

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA No. 3841/Del/2015
Asstt. Year: 2009-10

DCIT Circle-3(1)(2), Intl. Tax Room No. 418 4 th Floor, E-2 Block, Dr. SPM Civic Centre New Delhi.	Vs.	M/s SMS Mevac UK Ltd. C/o Mohinder Puri & Co. 1A-D, Vandana Building, 11, Tolstoy Marg, New Delhi – 110 001. PAN AAMCS7193M
(Appellant)		(Respondent)

Assessee by:	Shri G.K. Dhall CIT(DR)
Department by :	Ms. Ritu Theraja, Advocate
Date of Hearing	27/11/2018
Date of pronouncement	27/11/2018

ORDER

PER AMIT SHUKLA, J.M.

The aforesaid appeal has been filed by the revenue against impugned order dated 15.4.2015 passed by Ld. CIT(Appeals) 43 New Delhi in relation to the order passed u/s 154 for the assessment year 2009-10. The grounds taken by the department reads as under: -

1. *“Whether on the facts and in the circumstances of the case, the Ld. CIT(A) has erred in deleting interest charged u/s 234A and 234B of the Income Tax Act, 1961 (the Act) vide rectification order passed u/s 154 of the Act.*

1.(a) Whether the Ld. CIT(A) has erred in deleting the interest u/s 234A and 234B of the Act simply on the ground that no interest would be remaining u/s 234A & 234B as a result of relief allowed to the assessee by the CIT(A) in appeal against the additions made in order u/s 143(3), not appreciating the fact that the said relief allowed is under challenge in appeal filed by the Department before Hon’ble ITAT.”

2. At the outset, we find that in so far as issue of levy of interest u/s 234B the same is covered by the judgment of Hon’ble Jurisdictional High **Court in the case of DIT vs. GE Packaged Power Inc. (2015) 373 ITR 65(Delhi)**. As regard levy of interest u/s 234A, she submitted that in the quantum proceedings u/s 143(3) are still pending before the Tribunal and therefore levy of interest u/s 234A would be purely consequential after giving effect to the Tribunal order in the quantum proceedings.

3. On the other hand Ld. CIT (DR), though admitted that in so far as levy of interest u/s 234B is concerned the same is covered by the judgment of Hon’ble Delhi High Court, however in so far as levy of interest u/s 234A is concerned, it is independent and depends upon filing of return of income. Here in this case the assessee had filed return of income at loss which in the assessment order passed u/s 143(3) r.w.s 144C(1) same stood assessed at Rs. 25,15,57,358/-. The calculation of the interest would depend upon fate of the additions whence Tribunal decides the issues. Therefore, levy of interest u/s

234A should be remanded back to the AO for calculating the interest after giving effect to the ITAT order.

4. After considering the aforesaid submissions and on perusal of the impugned order, we find that assessment order u/s 143(3) r.w.s. 144C was passed on 23.2.2012, wherein the addition was made after taxing the payment of the drawings and designs as 'fee for technical services' as per article 13 of DTAA between India and U K and amount of supervisory charges was also taxed as FTS. It is an undisputed fact that assessee is a tax recipient of UK and is engaged in the business of supply of plant equipment drawings as well as rendering of services which is nature of supervision of erection and commissioning. Now it is well settled proposition of the Jurisdictional High court that where assessee is a non resident company and if the entire tax which was to be deducted at source on payments made by the payer to it, then there is was no question of payment of advanced tax by the assessee and consequently no interest u/s 234B can be charged. Hon'ble High Court after detailed reasoning and reference to various judgments has concluded that interest u/s 234B cannot be charged from non-resident where the entire tax was deducted at source by the payer. In sums and substance the issue of the said judgment reads as under:-

- The implication of an absolute obligation upon the payer to deduct tax at source under Section 195(I) is that it becomes the responsibility of the payer to determine the amount it ought to deduct from the remittance to be paid to the assessee, towards tax. This determination would depend directly on the income of the assessee that is taxable in India on account of being attributable to its PE in India. That this determination is the responsibility of the payer is provided for, in the statute, in Section 195(2).

- The assessee's liability to tax does not depend on its own view of its PE status, or its admission or denial of tax liability. If an assessee files NIL returns at the stage of assessment, and maintains that it is not liable to tax in India, the payer is obliged to apply to the AO to determine what portion, if any, of its remittance to the assessee, is liable to be deducted at source towards tax.
- The position of law itself requires that the tax be deducted at source, whatever may be the assessee's stance, failing which the payer is treated as an assessee-in-default under Section 201, and the payee is required to discharge its liability to pay the tax that was not deducted under Section 191.
- The view taken by Tribunal was correct; the primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer. The payer will be an assessee in default, on failure to discharge the obligation to deduct tax, under section 201.
- No interest is leviable on the assesseees under section 234B, even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assesseees were liable to tax under section 195(1), and to what extent, by taking recourse to the mechanism provided in section 195(2). The failure of the payers to do so does not leave the revenue without remedy; the payer may be regarded an assessee-in-default under section 201, and the consequences delineated in that provision will visit the payer. The appeal of the revenue is accordingly dismissed without any order as to costs.

5. Thus, respectfully following the aforesaid ratio, we hold that no interest u/s 234B can be charged from the assessee. Coming to the

issue of levy of interest u/s 234A it has been admitted by both the parties that levy of calculation of interest u/s 234A would be dependent upon the fate of the additions made by the AO from the stage of the Tribunal which matter is still pending. Accordingly, AO is directed to examine levy of interest u/s 234A and also calculation after giving effect to the Tribunal order. Accordingly, grounds raised by the revenue are treated as partly allowed for statistical purposes.

6. In the result appeal filed by the revenue is partly allowed for statistical purposes.

Order pronounced in the Open Court on 27th November, 2018.

Sd/-

sd/-

(L.P. SAHU)
ACCOUNTANT MEMBER

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 27/11/2018

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi