30th November, 2016
KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	3. आयकर आयुक्त (अपील)/CIT(A)	5. विभागीय प्रतिनिधि/DR
2. प्रत्यर्थी/Respondent	4. आयकर आयुक्त/CIT	6. गार्ड फाईल/GF