

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI JASON P. BOAZ ACCOUNTANT MEMBER
AND SHRI RAM LAL NEGI, JUDICIAL MEMBER

ITA No. 3491/MUM/2014
(Assessment Year : 1992-93)
ITA No. 3492/MUM/2014
(Assessment Year : 2008-09)

Growmore Exports Ltd.,
32, Madhuli, Dr. Annie Besant Road,
Mumbai 400 018
PAN:AAACG4939P

... Appellant

Vs.

The DCIT/ACIT, Cen. Circle
Aaykar Bhavan, MK Road,
Mumbai 400 020

.... Respondent

Appellant by : Shri Dharmesh Shah &
Shri Dhaval Shah
Respondent by : Dr. P.Daniel

Date of hearing : 12/01/2016
Date of pronouncement : 15/01/2016

ORDER

PER JASON P. BOAZ, A.M:

These appeals by the assessee are directed against the orders of the CIT(Appeals)-40, Mumbai for the assessment years 1992-93 and 2008-09 dated 02/12/2013 and 31/1/2014 respectively. These appeals having connected issues were heard together and are being disposed off hereunder by way of this common order.

Order on petitions for condonation of delay in filing appeals for A.Ys 1992-93 & 2008-09.

2.1 At the outset, the Ld. Representative for the assessee submitted that there was a delay of 16 days in filing the appeal before the Tribunal for assessment year 1992-93 and 52 days in filing the appeal for assessment year 2008-09. In this regard, he drew the attention of the Bench to the affidavits dated 16/10/2015 filed by the assessee explaining the reasons for the delay in filing those appeals before the Tribunal and praying for condonation of delay at para 2 & 3 thereof, which are extracted hereunder:-

"2. I say that moreover, the appeal fees released by the Custodian was received on 03.05.2014. Your Honours would observe that the applicant took the initiative to address letters and reminders to the Custodian for the release of the appeal fee for filing the appeal; and that immediately upon receipt of the counterfoil of the paid challan, the appeal was submitted before Your Honours. Thus, so far as the applicant was concerned, we were very much diligent and anxious about discharging our obligation. The delay was only for the reasons, which were beyond the control of the applicant. As a result of the above, the appeal was filed on 15.05.2014, i.e. late by 16 days

3. I state I was prevented by a reasonable cause in not having preferred the appeal for A.Y.1992-93 in time and there was no deliberate or malafide intention on my part."

A similar prayer has been put forth by the assessee in its Affidavit filed for assessment year 2008-09 seeking the delay of 52 days in filing the appeal before the Tribunal.

2.2 Considering the above averments of the assessee in the respective affidavits, we are of the opinion that there is reasonable cause that prevented the assessee from filing the aforesaid appeals for assessment years 1992-93 and 2008-09 within time specified in law and with a delay of 16 and 52 days. In this view of the matter, we condone

the aforesaid delay of 16 and 52 days in filing the appeals for assessment years 1992-93 and 2008-09 and admit the appeals for adjudication on merits.

ORDER

ITA NO.3491/MUM/2014 (Assessment Year 1992-93)

3. In this appeal, the assessee has raised the following grounds:-

“Grounds of appeal against the order dated 31.01.2014 u/s. 250 of the Act passed by the Ld. Commissioner of Income-tax (Appeals)-40, Mumbai.

Following grounds of appeal are without prejudice to each other:-

1. *The Ld. Commissioner of Income-Tax(Appeals) ought to have appreciated that as per the decision of Hon'ble Special Court dated 30.04.2010 in MP No. 41 of 1999, the assets under consideration and the consequential income belongs to Shri Harshad S. Mehta and hence the income assessed by the Assessing Officer ought to have been taxed in the hands of Shri Harshad S. Mehta and not in the hands of the appellant.*
2. *The Ld. Commissioner of Income-Tax (Appeals) has erred In Law and In facts in confirming the disallowance of interest expenses.*
3. *The Ld. Commissioner of Income-Tax (Appeals) has erred in law and in facts that in confirming the levy of interest u/s. 234A, 234B and 234C of the Act.*
4. *The Ld. Commissioner of Income-tax (Appeals) has erred in law and in facts in not appreciating that the income assessed. in the hands of the appellant were subjected to the provisions of TDS and hence on the said amount of tax no interest can be computed u/s. 234A, 234B and 234C of the Act.*
5. *The appellant craves leave of Your Honour to add to, alter, amend and l or delete all or any of the foregoing grounds of appeal.”*

4. **Ground No.1:**

4.1 At the outset, the Ld. Representative for the assessee for the assessee mentioned that the ground at S.No.1 is not pressed. After hearing the Ld. Special Counsel, Ground No.1 is dismissed as not pressed.

5. **Ground No.2:- Disallowance of Interest Expenditure:**

5.1 Ld. Representative for the assessee submitted that an identical issue of disallowance of interest expenditure against interest income

from investments, etc. had come up for consideration before the Co-ordinate Bench of this Tribunal in the case of Shri Hitesh S. Mehta in ITA Nos. 7726 & 7727/Mum/2010, wherein the Co-ordinate bench vide order dated 26/04/2013 had set aside the issue to the file of the CIT(A) adjudication of the issue afresh by adjudicating the respective ground relating to the rejection/reliability of the books of account. At para-5 of the aforesaid order, it is held as under:-

“ 5. Ground No.4 relates to the action of the Ld. CIT(A) in confirming the liabilities amounting to Rs.11,24,99,052/- and Rs.12,61,36,245/- respectively for the A.Ys 2005-06 and 2006-07 towards interest expenditure claimed by the assessee. It is pertinent to note that the findings given in para 3.3 above in respect of rejection/liability of the books of accounts and the proposed adjudication of the Ld. CIT(A) in view of the said direction may have direct impact on the issue of the impugned liability, we set aside this issue also to the files of the Ld. CIT(A) to adjudicate afresh along with the adjudication of the respective ground pertaining to the rejection/liability of the books of accounts.”

5.2 Per contra, the Ld. Special Counsel for the Revenue placed reliance on the orders of Ld. CIT(A).

5.3 We have heard both the parties and perused and considered the material on record; including the order of the Co-ordinate Bench of ITAT, Mumbai in the case of Hitesh S. Mehta (supra). Whether the interest expenditure constitutes ascertained liability or not is linked to the issue of rejection of books of account as the books of account are the basis for computation of 'book profits' under section 115JB of the Act. This issue was set aside to the file of the Ld. CIT(A) for fresh adjudication. Following the aforesaid order of the Co-ordinate Bench of this Tribunal in the case of Hitesh S Mehta (supra), we are of the considered opinion that the issue of disallowance of interest expenditure is to be set aside to the file of the Ld. CIT(A), for fresh adjudication after affording the assessee reasonable opportunity of

being heard and to file details/ submissions required in this regard and considering the discussion in the case of Hitesh S. Mehta (supra). We hold and direct accordingly.

6. Ground No.3 – Charging of interest u/s 234C of the Act.

6.1 We have heard both the Ld. Representative for the assessee and the Ld. Special Counsel for the Revenue in the matter. It was fairly conceded by the Ld. Representative for the assessee that the issue of chargeability of interest u/s. 234A, 234B and 234C of the Act was considered by the Hon'ble Bombay High Court in the case of Devine Holdings Pvt. Ltd. And their Lordships in their order dated 7/3/2012 have held that interest under section 234A, 234B and 234C of the Act is chargeable even in respect of 'notified persons' notified under the Special Court Act. The relevant portion of the said High Court order at paras 9 to 14 thereof is extracted hereunder:-

"9. The levy of interest under the provisions of Sections 234A 234B and 234C is mandatory in nature. The Constitution Bench of the Supreme Court in Commissioner of Income Tax v. Anjum M.H. Ghaswala held that the provision for the levy of interest contemplated under Sections 234A, 234B and 234C is mandatory in nature and a power of waiver or reduction has not been expressly conferred upon the Settlement Commission under Chapter XIX A of the Income Tax Act 1961. The Supreme, Court held that the Settlement Commission does not have the power to reduce or waive interest statutorily payable under those provisions except to the extent of granting relief under the circulars issued by the Board under Section 119. Section 119, statutorily confers a power upon the Board to issue general. or specific orders, inter alia in respect of any class of income or class of cases, where it considers it is necessary or expedient to do so for the proper and efficient management of assessment and collection of revenue, on the guidelines, principles or procedures to be followed by other income tax authorities whether by way of realization of the provisions of Section 234A, 234B, 234C or otherwise. It is in pursuance of this power that the Central Board of Direct Taxes has issued its direction dated 23 June 2006 in which power has been specifically conferred upon the Chief Commissioner / Director General in the circumstances set out in paragraph 2 of the direction.

10. *The submission which has been urged on behalf of the Respondent, however, is that the provisions of the Special Court Act, would override those of the Income Tax Act, 1961 and that consequently the provisions of Sections 234A, 234B and 234C would not be attracted.*

11. *In order to consider this submission, a brief reference to the provisions of the Special Court Act would be in order. Under Section 3(2) the Custodian is empowered, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after 1 April 1991 and on or before 6 June 1992 to notify the name of such person in the official gazette. Under sub section (3) of Section 3 with effect from the notification under sub section (2) any property belonging to a person notified shall stand attached simultaneously with the issuance of the notification. The property attached is thereafter required to be dealt with by the Custodian in such manner as the Special Court may direct. Under Section 9A the Special Court can exercise all the jurisdiction, power and authority as were exercisable by a Civil Court in relation to any matter or claim relating to any property standing attached under Section 3(3). Under Section 11 (1) the Special Court is entrusted with the jurisdiction to make such orders as it may deem fit directing the Custodian in regard to the disposal of property under attachment. Section 11 (2) provides as follows:*

“11(2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under –

(a) All revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of section 3 to the Central Government or any State Government or any local authority;

(b) All amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund;

(c) Any other liability as may be specified by the Special Court from time to time.

Under Section 13 the provisions of the Act are to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than the Act, or in any decree or order of any Court, tribunal or other authority.

12. *In Commissioner of Income Tax v. A.K. Menon the Supreme Court held that the Special Court has no power to sit in appeal over or overrule the orders of the tax authorities, the Income Tax Appellate Tribunal or the Courts in regard to tax liabilities of notified persons. The only power of the Special Court is to determine the priorities in which claims upon the property under attachment shall be paid. There is no provision in the Special Court Act which governs the determination of tax liabilities. The determination of tax liabilities under the Income Tax Act, 1961 is not governed by the provisions of the Special Court Act. Section 11 of the Special Court Act provides for the discharge of liabilities and empowers the Special Court to*

make such order as it may deem fit directing the custodian in regard to the disposal of the property under attachment. Sub-section (2) of Section 11 provides for the liabilities which shall be paid or discharged in full. The Supreme Court has held that the expression 'tax' in clause (a) of sub-section (2) of Section 11 would not include penalty or interest. The expression "any other liability as may be specified by the Special Court from time to time" in clause (c) of sub-section (2) has been dealt with by the Supreme Court in *Harshad Shantilal Mehta (supra)*, where the Court held that the Special Court would have the full discretion to decide as to whether such claim for penalty or interest should be paid out of any surplus in the hands of the Custodian. In other words, it is evident that the jurisdiction of the Special Court under Section 11 (2) (c) is to determine if and if so, the extent of which the liability on account of penalty or interest should be paid out of any surplus funds in the hands of the Custodian. The determination of the liability to pay penalty or interest under the Income Tax Act, 1961 does not fall within the domain of the Special Court.

13. In the judgment of the Supreme Court in *Solidaire India limited (supra)*, the Supreme Court held that both the Special Court Act and the Sick Industrial Companies (Special Provisions) Act 1985 are special Acts and in the event of a conflict, the later Act namely the Special Court Act would prevail. In the *Tax Recovery Officer v. Custodian (supra)* the Custodian in exercise of powers under Section 3(2) notified *Dhanraj Mills Private Limited* as a notified person. The assets of the notified person stood attached. *Killick Nixon Private Limited* together with its group companies owed money to the notified person and the custodian filed suits for recovery. The suits were decreed by the Special Court. In execution, the Special Court appointed a Receiver for taking charge of the assets of *Killick Nixon* and its group companies and thereafter certain properties were put to auction and money was realized. The Tax Recovery Officer filed an application for intervention before the Special Court with a prayer that the Custodian be directed to consider a claim for the recovery of arrears of income tax from *Killick Nixon* on a priority basis before the distribution of the sale proceeds to any other creditor. The intervention applications were dismissed by the Special Court. The Supreme Court observed that under clause (a) of sub-section (1) of Section 9A on and from the commencement of the Special Court (Trial of offences relating to Transactions in Securities) Amendment Act 1994, the Special Court shall exercise all such jurisdiction, powers and authority as were exercisable immediately before such commencement by any Civil Court in relation to any matter or claim relating to any property standing attached under sub-section (3) of Section 3. The Supreme Court held that the jurisdiction of the Special Court is confined to the property of the notified person which stands attached under section 3(3). In paragraph 14 of the judgment, the Supreme Court observed as follows:

"In *Solidaire India Ltd.* the provisions of Section 13 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and Section 32 of the Sick Industrial Companies (Special Provisions) Act 1985 were examined and it was held that both these Acts are special Acts and in such an event it is the later Act, namely,

the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 which must prevail. Thus there can be no manner of doubt that the provisions of the Special Courts Act, wherever they are applicable, shall prevail over the provisions of the Income Tax Act."

The Supreme Court held that the Special Court could not have entertained the application moved by the Income Tax Department under Section 26(4) of the Income Tax Act, 1961 for the realization of its income tax dues from Killick Nixon Private Limited which was not a notified party.

14. In paragraph 14 of the judgment, extracted above, the Supreme Court has held that the provisions of the Special Court Act, wherever they are applicable shall prevail over the provisions of the Income Tax Act, 1961. The words "wherever they are applicable" are crucial. The Special Court Act makes no provision in regard to the determination of the liability to pay interest under the Income Tax Act, 1961. That liability is clearly referable to the provisions embodied in Sections 234A, 234B and 234C. In the circumstances, the Tribunal, in our view, was in error in coming to the conclusion that interest under Sections 234A, 234B and 234C cannot be levied on an assessee who is a notified party under the Special Court Act. By the circular which has been issued by the Board, the power to grant such a waiver or remission has been vested with the Chief Commissioner. In terms of the judgment of the Supreme Court in Harshad Shantilal Mehta (supra) the notified person, the assessee in the present case, is not without remedy since it is open to the assessee to take recourse to the remedy available under the direction dated 26 June 2006. We accordingly answer the question of law as framed in the negative. However, we clarify that it would be open to the notified person to seek a waiver or reduction by making an application to the Chief Commissioner of Income Tax in terms of the order dated 26 June 2006 of the Central Board of Direct Taxes. The appeal is accordingly disposed of."

6.2 Respectfully following the decision of the Hon'ble Bombay High Court in the case of Divine Holdings Pvt. Ltd.,(supra) and in accordance with the ratio laid down in the Hon'ble Apex Court's order in Anjum H. Ghaswala (252 ITR 1) we hold that interest u/s. 234A, 234B and 234C of the Act is mandatorily chargeable in the case on hand even though it is a 'notified person'. Consequently, we uphold the order of the CIT(A) on this issue and dismiss Ground No.3 raised by the assessee.

7. **Ground No.4: Charging of Interest u/s. 234A,234B and 234C of the Act without considering TDS on income assessed:**

7.1 In this ground, the assessee contends that the impugned order of the Ld. CIT(A) is erroneous in not considering that the income assessed in its hands were subjected to TDS and, therefore, on the said amount of tax, no interests under section 234A, 234B and 234C of the Act can be charged. In support of this proposition, the Ld. Representative for the assessee submitted that a Co-ordinate bench of this Tribunal in the case of Eminent Holdings Pvt. Ltd. in ITA No.2139/Mum/2013 for assessment year 2002-03 had considered this issue and restored the same to the file of the Assessing Officer for fresh adjudication and computation after considering the amount of tax deducted at source on the income of the assessee.

7.2 Per contra, the Ld. Special Counsel for the Revenue placed strong reliance on the decision of the Hon'ble Bombay High Court in the case of Devine Holdings Pvt. Ltd.

7.3.1 We have heard the rival contentions and perused and carefully considered the material on record. We find that this issue i.e. chargeability of Interest u/s. 234A, 234B and 234C of the Act on 'notified persons', and the issue of chargeability of the same interest in respect of TDS made on assessed income has been considered and adjudicated upon by a company-ordinate Bench of the Tribunal in the case of Eminent Holdings Pvt. Ltd. in its order in ITA No.2139/Mum/2013 dated 18/6/2014; for the assessment year 2002-03, holding as under at paras 3 and 3.1 thereof:

"3.Next ground of appeal is about levy of interest u/s. 234 of the Act.Before us, AR stated that the assessee was a notified entity,that the provisions of s. 234A, 234B and 234C of the Act were deemed to have complied with,that the assets were already in attachment of the Custodian appointed under the provisions of the Special Courts Act,that the Tribunal in the case of the appellant and several other

entities had held the view in favour of the appellant, that the Hon'ble Bombay High Court in the case of Divine Holdings Pvt. Ltd. and Cascade Holdings Pvt. Ltd. had held that the provisions of sections 234A, 234B and 234C of the Act were mandatory and were applicable to the notified entities also, that the assessee was in the process of filing an appeal against the said order before the Hon'ble Supreme Court, that the income earned in the year under consideration was subjected to provisions of TDS, that the changeability of the section 234A, 234B and 234C of the Act should be after considering the amount of tax deductible at source on the income assessed. The appellant relies in this regard on the following decisions. He relied upon the cases of Motorola inc. v. DCIT [95 ITD 269 (Del.(SB)], Sedco Fores Drilling Co. Ltd. [264 ITR 320], NGC Network Asia LLC [313 ITR 187], Summit Bhattacharya [300 ITR (AT) 347 (Bom)(SB)], Vijal Gopal Jindal [ITA No. 4333/Del/2009] & Emillo Ruiz Berdejo [320 ITR 190 (Bom)]. DR relied upon the cases of Devine Holdings Pvt. Ltd.

3.1. We have heard the rival submissions and perused the material before us. We find that in the case of Devine Holdings Pvt. Ltd. Hon'ble Bombay High Court has held that provisions of section 234A, 234B and 234C were applicable to the notified person also. Therefore, upholding the order of the FAA to that extent, we hold that provisions of section 234 of the Act are applicable. As far as calculation part is concerned, we find merits in the submission made by the assessee. Therefore, we are restoring back the issue to the file of the AO for fresh adjudication who would decide the issue after considering the amount taxed deductible at source on the income assessed and after affording a reasonable opportunity of hearing to the assessee. Ground no.5 is allowed in part in favour of the assessee.

As a result, appeal filed by the assessee for the AY.2002-03 stands partly allowed."

7.3.2 Following the decision of the co-ordinate Bench of the Tribunal in the case of Eminent Holdings Pvt. Ltd.; (supra), we restore the issue of computation of interest chargeable u/s. 234A, 234B and 234C of the Act to the file of the Assessing Officer for fresh examination and adjudication after considering the amount of TDS made on income assessed and after affording the assessee adequate opportunity of being heard and to file details/submissions in this regard. Consequently, Ground No.4 is allowed for statistical purposes only.

8. Ground No.5- is general in nature and therefore, no adjudication is called for thereon.

9. In the result, the assessee 's appeal for assessment year 1992-93 is partly allowed for statistical purposes.

ORDER

ITA No.3492/M/2014 (Assessment Year 2008-09) :

10. In this appeal, the assessee has raised the following grounds:-

1. “ *The Ld. Commissioner of Income-Tax (Appeals) ought to have appreciated that as per the decision of Hon'ble Special Court dated 30.04.2010 in MP No. 41 of 1999, the assets under consideration and the consequential income belongs to Shri Harshad S. Mehta and hence the income assessed by the Assessing Officer ought to have been taxed in the hands of Shri Harshad S. Mehta and not in the hands of the appellant.*
2. *The Ld. Commissioner of Income-Tax (Appeals) has erred in law and in facts in confirming the disallowance of interest expenditure amounting to Rs.2,50,18,362/-*
3. *The Ld. Commissioner of Income-tax (Appeals) has erred in law and in facts in confirming calculation of book profit u/s.115JB at Rs.2,10,39,882/-.*
4. *The Ld. Commissioner of Income-Tax (Appeals) has erred in law and in facts that in confirming the levy of interest u/s. 234A, 234B and 234C of the Act.*
5. *The Ld. Commissioner of Income-tax (Appeals) has erred in law and in facts in not appreciating that the income assessed in the hands of the appellant were subjected to the provisions of TDS and hence on the said amount of tax no interest can be computed u/s. 234A, 234B and 234C of the Act.*
6. *The appellant craves leave of your Honour to add to, alter, amend and/or delete all or any of the foregoing grounds of appeal.”*

11. Ground No.1-

11.1 At the outset, the Id. AR for the assessee mentioned that the ground at Sl.No.1 is not pressed. After hearing the Id. Special Counsel, the Ground No.1 is dismissed as not pressed.

12. Ground No.2 – Disallowance of Interest expenditure – Rs.2,50,18,362/-.

12.1 The Id. for the assessee submitted that an identical issue of disallowance of interest expenditure against interest income from investment etc. had come up for consideration before the co-ordinate Bench of the Tribunal in the case of Sri Hitesh Mehta in ITA Nos.7726 & 7727/Mum/2010 wherein the co-ordinate Bench vide order dated 26/04/2013 had set aside this issue afresh by adjudicating the respective ground relating to the rejection/reliability of the books of accounts. At para-5 of the aforesaid order, it is held as under :-

“5. Ground no. 4 relates to the action of the Ld.CIT(A) in confirming the liabilities amounting to Rs.11,24,99,052/- and Rs.12,61,36,245/- respectively for the A.Ys 2005-06 and 2006-07 towards interest expenditure claimed by the assessee. It is pertinent to note that the findings given in para 3.3 above in respect of rejection/reliability of the books of accounts and the proposed adjudication of the Ld.CIT(A) in view of the said direction may have direct impact on the issue of the impugned liability, we set aside this issue also to the files of the Ld.CIT(A) to adjudicate afresh along with the adjudication of the respective ground pertaining to the rejection/reliability of the books of accounts.”

12.2 Per contra, the Id. Special Counsel for Revenue placed reliance on the order of the Id. CIT(Appeals).

12.3 We have heard both parties and perused and considered the material on record; including the order of the Co-ordinate Bench of ITAT, Mumbai in the case of Hitesh S. Mehta (supra). Whether the interest expenditure constitutes ascertained liability or not is linked to the issue of rejection of books of account as the books of account are the basis for computation of 'book profits' u/s. 115JB of the Act. This issue was set aside to the file of the Id. CIT(A) for fresh adjudication. Following the aforesaid order of the co-ordinate Bench of this Tribunal in the case of Hitesh S. Mehta (supra), we are of the considered opinion that the issue of disallowance of interest expenditure is to be set aside

to the file of the Id. CIT(A) for fresh adjudication after affording the assessee reasonable opportunity of being heard and to file details/submissions required in this regard and considering the discussion in the case of Hitesh S. Mehta (supra), we hold and direct accordingly.

13. Ground No.3 – Computation of Book profit u/s. 115JB at Rs.2,10,39,882/-.

13.1 In this ground it is contented that the Id. CIT(A) had erred in confirming the calculation of book profits u/s. 115JB of the Act at Rs.2,10,39,882/-. It was submitted by the Id. AR for the assessee that this ground is consequential to the decision taken in Ground No.2 of this appeal. Since we have restored this issue of disallowance of interest expenditure to the file of the Id. CIT(A) for fresh adjudication after affording the assessee reasonable opportunity of being heard, we consequently restore this issue of computation of 'Book profits' u/s. 115 JB of the Act also to the file of the Id. CIT(A) with respect to the issue of disallowance of interest expenditure. It is accordingly ordered. Ground No.3 is treated as allowed for statistical purposes.

14. Ground No.4- Charging of interest u/s. 234A, 234B and 234C of the Act.

14.1 We have heard both the Id. AR for the assessee and the Id. Special Counsel for the Revenue in the matter. It was fairly conceded by the Id. AR for the assessee that the issue of chargeability of interest u/s.234A, 234B and 234C of the Act was considered by the Hon'ble Bombay High Court in the case of Divine Holdings Pvt. Ltd., dated 7/3/2012 and their Lordships in that order held that interest u/s. 234A, 234B and 234C of the Act is chargeable even in respect of notified persons, notified under

the Special Court Act. The relevant portion of the said High Court order at para 9 to 14 thereof is extracted hereunder :-

“9. The levy of interest under the provisions of Sections 234A 234B and 234C is mandatory in nature. The Constitution Bench of the Supreme Court in Commissioner of Income Tax v. Anjum M.H. Ghaswala held that the provision for the levy of interest contemplated under Sections 234A, 234B and 234C is mandatory in nature and a power of waiver or reduction has not been expressly conferred upon the Settlement Commission under Chapter XIX A of the Income Tax Act 1961. The Supreme Court held that the Settlement Commission does not have the power to reduce or waive interest statutorily payable under those provisions except to the extent of granting relief under the circulars issued by the Board under Section 119. Section 119, statutorily confers a power upon the Board to issue general or specific orders, inter alia in respect of any class of income or class of cases, where it considers it is necessary or expedient to do so for the proper and efficient management of assessment and collection of revenue, on the guidelines, principles or procedures to be followed by other income tax authorities whether by way of realization of the provisions of Section 234A, 234B, 234C or otherwise. It is in pursuance of this power that the Central Board of Direct Taxes has issued its direction dated 23 June 2006 in which power has been specifically conferred upon the Chief Commissioner / Director General in the circumstances set out in paragraph 2 of the direction.

10. The submission which has been urged on behalf of the Respondent, however, is that the provisions of the Special Court Act, would override those of the Income Tax Act, 1961 and that consequently the provisions of Sections 234A, 234B and 234C would not be attracted.

11. In order to consider this submission, a brief reference to the provisions of the Special Court Act would be in order. Under Section 3(2) the Custodian is empowered, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after 1 April 1991 and on or before 6 June 1992 to notify the name of such person in the official gazette. Under sub section (3) of Section 3 with effect from the notification under sub section (2) any property belonging to a person notified shall stand attached simultaneously with the issuance of the notification. The property attached is thereafter required to be dealt with by the Custodian in such manner as the Special Court may direct. Under Section 9A the Special Court can exercise all the jurisdiction, power and authority as were exercisable by a Civil Court in relation to any matter or claim relating to any property standing attached under Section 3(3). Under Section 11 (1) the Special Court is entrusted with the jurisdiction to make such orders as it may deem fit directing the Custodian in regard to the disposal of property under attachment. Section 11 (2) provides as follows:

“11(2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under –

(a) All revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of section 3 to the Central Government or any State Government or any local authority;

(b) All amounts due from the person so notified by the Custodian to any bank or financial institution or mutual fund;

(c) Any other liability as may be specified by the Special Court from time to time.

Under Section 13 the provisions of the Act are to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than the Act, or in any decree or order of any Court, tribunal or other authority.

12. In Commissioner of Income Tax v. A.K. Menon the Supreme Court held that the Special Court has no power to sit in appeal over or overrule the orders of the tax authorities, the Income Tax Appellate Tribunal or the Courts in regard to tax liabilities of notified persons. The only power of the Special Court is to determine the priorities in which claims upon the property under attachment shall be paid. There is no provision in the Special Court Act which governs the determination of tax liabilities. The determination of tax liabilities under the Income Tax Act, 1961 is not governed by the provisions of the Special Court Act. Section 11 of the Special Court Act provides for the discharge of liabilities and empowers the Special Court to make such order as it may deem fit directing the custodian in regard to the disposal of the property under attachment. Sub-section (2) of Section 11 provides for the liabilities which shall be paid or discharged in full. The Supreme Court has held that the expression 'tax' in clause (a) of sub-section (2) of Section 11 would not include penalty or interest. The expression "any other liability as may be specified by the Special Court from time to time" in clause (c) of sub-section (2) has been dealt with by the Supreme Court in Harshad Shantilal Mehta (supra), where the Court held that the Special Court would have the full discretion to decide as to whether such claim for penalty or interest should be paid out of any surplus in the hands of the Custodian. In other words, it is evident that the jurisdiction of the Special Court under Section 11 (2) (c) is to determine if and if so, the extent of which the liability on account of penalty or interest should be paid out of any surplus funds in the hands of the Custodian. The determination of the liability to pay penalty or interest under the Income Tax Act, 1961 does not fall within the domain of the Special Court.

13. In the judgment of the Supreme Court in Solidaire India limited (supra), the Supreme Court held that both the Special Court Act and the Sick Industrial Companies (Special Provisions) Act 1985 are special Acts and in the event of a conflict, the later Act namely the Special Court Act would prevail. In the Tax

Recovery Officer v. Custodian (supra) the Custodian in exercise of powers under Section 3(2) notified Dhanraj Mills Private Limited as a notified person. The assets of the notified person stood attached. Killick Nixon Private Limited together with its group companies owed money to the notified person and the custodian filed suits for recovery. The suits were decreed by the Special Court. In execution, the Special Court appointed a Receiver for taking charge of the assets of Kiliick Nixon and its group companies and thereafter certain properties were put to auction and money was realized. The Tax Recovery Officer filed an application for intervention before the Special Court with a prayer that the Custodian be directed to consider a claim for the recovery of arrears of income tax from Killick Nixon on a priority basis before the distribution of the sale proceeds to any other creditor. The intervention applications were dismissed by the Special Court. The Supreme Court observed that under clause (a) of sub-section (1) of Section 9A on and from the commencement of the Special Court (Trial of offences relating to Transactions in Securities) Amendment Act 1994, the Special Court shall exercise all such jurisdiction, powers and authority as were exercisable immediately before such commencement by any Civil Court in relation to any matter or claim relating to any property standing attached under sub- section (3) of Section 3. The Supreme Court held that the jurisdiction of the Special Court is confined to the property of the notified person which stands attached under section 3(3). In paragraph 14 of the judgment, the Supreme Court observed as follows:

"In Solidaire India Ltd. the provisions of Section 13 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and Section 32 of the Sick Industrial Companies (Special Provisions) Act 1985 were examined and it was held that both these Acts are special Acts and in such an event it is the later Act, namely, the Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 which must prevail. Thus there can be no manner of doubt that the provisions of the Special Courts Act, wherever they are applicable, shall prevail over the provisions of the Income Tax Act."

The Supreme Court held that the Special Court could not have entertained the application moved by the Income Tax Department under Section 26(4) of the Income Tax Act, 1961 for the realization of its income tax dues from Killick Nixon Private Limited which was not a notified party.

14. In paragraph 14 of the judgment, extracted above, the Supreme Court has held that the provisions of the Special Court Act, wherever they are applicable shall prevail over the provisions of the Income Tax Act, 1961. The words "wherever they are applicable" are crucial. The Special Court Act makes no provision in regard to the determination of the liability to pay interest under the Income Tax Act, 1961. That liability is clearly referable to the provisions embodied in Sections 234A, 234B and 234C. In the circumstances, the Tribunal, in our view, was in error in coming to

the conclusion that interest under Sections 234A, 234B and 234C cannot be levied on an assessee who is a notified party under the Special Court Act. By the circular which has been issued by the Board, the power to grant such a waiver or remission has been vested with the Chief Commissioner. In terms of the judgment of the Supreme Court in Harshad Shantilal Mehta (supra) the notified person, the assessee in the present case, is not without remedy since it is open to the assessee to take recourse to the remedy available under the direction dated 26 June 2006. We accordingly answer the question of law as framed in the negative. However, we clarify that it would be open to the notified person to seek a waiver or reduction by making an application to the Chief Commissioner of Income Tax in terms of the order dated 26 June 2006 of the Central Board of Direct Taxes. The appeal is accordingly disposed of. "

14.2 Respectfully following the decision of the Hon'ble Bombay High Court in the case of Divine Holdings Pvt. Ltd. (supra), and in accordance with the ratio laid down in the Hon'ble Apex Court's order in Anjum H. Ghaswala (252 ITR 1), we hold that interest u/s. 234A, 234B and 234C of the Act is mandatorily chargeable in the case on hand even though it is a 'notified person'. Consequently, we uphold the order of the Id. CIT(A) on this issue and dismiss Ground No.4 raised by the assessee .

15. Ground No.5 – **Charge of Interest u/s. 234A, 234B and 234C of the Act without considering TDS income assessed.**

15.1 In this ground the assessee contends that the impugned order of the Id. CIT(A) is erroneous in not considering that the income assessed in its hands were subjected to TDS and, therefore, on the said amount of tax, no interest u/s. 234a, 234B and 234C of the Act can be charged. In support of this proposition, the Id. AR for the assessee submitted that a co-ordinate bench of this Tribunal in the case of Eminent Holdings Pvt. Ltd. in ITA No.2139/Mum/2013 for the assessment year had considered this issue and restored the issue to the file of the Assessing Officer for fresh adjudication and computation after considering the amount of tax deductible at source on the income of the assessee.

15.2 Per contra, the Special Counsel for revenue placed strong reliance on the decision of the Hon'ble Bombay High Court in the case of Divine Holdings Pvt. Ltd.

15.3.1 We have heard the rival contentions and perused and carefully considered the material on record. We find that this issue i.e. the chargeability of interest u/s. 234A, 234B and 234C of the Act on 'notified persons', and the issue of chargeability of the same interest in respect of TDS made on assessed income has been considered and adjudicated upon by a co-ordinate Bench of this Tribunal in the case of Eminent Holdings Pvt. Ltd. in its order in ITA No.2139/Mum/2013 dated 18/6/2004; for the assessment year 2002-03, holding as under at para 3 and 3.1 thereof:

"3.Next ground of appeal is about levy of interest u/s. 234 of the Act.Before us, AR stated that the assessee was a notified entity,that the provisions of s. 234A, 234B and 234C of the Act were deemed to have complied with,that the assets were already in attachment of the Custodian appointed under the provisions of the Special Courts Act,that the Tribunal in the case of the appellant and several other entities had held the view in favour of the appellant,that the Hon'ble Bombay High Court in the case of Divine Holdings Pvt. Ltd. and Cascade Holdings Pvt. Ltd. had held that the provisions of sections 234A,234B and 234C of the Act were mandatory and were applicable to the notified entities also,that the assessee was in the process of filing an appeal against the said order before the Hon'ble Supreme Court,that the income earned in the year under consideration was subjected to provisions of TDS,that the changeability of the section 234A, 234B and 234C of the Act should be after considering the amount of tax deductible at source on the income assessed. The appellant relies in this regard on the following decisions. He relied upon the cases of Motorola inc. v. DCIT [95 ITD 269 (Del.(SB)], Sedco Fores Drilling Co. Ltd. [264 ITR 320],NGC Network Asia LLC [313 ITR 187] ,Summit Bhattacharya [300 ITR (AT) 347 (Bom)(SB)], Vijal Gopal Jindal [ITA No. 4333/Del/2009] & Emillo Ruiz Berdejo [320 ITR 190 (Bom)].DR relied upon the cases of Devine Holdings Pvt. Ltd.

3.1.We have heard the rival submissions and perused the material before us.We find that in the case of Devine Holdings Pvt. Ltd. Hon'ble Bombay High Court has held that provisions of section 234A, 234B and 234C were applicable to the notified

person also. Therefore, upholding the order of the FAA to that extent, we hold that provisions of section 234 of the Act are applicable. As far as calculation part is concerned, we find merits in the submission made by the assessee. Therefore, we are restoring back the issue to the file of the AO for fresh adjudication who would decide the issue after considering the amount taxed deductible at source on the income assessed and after affording a reasonable opportunity of hearing to the assessee. Ground no.5 is allowed in part in favour of the assessee. "

15.3.2 Following the decision of the co-ordinate Bench of the Tribunal in the case of Eminent Holdings Pvt. Ltd.; (supra), we restore the issue of computation of interest chargeable u/s. 234A, 234B and 234C of the Act to the file of the Assessing Officer for fresh examination and adjudication after considering the amount of TDS made on income assessed and after affording the assessee adequate opportunity of being heard and to file details/submissions in this regard. Consequently, Ground No.5 is allowed for statistical purposes only.

16. Ground No.6 is general in nature and therefore no adjudication is called for.

17. In the result, the assessee 's appeal for the assessment year 2008-09 is partly allowed for statistical purposes.

18. To sum up, the assessee's appeals for the assessment years 1992-93 and 2008-09 are partly allowed for statistical purposes.

Order pronounced in the open court on 15/01/2016

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER
Mumbai, Dated 15/01/2015

Sd/-
(JASON P. BOAZ)
ACCOUNTANT MEMBER

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

Vm, Sr. PS

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai