

**IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA**

**BEFORE SHRI N.V. VASUDEVAN, JM &DR. A.L.SAINI, AM**

**आयकरअपीलसं./ITA No.1687/Kol/2016**

**(निर्धारणवर्ष / Assessment Year: 2007-08)**

<b>Ellenbarrie Industrial Gases Ltd.</b>	<b>Vs.</b>	<b>ITO, Ward-8(2), Kolkata</b>
34, Ripon Street, Kolkata – 700016.		
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. :AAACE 5770 E		
<b>(Appellant)</b>	<b>..</b>	<b>(Respondent)</b>

Appellant by :Shri A.K. Bandyopadhyay, FCA  
Respondent by :Shri S. Dasgupta, Addl. CIT(DR)

सुनवाईकीतारीख/ **Date of Hearing** : **06/12/2017**  
घोषणाकीतारीख/**Date of Pronouncement** : **07/02/2018**

**आदेश / ORDER**

**Per Dr. Arjun Lal Saini, AM:**

The captioned appeal filed by the assessee, pertaining to Assessment Year 2007-08, is directed against an order passed by the Commissioner of Income Tax(Appeals)-16, Kolkata, in Appeal No.352/CIT(A)-16/Kol/2014-15/W-8(2), dated 13.07.2016, which in turn arises out of an order passed by the Assessing Officer u/s154/143(1) of the I.T. Act, 1961 (hereinafter referred to as the 'Act'), dated 16-04-2009.

2.The assessee has raised the following grounds of appeal:

*"1. The order of the Learned Commissioner of Income Tax (Appeals)-16, to the extent that he has confirmed the order of Ld. Income Tax Officer Ward 8(2) Kolkata, is contrary to law and facts of the case.*

*2. The Learned Commissioner of Income Tax (Appeals)-16 had ignored the fact that assessed tax for the purpose of Section 234B and 234C of the Income Tax Act 1961 was computed without considering available MAT Credit of Rs.12,91,616/-upto the Assessment Year 2006-2007. Computation of Interest under Section 234B and 234C was not made in accordance with Explanation 1(v) to Sub-Section (1) of Section 234B and 234C of Income Tax Act 1961;*

*and also violative of Hon'ble Supreme Court decision in CIT Vs. TULSYAN NECL LTD. (2011) 196 TAXMAN 181. The order of Learned Commissioner of Income Tax (Appeals)-16 is bad in law.*

*3. In the computation of Assessed Tax, TDS of Rs.4,35,927/- was deducted instead of Rs.4,36,617/- and this plea was brought to the notice of Ld. Commissioner of Income Tax (Appeals)-16 at the time of hearing.*

*4. Under the above facts of the case, the order passed by Ld. Commissioner of Income Tax (Appeals)-16 is liable to be set aside.*

*5. For these and other grounds, which may be urged at the time of the hearing, the appeal may be allowed and justice rendered.”*

**3. The main grievance of the assessee in this appeal is that MAT credit of Rs.12,91,616/- should be allowed from the ‘assessed tax, and thereafter the interest under section 234B and C should be computed. Whereas the AO computed the interest under section 234B and C without considering MAT credit. Apart from this, in computation of ‘assesses tax’ the AO considered TDS claim of the assessee at Rs. 4,35,927/- instead of Rs.4,36,617.**

The brief facts apropos this issue are that in the assessee`s case under consideration, the return of income was processed under section 143(1) of the Act, on 17.03.2009 raising a demand of Rs.14,92,848/- and the intimation u/s 143(1) was served upon the assessee company on 26.03.2009. The assessee company submitted a rectification petition u/s 154 of the Act on 27.03.2009 in response to the intimation served on 26.03.2009. In the rectification petition u/s 154, the assessee company claimed that credit for TDS was allowed in the intimation at Rs.4,35,927/- and the relevant TDS certificates in original had been submitted by the assessee company. On verification of the TDS certificates, it had been seen that total amount of tax deducted for an amount of Rs.4,36,617/- was not given credit at the time of processing and since the mistake was apparent from record that credit for TDS of Rs.4,36,617/- was allowed to the assessee company. The assessee company, in the petition further claimed that interest u/s 234B and 234C were not leviable in the case of the

company for the reason that assessee company did not make payment of advance tax on the basis of the decision of the Supreme Court in the case of CIT vs. Kwality Biscuits Ltd.(2006) reported in 15 Taxman 658. The submission of the assessee company was noted by the AO and observed that the said Supreme Court decision relates to Section 115J of the Act, whereas the assessee company was liable to pay tax u/s 115JB of the Act. Section 115JB had been introduced by Finance Act, 2000 w.e.f.01.04.2001 and by an amendment by Finance Act, 2000, the book profit is deemed to be the total income of the assessee. In this respect, the Hon'ble Karnataka High Court in the case of M/s. Jindal Thermal Power Co. Ltd. vs. DCIT(2006) 286 ITR 182 held that the book profit were deemed and the liability to pay advance tax arose.

3.1 The AO also noted that the CBDT Circular No.13/2001 clarifies the position of payment of advance tax u/s 115JB of the Act. Para-4 of the said circular states as under: *"It is thus, abundantly clear that all companies are liable for payment of advance tax having regard to the provisions contained in new section 115JB. Consequently, the provisions of sections 234B and 234C for interest on defaults in payments of advance tax and deferment of advance tax would also be applicable where facts of the case warrant"*.

Considering the above circular of CBDT, the AO held that the assessee company was liable to pay advance tax and for failure to do so, interest u/s 234B & 234C had been rightly charged. The AO rejected the rectification application of the assessee and computed the tax payable as under:

Total income as per order u/s 143(1) 17.03.2009		NIL
Tax @ 10% of book profit		Rs.61,22,210/-
Surcharge @ 10%		Rs.6,12,221/-
Education Cess @ 2%		<u>Rs.1,34,689/-</u>
Total Tax Payable		Rs.68,69,120/-
<b>Less: T.D.S</b>		<b><u>Rs.4,35,927/-</u></b>
		Rs.64,33,193/-
Add: Interest u/s 234B	Rs.5,84,199/-	
Add: Interest u/s 234C	<u>Rs.3,24,876</u>	<u>Rs.9,09,075/-</u>
		Rs.73,42,268
Less: Self Assessment Tax payable		<u>Rs.64,20,902/-</u>

Less: FBT refund for the A.Y 2007-08 adjusted  
**Balance Payable**

4. Aggrieved by the order passed by the AO, the assessee filed an appeal before the CIT(A) who has confirmed the addition made by the AO. The assessee submitted before the CIT(A), that interest u/s 234B and 234C are not leviable in view of the decision of Hon'ble Supreme Court in the case of CIT vs. Tulsyan Ltd. 196 Taxman 181.

4.1 The CIT(A) noted that the AO while passing order u/s 154 of the I.T. Act dated 16.04.2009 held that section 115JB of the Act, had been introduced by Finance Act 2000 w.e.f. 01.04.2001. As per this section, the Book Profit is deemed to be the total income of the assessee. The AO has relied upon the decision of Hon'ble Karnataka High Court in the case of M/s. Jindal Thermal Power Co. 286 ITR 182 that the Book Profits are deemed and the liability to pay Advance Tax arose. The AO has further relied upon the CBDT circular no.13/2001. The AO on the basis of the CBDT's circular and the decision cited above held that the assessee company was liable to pay Advance Tax and for failure to do so, interest u/s 234B and 234C were levied. Therefore, CIT(A) held that the AO had rightly levied interest u/s 234B and 234C on the basis of the CBDT's circular and this way, he confirmed the order passed by the AO.

5. The Ld Counsel for the assessee submitted before us that the said issue is fully covered by the judgment of Hon'ble Supreme Court in the case of Tulsyan NEC Ltd. vide Civil Appeal Nos.10677-79 of 2010 (SC) wherein the Hon'ble Supreme Court has held that under section 234B, "assessed tax" means the tax on the total income determined under Section 143(1) or on regular assessment under Section 143(3) as reduced by the amount of tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection

and which is taken into account in computing such total income. The definition, thus, at the relevant time excluded MAT credit for arriving at assessed tax. This led to immense hardship. The position which emerged was that due to omission on one hand MAT credit was available for set off for five years under Section 115JAA but the same was not available for set off while calculating advance tax. This dichotomy was more spelt out because Section 115JAA did not provide for payment of interest on the MAT credit. To avoid this situation, Parliament amended Explanation 1 to Section 234B by Finance Act, 2006 w.e.f. 1.4.2007 to provide along with tax deducted or collected at source, MAT credit under Section 115JAA also to be excluded while calculating assessed tax. From the above, it is evident that any tax paid in advance/pre-assessed tax paid can be taken into account in computing the tax payable subject to one caveat, viz, that where the assessee on the basis of self computation unilaterally claims set off or MAT credit, the assessee does so at its risk as in case it is ultimately found that the amount of tax credit availed was not lawfully available, the assessee would be exposed to levy of interest under Section 234B on the shortfall in the payment of advance tax. We reiterate that we cannot accept the case of the Department because it would mean that even if the assessee does not have to pay advance tax in the current year, because of his brought forward MAT credit balance, he would nevertheless be required to pay advance tax, and if he fails, interest under Section 234B would be chargeable. The consequence of adopting the case of the Department would mean that MAT credit would lapse after five succeeding assessment years under Section 115JAA(3); that no interest would be payable on such credit by the Government under the proviso to Section 115JAA(2) and that the assessee would be liable to pay interest under Sections 234B and C on the shortfall in the payment of advance tax despite existence of MAT credit standing to the account of the assessee. Thus, despite MAT credit standing to the account of the assessee, the liability of the assessee gets increased instead of it getting reduced. Lastly, it is immaterial that the relevant form prescribed under Income Tax Rules, at the relevant time (i.e. before

1.4.2007), provided for set off of MAT credit balance against the amount of tax plus interest i.e. after the computation of interest under Section 234B. This was directly contrary to a plain reading of Section 115JAA(4). Further, a form prescribed under the rules can never have any effect on the interpretation or operation of the parent statute. Based on the above reasons, the Hon`ble Supreme Court held that there is no merit in the civil appeals filed by the Department and the same were dismissed.

5.1 The Ld Counsel for the assessee submitted before us that the said issue is also fully covered by the judgment of Hon`ble Delhi High Court in the case of CIT vs. Salora International Ltd, ITA 693/2010 (Del-HC) dated 4<sup>th</sup> May, 2010 wherein it was held that the Assessing Officer not only withdrew the excess MAT credit allowed to the assessee but in the garb of creating a demand in ITNS 150 also charged interest under [Section 234B](#) and [234C](#). The Assessing Officer completely ignored the settled legal issue that before charging interest under [Section 234B](#) and [234C](#), MAT credit was to be first allowed to the assessee. The charging of interest under [Section 234B](#) and [234C](#) by the Assessing Officer, as a consequence of the order passed under [Section 154](#), was a debatable issue, which the Assessing Officer could not do by invoking the provisions of [Section 154](#).

6. The Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

7. We have given a careful consideration to the rival submissions and perused the material available on record, we note that the charging of interest under [Section 234B](#) and [234C](#) was introduced by the Assessing Officer in his order under [Section 154](#) of the Act. The Assessing Officer completely ignored the settled legal issue that before charging interest under [Section 234B](#) and [234C](#), MAT credit was to be first allowed to the assessee. The Learned Commissioner of Income Tax (Appeals), had also ignored the fact that assessed tax for the purpose of Section 234B and

234C of the Income Tax Act 1961 was computed without considering available MAT Credit of Rs.12,91,616/-. That is, upto the Assessment Year 2006-2007 the available MAT Credit was at Rs.12,91,616/- and the assessing officer did not consider it before charging of interest under section 234B and 234C of the Act. We note that, the Computation of Interest under Section 234B and 234C was not made in accordance with Explanation 1(v) to Sub-Section (1) of Section 234B and 234C of Income Tax Act 1961; which is given below:

**SECTION 234B: Interest for defaults in payment of advance tax.**

*(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of [one per cent] for every month or part of a month comprised in the period from the 1st day of April next following such financial year [to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment, on an amount] equal to the assessed tax or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the assessed tax.*

*Explanation 1.—In this section, "assessed tax" means the tax on the total income determined under sub-section (1) of section 143 and where a regular assessment is made, the tax on the total income determined under such regular assessment as reduced by the amount of,—*

*(i) any tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income;*

*(ii) any relief of tax allowed under section 90 on account of tax paid in a country outside India;*

*(iii) any relief of tax allowed under section 90A on account of tax paid in a specified territory outside India referred to in that section;*

*(iv) any deduction, from the Indian income-tax payable, allowed under section 91, on account of tax paid in a country outside India; and*

***(v) any tax credit allowed to be set off in accordance with the provisions of section 115JAA[or section 115JD]"***

Thus, Explanation 1 (v) of sub section 1 of section 234B clearly guides that MAT credit set off should be allowed while computing 'assessed tax'. Therefore, it is abundantly clear that in the assessee's case under

consideration, the available MAT credit was at Rs.12,91,616/- up to assessment year 2006-07, and the same should be allowed first, (that is, before computing the interest under section 234B and C of the Act), but, in fact, we note that AO has not allowed this MAT credit to the assessee.

7.1 We note that Parliament amended Explanation 1 to Section 234B by Finance Act, 2006 w.e.f. 1.4.2007 to provide along with tax deducted or collected at source, MAT credit under Section 115JAA also to be excluded while calculating assessed tax. From the above, it is evident that any tax paid in advance/pre-assessed tax paid can be taken into account in computing the tax payable.

Based on the factual position explained above, we direct the assessing officer to allow MAT credit, which is available with the assessee at Rs.12,91,616/- and , then, interest under section 234B and C, if any, may be charged, that is, after set off of MAT credit, the AO may compute the interest under section 234B and C.

7.2 The assessee in the ground No.3 raised before us stated that while computing 'assessed tax' , the AO has allowed TDS claim at Rs.4,35,927/- whereas as per assessee it should be Rs.4,36,617/-. We direct the assessing officer to allow the claim of the assessee for the balance amount of Rs.670/- (Rs.4,36,617/- – Rs. 4,35,927/-), after verification, as per law.

8. In the result, Ground No.2 raised by the assessee is allowed, and ground No.3 raised by the assessee is allowed for statistical purposes.

Order is pronounced in the open court on 07/02/2018.

**Sd/-**  
**(N.V. VASUDEVAN)**  
न्यायिक सदस्य / JUDICIAL MEMBER  
कोलकाता /Kolkata;  
दिनांक Dated 07/02/2018  
(RS, SPS)

**Sd/-**  
**(DR. A.L.SAINI)**  
लेखा सदस्य / ACCOUNTANT MEMBER



**आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant – Ellenbarrie Industrial Gases Ltd.
2. प्रत्यर्थी/ The Respondent- ITO, Ward-8(2), Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A),
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT,  
Kolkata
6. गार्डफाईल / Guard file.  
सत्यापितप्रति

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By Order

Senior Private Secretary,  
Head of Office/D.D.O,  
I.T.A.T, Kolkata Benches,  
Kolkata.