

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "I" MUMBAI**

**BEFORE SHRI C.N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5326/MUM/2015
Assessment Year: 1991-92**

Indian Aluminum Company
Ltd. (Since merged with
Hindaloc Industries Ltd.)
Century Bhavan Dr. Annie
Besant Road, Worli,
Mumbai-400018.

Vs.
Dy. Commissioner
of Income Tax-
Central Circle-1(4),
9th floor, Old CGO
Building, M.K.
Road, Mumbai.

PAN No. AAACI5375F
Appellant

Respondent

Assessee by : Mr. Naresh Jain, AR
Revenue by : Ms. Pooja Swaroop, DR

Date of Hearing : 02/02/2018
Date of pronouncement : 23/03/2018

ORDER

PER N.K. PRADHAN, AM

Whether interest on refunds would fall under (1)(a) or (1)(b) of section 244A in case the refund on account of excess TDS and advance tax is less than 10% of the total tax?

This is what the case is all about.

This is an appeal filed by the assessee. The relevant assessment year is 1991-92. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-12, Mumbai [in short CIT(A)]

and arises out of the assessment completed u/s 154 of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee/appellant read as under:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) has grossly erred in confirming the action of AO in dismissing the petition u/s 154 and holding that there is no mistake apparent from the record.
2. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that proviso to section 244A(1)(a) is not applicable to the refund arising to the appellant and appellant is entitled to interest as per sec 244(1)(b).

3. Briefly stated, the facts of the case are that for the assessment year (AY) 1991-92, an appeal effect order was passed on 15.03.2007 giving combined appeal effect to the order of the ITAT, Kolkata dated 30.10.2003 (ITA No. 1283/Kol/2002) and order of CIT(A)-IX, Kolkata dated 12.03.2002. In the said appeal effect order, refund on excess advance tax and TDS was shown as Rs.2,06,13,746/-, part of which amounting to Rs.86,49,851/- was refunded on 10.02.1993. Balance sum out of the excess advance tax and TDS was not refunded earlier because of tax demand raised by the AO while passing the order u/s 143(3). The same was adjusted with tax demand so raised. However, in the above appeal effect order, the demand raised by the AO in the original assessment order was deleted and the refund was finally granted to the appellant company amounting to Rs.1,23,70,388/- on 15.03.2007.

4. The appellant company asked for the interest on said amount vide rectification petition u/s 154. However, the same was rejected by the AO on the following reasons:

“As per appeal effect order u/s 254/251/143(3) of the IT Act, 1961 dated 15.03.2007, the total tax is worked out at Rs.21,90,26,332/- and 10% of the total tax is Rs.2,19,02,633/-. Refund on account of excess TDS and Advance Tax works out at Rs.2,07,94,076/- only which is less than 10% of the total tax. Hence no interest u/s 244A is to be granted on the same as per proviso to section 244(1)(a).”

5. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held :

“As per proviso to section 244A(1)(a) no interest shall be payable to the appellant if the amount of refund is less than 10% of the determined tax. In para 2 of his 154 order, the AO has very clearly worked out as to how the appellant’s refund on account of excess TDS and advance tax is less than 10% of the total tax. That is the reason why no interest u/s 244A has been given to the appellant. The law of the land i.e. the statutory provisions of the IT Act has been correctly applied by the AO.”

6. Before us, the Ld. counsel of the assessee submits that the said refund was granted after a period of 14 years, since refund otherwise payable was adjusted with regular demand arising out of the original assessment completed u/s 143(3) on 31.03.1994.

It is further submitted that once excess advance tax and TDS is adjusted with tax liability arising out of regular assessment, it loses the character of advance tax and TDS and becomes tax paid on regular demand. Hence the proviso to section 244A(1)(a) is not applicable and

interest is payable within the meaning of section 244A(1)(b). Reliance is placed by him on the decision in *Modi Industries Ltd. v. CIT* [SC (1995) 128 CTR 0361], *CIT v. Punjab Chemical & Crop Protection Limited* [2015 279 CTR 071 (P&H)], *Merck Ltd. v. Tarkeshwar Singh* [Bom HC Writ Petition No. 2529 of 2004], *Dhanvi Trading & Investment v. Assessing Officer* [(1999) 18 CCH 0046 Ahd. Trib.], *Asian Techs Ltd. v. DCIT* [213 ITR 0373 (Ker)], *CIT v. Cholamandalam Investment & Finance Co. Ltd.* [(2007) 211 CTR 0394 (Mad)], *CIT v. Leader Engg. Works* [(P&H) 178 ITR 529)].

7. On the other hand, the Ld. DR submits that in the case of the appellant, section 244A(1)(a) is squarely applicable. He supports the order passed by the Ld. CIT(A).

8. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

The provisions of section 244A during the impugned assessment year are as under:

- i. Sub-section (1) provides that where in pursuance of any order passed under this Act, refund of any amount becomes due to the assessee then –
 - a. If the refund is out of any advance tax paid or tax deducted at source during the financial year immediately preceding the assessment year, interest shall be payable for the period starting from the 1st April of the assessment year and ending on the date of grant of the refund. No interest shall, however, be payable if the amount of refund is less than 10% of the tax determined on regular assessment;
 - b. If the refund is out of any tax, other than advance tax or tax deducted at source, or penalty, interest shall be payable for the period starting from

the date of payment of such tax or penalty and ending on the date of the grant of the refund.

- c. The interest is to be calculated @ 1.5% per month or part of a month comprised in the period of delay for which the interest is payable. As already explained, the meaning of this expression is that even where the delay is for part of a month, interest @ 1.5% will be charged.
- ii. Sub-section (2) provides that for the purpose of computing the period of delay under sub-section (1), any period of delay attributable to the assessee shall be excluded.
- iii. Sub-section (3) provides for automatic revision of the amount of interest on refund where the amount of refund is varied as a result of an order re-assessment, rectification, appeal, revision or settlement mentioned in the sub-section.
- iv. Sub-section (4) provides that the provisions of this section shall apply to the assessment year 1989-90 and subsequent assessment year.

8.1 The new section 244A inserted by the Amending Act, 1987, provided for calculation and payment of interest to the assessee only where the refund became due to him in pursuance of an order passed under the Act. It did not provide for payment of interest where refund became due to the assessee under the provisions of the new section 143(1) without passing an assessment order. The Amending Act, 1989, has therefore, amended sub-section (1) of this section to provide for calculation and payment of interest to the assessee on refund becoming due to him in pursuance of total income determined under the provisions of the new section 143(1).

The Amending Act, 1989, has also amended sub-section (3) of this section to include reference to the order passed u/s 143(3) for the

purposes of calculation of revised interest under this sub-section. The effect is that any interest granted on refund becoming due in pursuance of the provisions of section 143(1) will also be revised if the amount of refund is reduced as a result of an assessment order u/s 143(3) passed in that case.

The provisions of the new section 244A shall apply to the assessment year (AY) 1989-90 and subsequent assessment years, while the provisions of sections 214, 243 and 244, which have been replaced by the provisions of new section 244A, shall cease to apply to the AY 1989-90 and onwards.

8.2 Section 244A applies in respect of assessment for the AY 1989-90 and thereafter. It takes the place of sections 214, 243 and 244 which apply in respect of prior assessment years. The section grants a substantive right to interest and is not procedural and is therefore, not applicable to pending assessments prior to the AY 1989-90 as held in *DCIT v. Central Concrete* 236 ITR 595.

In *Delhi Development Authority v. ITO* (1998) 230 ITR 9, 15 (Del), affirmed in *ITO v. Delhi Development Authority*, (2001) 252 ITR 772 (SC), the AO was directed to deal with and dispose of the petitioner's claim for interest for AY 1989-90 and 1990-91, according to the provisions of section 244A.

8.3 At this moment, we discuss below the case laws relied on by the Ld. counsel of the assessee.

In *Modi Industries Ltd.*(supra), the issue was interest u/s 214(1). The summary of the decision is at para 21 and the same is produced below:

21. The position that emerges from the above analysis can be summarized finally as under:

(i) upto 31st March, 1975, interest u/s 214 is payable from the first day of April of the relevant assessment year to the date of the first assessment order. The amount on which the Interest Is to be paid is the amount of advance tax paid in excess of the tax payable by the assessee as calculated in the regular assessment (the first assessment order). The amount on which Interest was payable did not vary due to reduction or enhancement of tax as a result of any subsequent proceeding. But w.e.f. 1st April, 1985 while the period for which interest was payable remained constant, the amount on which the interest was payable, varied with the variation in the quantum of refund as a result of any subsequent orders.

(ii) If any tax Is paid pursuant to an assessment order after 31stMarch, 1975 (which will Include tax deducted at source and advance tax to the extent the same has been retained and treated by the ITO as payment of tax in discharge of the assessee's tax liability in the assessment order) becomes refundable wholly or in part as a result of any appellate or other order passed, the Central Government will have to pay the assessee interest on the refundable amount under s. 244(1A). For the purpose of this section, the amount of advance payment of tax and the amount of tax deducted at source must be treated as payment of Income-tax pursuant to an order of assessment on and from the date when these amounts were set off against the tax demand raised in the assessment order, in other words the date of the assessment order.

(iii) With effect from 1st April, 1985, interest payable under s. 214 will increase or decrease in accordance with the variation in the quantum of the

excess payment of tax brought about by orders passed subsequent to the regular assessment as mentioned in sub- s. (1A).

In *Punjab Chemical and Crop Protection Ltd.* (supra), the issue was interest on refunds. The assessee-company was allowed Interest u/s. 244A at Rs.7,02,044/- while giving effect to order of Tribunal. Interest was allowed on refund due for period from 1.4.1989 to date of issue of refund. However, later on interest allowed u/s. 244A was withdrawn u/s. 154. CIT(A) had confirmed order of AO. Tribunal partly allowed assessee's appeal by holding that assessee was entitled to interest u/s. 244A(1)(b). The Hon'ble High Court held that the assessee was entitled to interest u/s. 244A(1)(b) on refund of self-assessment tax as well.

In *Merck Ltd.* (supra), the issue was interest u/s 244(1A) i.e. refund of self-assessment Tax. After assessment order passed by the AO on Tribunal's order, the assessee by rectification application pointed out to the AO that there was a shortfall in payment of interest in view of interest payable on self-assessment tax. The AO rejected the application on the ground that interest claimed is attributable to self-assessment tax paid and the same was inadmissible under section 244(1A). By an order the CIT rejected the revision application as filed by the assessee u/s 264. The Hon'ble High Court held that like payment of advance tax, the self-assessment tax u/s 140A would be treated and payment to the order of assessment i.e. when the amounts already paid were set off against the demand raised in assessment order. As such assessee was entitled to interest under section 244(1A) on refund of self-assessment tax from date of assessment and not from payment of self-assessment tax.

In *Dhanvi Trading & Investment (P) Ltd.* (supra), the issue was interest u/s 244A i.e. refund of self-assessment tax. The Tribunal held that (i) moment the adjustment of self-assessment tax is made towards tax liability created under regular assessment, it takes the shape of payment of tax in pursuance of order of assessment, (ii) the amount loses its character of self-assessment tax and becomes income-tax paid in respect of income of relevant year (iii) it is only on the date the assessment is made that the deeming fiction contained under s. 140A(2) comes into play and (iv) therefore, assessee is entitled to interest under s. 244A from the date of assessment order to the date of granting refund of excess payments made by way of self-assessment tax.

In *Asian Techs Ltd.* (supra), it is held that excess amount adjusted from advance tax paid and treated as tax paid pursuant to order of assessment and became refundable consequent to appellate order, qualifies for interest u/s 244(1A).

In *Cholamandalam Investment & Finance Co. Ltd.* (supra), the issue was interest u/s 244A. It is held that (i) assessee is entitled to interest u/s 244A on refund of tax paid u/s 140A on self-assessment and (ii) wherever, the assessee is entitled to refund, there is a statutory liability on the revenue to pay interest on such refund on general principles to pay interest on sums wrongfully retained.

In *Leader Engg. Works* (supra) the assessment year was 1973-74. The assessee paid advance tax before 31.05.1975. The AO adjusted advance tax against tax liability and completed regular assessment on 27.01.1977. On appeal by the assessee, taxable liability was reduced and

excess amount was refunded. The Hon'ble High Court held that the assessee was entitled to interest u/s 244(1A) on amount which was found refundable on basis of aforesaid appellate order.

8.4 To recapitulate, in *Modi Industries Ltd.*(supra), the issue was interest u/s 214(1). In *Merck Ltd.*(supra), *Asian Techs Ltd.*(supra), and *Leader Engg. Works*(supra), the issue was interest u/s 244(1A). As already pointed out earlier, the provisions of section 244A shall apply to AY 1989-90 and subsequent assessment years, while the provisions of section 214, 243 and 244, which have been replaced by the provisions of section 244A, shall cease to apply to the assessment year 1989-90 and onwards. We are concerned here with the AY 1991-92. Accordingly, the above decisions relied on by the Ld. counsel are distinguishable from the case of the appellant as they relate to the earlier provisions like sections 214, 243 and 244 which have been replaced by section 244A from AY 1989-90 and onwards.

8.4.1 In *Punjab Chemical & Crop. Protection Ltd.*(supra), *Dhanvi Trading & Investment* (supra) and *Cholamandalam Investment & Finance Co. Ltd.*(supra), the issue was interest on refunds concerning self-assessment tax. We do not have any dispute in this regard.

8.5 It has been held in *Stock Holding Corpn. of India Ltd. v. CIT* [2015] 229 Taxman 512 (Bom.) that tax paid on self-assessment would fall u/s 244A(1)(b), i.e. a residuary clause, covering refunds of amount not falling u/s 244A(1). Therefore, interest is payable u/s 244A(1)(b) on refund on excess amount paid on self-assessment tax. Interest is payable

from date of payment of tax on self-assessment to date of refund of amount u/s 244A.

8.6 In the instant case, as per the appeal effect order u/s 254/251/143(3) dated 15.03.2007, the total tax effect has been worked out by the AO at Rs.21,90,26,332/- and 10% of the total tax is Rs.2,19,02,633/-. The refund on account of excess TDS and advance tax works out to Rs.2,07,94,076/- which is less than 10% of the total tax.

8.7 How to interpret section 244A? In *CIT V. Tara Agencies* [2007] 162 Taxman 337 (SC), the Hon'ble Supreme Court at para 62-67 held:

“The intention of the Legislature has to be gathered from the language used in the statute which means that attention should be paid to what has been said as also to what has not been said.

In *Union of India v. Deoki Nandan Aggarwal* 1992 Suppl. (1) SCC 323, a three-Judge Bench of this court held that it is not the duty of the court either to enlarge the scope of legislation or the intention of the Legislature, when the language of the provision is plain. The court cannot rewrite the legislation for the reason that it had no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it which are not there.

In *State of Kerala v. Mathai Verghese* [1986] 4 SCC 746, this court has reiterated the well settled position that the court can merely interpret the section; it cannot re-write, recast or redesign the section. In interpreting the provision the exercise undertaken by the court is to make explicit the intention of the Legislature which enacted the legislation. It is not for the court to reframe the legislation for the very good reason that the powers to 'legislate' have not been conferred on the court.

In *Gwalior Rayons Silk Mfg. (Wvg.) Co. Ltd. v. Custodian of Vested Forests* 1990 (Suppl) SCC 785, the court rightly observed that in seeking legislative intention Judges not only listen to the voice of the Legislature but also listen attentively to what the Legislature does not say.

House of Lords in *Pinner v. Everett* [1969] 3 All. ER 257 aptly observed that we have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute.

Therefore, the legal position seems to be clear and consistent that it is the bounden duty and obligation of the court to interpret the statute as it is. It is contrary to all rules of construction to read words into a statute which the Legislature in its wisdom has deliberately not incorporated.”

8.8 In the instant case, TDS of Rs.2,98,20,408/- and advance tax of Rs.21,00,00,000/- has been paid by the assessee.

As per section 244A(i)(a) during the relevant period, no interest shall, however, be payable if the amount of refund is less than 10% of the tax determined on regular assessment. The AO has rightly followed the above provision.

9. In the result, the appeal is dismissed.

Order pronounced in the open Court on 23/03/2018.

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 23/03/2018

Rahul Sharma, Sr. P.S.

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//

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai