

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.**

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER
AND SH. N. K. CHOUDHRY, JUDICIAL MEMBER

I.T.A. No. 375/Asr/2016

Assessment Year: 1998-99

Baba Naga Rice & General
Mills, Vill. Basarke Bhaini,
Chheharta, Amritsar
[PAN: AAEFB 8457G]

(Appellant)

Vs. The Asst. Commissioner of Income
Tax, Circle-V, Amritsar

(Respondent)

Appellant by : Sh. Sudarshan Kapoor (Adv.)

Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 04.04.2018

Date of Pronouncement: 24.05.2018

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee agitating the Order by the Commissioner of Income Tax (Appeals)-2, Amritsar ('CIT(A)' for short) dated 30.03.2016, dismissing the assessee's appeal contesting the rejection of its application u/s. 154 of the Income Tax Act, 1961 ('the Act' hereinafter) vide his order dated 24.06.2008 for Assessment Year (AY) 1998-99.

2. The background facts, in brief, are that the assessee's return for the relevant year was processed u/s. 143(1)(a) on 09.02.1999 at the returned income of Rs.2,15,080/-, granting refund (of advance tax) at Rs.3580/- (along with the interest u/s. 244A). Assessment u/s. 143(3) read with section 147 was made on

20.03.2006 at an income of Rs.61,29,267/-, entailing an additional tax liability of Rs.20,69,965/-. It is the interest u/s. 234B on this additional tax, computed at Rs.22,45,912/-, that the assessee claims to be a mistake, liable, therefore, for rectification by way of withdrawal.

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

The assessee's case is that interest u/s. 234B(3) could be, in terms thereof, levied only where there has been an interest liability u/s. 234B(1), i.e., on processing u/s. 143(1) or on regular assessment. Unless there is a default attracting interest u/s. 234B(1), how could additional interest be levied, which is what section 234B(3) seeks to upon subsequent assessment u/s. 147. There being no default in terms of section 234B(1) in the present case, no additional interest u/s. 234B(3) could have been charged in reassessment, which therefore is a mistake apparent from record liable for rectification. Reliance is placed on the decision in *Datamatics Ltd. v. Asst. CIT* [2008] 299 ITR (AT) 286 (Mum). The Revenue rebuts this, stating that the levy of interest u/s. 234B, i.e., toward shortfall in the advance-tax, reckoned with reference to the assessed tax – defined as tax on total income assessed as reduced by TDS/TCS on the income included therein which is subject to tax deduction/collection at source, is mandatory as well as compensatory, relying on decisions, among others, in *Anjun M.H. Ghaswala* [2001] 252 ITR 1 (SC) and *CIT v. Bhagat Construction Co. (P.) Ltd.* [2015] 60 taxmann.com 334 (SC). Clearly, section 234B(3) only seeks to charge mandatory interest u/s. 234B on the increased tax liability on account of enhancement in assessed income on reassessment/recomputation. Reliance is placed on the decision in the *South Indian Bank Ltd. v. CIT* [2010] 325 ITR 517 (Ker). The assessee meets this reliance on the basis of admission of SLP by the Apex Court there against [SLP (C) No. 122 & 12288 of 2010 dated 15.02.2016 (reported at

[2016] 382 ITR (St.) 1)]. The Apex Court in *Kunahayammed & Ors. v. State of Kerala* [2000] 245 ITR 286 (SC) clarified that on account of leave to appeal the finality of a judgment, decree or order appealed against is to put in jeopardy, though it continues to be, unless stayed or suspended, etc. per a speaking order, binding and effective between the parties. The decision in *South Indian Bank Ltd.* (supra) can therefore no longer be regarded as a judicial precedent.

Our first observation is that the assessee in the instant case denies his liability to interest u/s. 234B. It is this that therefore entitles him to contest the said levy in-as-much as otherwise, consequential and compensatory interest cannot be challenged (refer: *Central Provinces Manganese Ore Co. Ltd. v. CIT* [1986] 160 ITR 961 (SC)). The said contest, however, even as noted during hearing, is not by challenging the assessment whereby the same is levied, *per se* but per an application u/s. 154, the scope of which is severely limited, i.e., to rectify a mistake apparent from record. That is, the challenge, to be successful, has to necessarily exhibit the issue under reference to be a 'mistake', i.e., on which two views are not possible or is free from debate. Even if therefore the decision by the tribunal in *Datamatics Ltd.* (supra), taking the view being advanced by the assessee, was not available, the matter having traveled to the Apex Court – granting leave to appeal against the decision by the Hon'ble Kerala High Court, the same itself shows the matter to be debatable and, in any case, not free from debate. The issue involved, it needs to be appreciated, in both the decisions, i.e., by the tribunal and the Kerala High Court, taking contrary views, is the same, i.e., the true interpretation and scope of section 234B(3) read with section 234B(1). While the tribunals' view is guided by the language of section 234B(3), the Hon'ble High Court has taken a broader view of the matter. The same therefore is not free from debate, to qualify it as a 'mistake' and, thus, liable for rectification u/s. 154. Why, even if therefore both the decisions had subscribed to the same view, say, in favour of the assessee,

the matter having reached the tribunal/High Court, on the basis of a different interpretation, it could only be regarded as debatable. It all the more so where, as in the present case, the two have taken different views. The only exception would be where the 'other view' is shown, in a particular case, to be completely without any basis. Yes, SLP stands admitted against the decision by the Hon'ble Kerala High Court, but the same does not, for that reason, in any manner, cease to be its view, representing in fact a different view, taken earlier by the tribunal, against whose order the matter traveled to it at the instance of the assessee-appellant in that case. *How, then, we wonder, the matter of levy of interest u/s. 234B(3) could be regarded as a 'mistake'?* It is akin to the said levy having been omitted to be charged in assessment, and sought to be imposed through recourse to section 154; the issue in either case, as afore-stated, being the true interpretation of section 234B(3) read with section 234B(1). In fact, the entire section 234B, along with sections 207 to 210, so as to discern the scheme of advance-tax, and the income (base) with reference to which it is to be deposited, would call for being reviewed, besides the relevant case law by the higher courts of law, to some of which reference has been made by the Revenue. Reference in this regard may also be made to the decision in *CIT v. Hindustan Bulk Carriers* [2003] 259 ITR 449 (SC). The moot question, perhaps, required to be answered is if the obligation to deposit advance-tax, which is on the 'current income', be construed (for the purpose of charge of interest on the shortfall in advance-tax) as represented by income as originally assessed or as finally assessed. This is as if it is to be as finally assessed, as the reading of the different clauses of section 234B suggests, could the default for the shortfall be restricted to advance-tax on the income as originally assessed? This is particularly so as the charge of interest is mandatory and compensatory. In fact, as a reading of the decision in *Datamatics Ltd.* (supra) shows, the issue stood advanced as an additional ground, which was admitted as a purely legal ground

(para 44), while the analysis as well as the reliance on case law is marked by consideration of the assessee having exercised due diligence while returning his income (para 54) – a matter of fact, which may or may not obtain in a particular case, as the reason/s for reassessment would be different in each case.

4. The matter, in view of the fore-going, is clearly debatable, on which two views are possible, precluding section 154. The assessee's claim is thus not maintainable. We, therefore, do not consider the need to travel to the merits of the levy. We decide accordingly.

5. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on May 24, 2018

Sd/-
(N. K. Choudhry)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Date: 24.05.2018

/GP/Sr. Ps.

Copy of the order forwarded to:

- (1) The Appellant: Baba Naga Rice & General Mills, Vill. Basarke Bhaini, Chheharta, Amritsar
- (2) The Respondent: The Asst. CIT, Circle-V, Amritsar
- (3) The CIT(Appeals)-2, Amritsar
- (4) The CIT concerned
- (5) The Sr. DR, I.T.A.T

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By Order