

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

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, HON'BLE ACCOUNTANT MEMBER**

ITA No. 276/MUM/2018 (A.Y: 2012-13)

<p>Citibank Overseas Investment Corporation C/o Deloitte Haskins & Sells LLP 30 Floor, Tower 3 India Bulls Finance Centre Senapati Bapat Marg Elphinstone Road (West) Mumbai – 400 013</p> <p>PAN: AABCC5333N</p>	v.	<p>Dy. CIT (International Taxation) – 2(1)(1) Room No. 1713, 17th Floor Air India Building Nariman Point, Mumbai – 400 021</p>
(Appellant)		(Respondent)

ITA No. 34/MUM/2018 (A.Y: 2012-13)

<p>Dy. CIT (International Taxation) – 2(1)(1) Room No. 1713, 17th Floor Air India Building Nariman Point, Mumbai – 400 021</p>	v.	<p>Citibank Overseas Investment Corporation C/o Deloitte Haskins & Sells LLP 30 Floor, Tower 3 India Bulls Finance Centre Senapati Bapat Marg Elphinstone Road (West) Mumbai – 400 013</p> <p>PAN: AABCC5333N</p>
(Appellant)		(Respondent)

CO. No. 27/MUM/2019
[Arising out of ITA No. 34/MUM/2018 (A.Y: 2012-13)]

<p>Citibank Overseas Investment Corporation C/o Deloitte Haskins & Sells LLP 30 Floor, Tower 3 India Bulls Finance Centre Senapati Bapat Marg Elphinstone Road (West) Mumbai – 400 013</p> <p>PAN: AABCC5333N</p>	<p>v.</p>	<p>Dy. CIT (International Taxation) – 2(1)(1) Room No. 669A, Aayakar Bhavan M.K. Road, Mumbai – 400 020</p>
<p>(Appellant)</p>		<p>(Respondent)</p>

Assessee by : **Shri P.J. Pardiwala & Shri Madhur Agarwal**

Department by : **Shri Avaneesh Tiwari**

Date of Hearing : **05.11.2019**

Date of Pronouncement : **10.01.2020**

ORDER

PER C.N. PRASAD (JM)

1. These cross appeals and cross objection are filed by the assessee and revenue against the order of the Ld. Commissioner of Income-tax (Appeals)–56, Mumbai [hereinafter for short “Ld. CIT(A)”] dated 18.10.2017 for the A.Y. 2012-13.
2. Assessee has raised following grounds in its appeal: -

1. The Commissioner of Income-tax (Appeals)-56, Mumbai [hereinafter referred to as "the CIT(A)"] erred in holding that income tax refund under section 244A of the Income-tax Act ("the Act") is not a debt - claim and therefore interest thereon is not covered under Article 11 of the India-USA Double tax Avoidance Agreement ("the DTAA") for concessional tax treatment and hence normal rates apply.

2. The CIT(A) erred in holding that the Deputy Commissioner of Income-tax (International Taxation) - 2(1)(1), Mumbai ("the Assessing Officer" / "the AO") has rightly applied the rate of tax being 16.2225% [i.e. 15% (as per Article 11 of the India US DTAA) + 5% (surcharge) + 3% (education cess)] on the interest income of Rs.20,83,836 received on the Income-tax refund, as against the tax rate of 15% applicable per Article 11 of the DTAA.

Re. Relief No. 2

3. The CIT(A) erred in directing the AO to verify the reason for failure on part of the payer to deduct tax at source for deciding whether interest under section 234B is leviable notwithstanding that for the year under consideration advance tax was not payable because tax was deductible on the entire income of the Appellant, being a non-resident.

Re. Relief No. 3

4. The CIT(A) erred in directing the AO to verify the reason for failure on part of the payer to deduct tax at source for deciding whether interest under section 234C is leviable notwithstanding that for the year under consideration advance tax was not payable because tax was deductible on the entire income of the Appellant, being a non-resident.

3. Ground Nos. 1 and 2 of grounds of appeal of the assessee are in relation to dispute about rate of tax to be charged on the interest refund u/s. 244A of the Act.

4. Briefly stated the facts are that, the assessee during the assessment year under consideration received interest of ₹.20,83,836/- u/s. 244A of the Act. Assessee in its return of income offered the said interest income

to tax @15% as per Article 11 of the India– USA DTAA. The assessment was completed u/s. 143(3) of the Act and while computing the income the Assessing Officer brought to tax this interest income @16.2225% i.e. 15% as per Article 11 of India-USA DTAA, Plus 5% surcharge thereon, plus 3% education cess on tax plus surcharge. Assessee preferred appeal before the Ld. CIT(A) contending that the rate of tax to be applied to the income tax refund is only the rate as specified in the DTAA and nothing more. However, the Ld.CIT(A) held that scope of the definition of ‘interest’ as per Article 11(4) of India – USA DTAA does not cover interest granted u/s. 244A of the Act. Ld. CIT(A) held that asset on which the interest income accrued viz TDS is not a debt claim or government bond or security. Accordingly, he rejected the contention of the assessee.

5. Ld. Counsel for the assessee before us, submitted that income tax refund is a debt claim from the income tax authority and falls under the definition “interest” as per Article 11(4) of the India –USA DTAA. Referring to the decision of the Hon'ble Supreme Court in the case of Union of India v. Tata Chemicals Ltd [43 taxmann.com 240], Ld. Counsel for the assessee submitted that the Hon'ble Supreme Court held that interest payment u/s. 244A of the Act is a statutory obligation. Interest u/s. 244A of the Act is a kind of compensation of use and retention of the money

collected unauthorizedly by the tax department. It was held that if the collection is illegal there is a corresponding obligation on the tax revenue to refund such amount with interest in as much as the revenue has retained and enjoyed the money deposited by the assessee. He submitted that it was also observed by the Hon'ble Supreme Court that even the department has understood the object behind insertion of section 244A of the Act as that the assessee is entitled to payment of interest for money remaining with the government which would be refund. Refund due and payable to the assessee is debt owed and payable by the revenue. Therefore, Ld. Counsel for the assessee contended that income tax refund is taxable under Article 11 of the DTAA and reliance was placed on the following decisions: -

- (i) *ADIT (IT) v. Credit Agricole Indosuez [33 taxmann.com 441][2013].*
- (ii) *M/s. DHL Operations B.V., The Netherlands (Now Post Merger, DHL International GMBH) v. DDIT (IT) (183/Mum/2010)*
- (iii) *ACIT v. Clough Engineering Ltd (Delhi ITAT - SB) (11 taxmann.com 70) [2011]*
- (iv) *Platinum Investment Management Ltd. v. DDIT(IT) (Mumbai Tribunal) (ITA No. 4770/Mum/2015)*
- (v) *Bechtel International Inc. v. ADIT(IT) (Mumbai ITAT) (19 taxmann.com 179) [2012]*
- (vi) *DDIT(IT) v. Principal Life - International Emerging Markets Separate Account (Mumbai ITAT) (53 taxmann.com 101) [2015].*

6. Ld. DR vehemently supported the orders of the authorities below.

7. We have heard the rival submissions and perused the orders of the authorities below and the decisions relied on. This issue is squarely

covered by the decision of the Delhi Special Bench of the Tribunal in the case of the ACIT v. Clough Engineering Ltd (supra) which was also impliedly approved by the Hon'ble Bombay High Court in the case of DIT(IT) v. Credit Agricole Indosuez [69 taxmann.com 285] wherein the Hon'ble High Court held as under: -

“6 Regarding Question 4 –

(a) The Tribunal by the impugned order restored the issue of the rate at which interest is to be charged to tax on income-tax refund received under Section 244A of the Act to the Assessing Officer to be decided in the light of Indo-France DTAA and the decision of the Special Bench of the Tribunal in the matter of Assistant Commissioner of Income Tax vs. Clough Engineering Ltd. [130 ITD 137].

(b) The grievance of the Revenue is with the impugned order following the decision of the Special bench in Clough Engineering Ltd.

(c) However we find that the decision in Clough Engineering (supra) of the Special Bench had been followed by the Tribunal in ITA No.183/Mum/2010 [M/s DHL Operations B.V., The Netherlands Vs. Dy. Director of Income Tax]. The issue before the Tribunal was the rate of tax on which Income tax refund is to be taxed i.e. on the basis of the Articles of DTAA or under the Act. The Tribunal on examination of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Therefore, taxable under the Article 11(2) of Indo-Netherlands tax treaty. The Revenue carried the aforesaid decision of M/s DHL Operations B.V.(supra) in appeal to this Court, being Income Tax Appeal No.431 of 2012. This Court by order dated 17 July 2014 refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing officer to determine / adopt the rate of tax on refund in the light of the relevant clauses of Indo-France DTAA and the decision of Special Bench in Clough Engineering (supra) Accordingly, question 4 does not raise any substantial question of law so as to be entertained.”

8. Respectfully following the said decision, we restore this issue to the file of the Assessing Officer to adopt the tax rate as specified in India–USA DTAA in the light of the decision of the Hon'ble Special Bench in the case of ACIT v. Clough Engineering Ltd (supra) and the decision of the Hon'ble Jurisdictional High Court in the case of the DIT(IT) v. Credit Agricole Indosuez (supra).

9. Ground No. 3 of grounds of appeal relates to charging of interest u/s.234B of the Act.

10. Briefly stated the facts are that, the Assessing Officer while computing the tax payable by the assessee charged interest u/s. 234B of the Act at ₹.63,44,480/- as against NIL interest as calculated by the assessee, since according to Assessee no interest u/s. 234B of the Act is liable to be charged. Ld. CIT(A) directed the Assessing Officer to examine the facts and the reasons for the failure on the part of the payer to deduct tax at source and take a decision.

11. Ld. Counsel for the assessee before us, submitted that for the year under consideration advance tax was not payable by the assessee being the non-resident company because tax was fully deductible on the entire income earned by the assessee. It is submitted that as per the provisions

of the section 209 of the Act applicable for the A.Y. 2012-13 advance tax was payable on the estimated income tax, income tax liability after reducing tax deductible at source and in case of Non-resident, tax is fully deductible at source on the entire income as per Section 195 of the Act.

12. Ld. Counsel for the assessee submitted that the amendment in section 209 of the Act by the Finance Act, 2012 applies only from the A.Y.2013-14 onwards. Reliance was placed on the Memorandum explaining the provisions of Finance Bill, 2012. Ld. Counsel for the assessee further submitted that the duty is cast on the payer to deduct tax at source and on the payer's failure to deduct such tax, interest u/s. 234B of the Act cannot be imposed on the payee assessee. Reliance was placed on the following decisions in support of his contentions: -

1. *DIT (IT) v. Ngc Network Asia LLC [2009] 222 CTR 85 (Bombay HC)*
2. *DIT (IT) v. White Industries Australia Ltd. (81 taxmann.com 33) [2017] (Kolkata Tribunal)*
3. *Orient Overseas Container Line Ltd. [2013] 35 taxmann.com 342 (Mumbai ITAT)*
4. *DDIT v. MGB Metro Group Buying HK Ltd. (29 taxmann.com 164) [2013] (Delhi Tribunal)*
5. *IAN Peter Morris v. ACIT [2016] 76 taxmann.com 271 (SC)*
6. *ADIT (IT) v. Alcatel Lucent USA, Inc. [2012] 21 taxmann.com 302 (Delhi ITAT)*

13. Ld. DR vehemently supported the orders of the authorities below.

14. We have heard the rival submissions and perused the orders of the authorities below and the decisions relied on. It is not in dispute that for the relevant assessment year i.e. A.Y. 2012-13 as per the provisions of the section 209 of the Act advance tax was not payable by the assessee being a non-resident company. We find that the Hon'ble Jurisdictional High Court in the case of the DIT (IT) v. NGC Network Asia LLC [222 CTR 85] held that when a duty is cast on payer to deduct and pay tax at source, on payer's failure to do so interest u/s. 234B cannot be imposed on payee assessee, while holding so it has been observed as under: -

"1. The Revenue has come in appeal on the following question –

"Whether on the facts and in the circumstances of the case the Tribunal was right in law in upholding the assessee's contention that when the assessee is not liable to pay advance tax, there is no question of charging interest under Section 234B of the Act by relying upon the decision in the case of Motorola Inc. rendered by Hon'ble Special Bench of ITAT, "A" Bench, Delhi, reported in (2005) 95 ITD 269."

2. Our attention is invited to the following findings recorded by the Tribunal in its order dated 12th December, 2007:

"Thus, in the given case, though assessee is assessable in respect of the income (though of course and it would not be if its quantum appeal is successful), it is not liable to pay advance tax, since tax is deductible by the payer M/s.NTIL, though not actually deducted by it."

3. The submission on behalf of the revenue is that, on failure of the payer to deduct the advance tax, it is the liability of the assessee

to pay the advance tax even on the amount which had not been deducted under Section 195 of the Income Tax Act.

4. Our attention also has been invited to the observations of the Full Bench of this Court under the Indian Income Tax Act, 1922 in the case of *Commissioner of Income Tax, Bombay City-I v/s Daimler Benz A.G.* reported in (1977) 108 ITR 961). One of the issues considered was the consequence of failure to pay advance tax by the assessee. The Full Bench held that the assessee was of the opinion that it was under no obligation to pay advance tax under Section 18A inasmuch as being a non-resident company its income fell under Section 18 of the Act, that is to say an income in respect of which the tax payable was liable to be deducted at source at the time of payment. The learned Full Bench of this Court took the view considering the discussion that the assessee would not be liable to pay the interest on the advance tax not so deducted.

5. Under the provisions of the present Act, the issue had come for consideration in the case of *Commissioner of Income Tax & anr. v/s Sedco Forex International Drilling Co. Ltd.*, reported in (2003) 264 ITR 320. One of the questions was, as to whether interest could be levied on the assessee under Section 234B of the Act in respect of tax which was not liable to be deducted at source. A learned Bench of the Uttaranchal High Court, after considering the provisions, held as under :

"Secondly, although section 191 of the Act is not overridden by sections 192, 208 and 209(1)(a)(d) of the Act, the scheme of sections 208 and 209 of the Act indicates that in order to compute advance tax the assessee has to, *inter alia*, estimate his current income and calculate the tax on such income by applying the rates in force. That under section 209(1)(d) the income-tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which the assessee cannot be faulted."

6. Relying on the judgment in *Sedco Forex International Drilling Co. Ltd. (supra)*, a learned Bench of this Court was pleased to pass an order dated 16.7.2008 in Income Tax Appeal (L) No.1796 of 2007 in the case of the Director of Income Tax (International Taxation) v/s

M/s.Morgan Guarantee International Finance Corporation, by applying the ratio of that judgment.

7. *Our attention is also invited to the judgment of the Madras High Court, in the case of Commissioner of Income-Tax, Tamil Nadu-I, Madras v/s Madras Fertilisers Ltd., reported in (1984) 149 ITR 703, where the Madras High Court took the view that the amount of tax deductible at source is to be taken into consideration to determine the liability to pay the interest under Section 215. In that case, the assessee had not paid advance tax on interest income. The payer of interest had not deducted the tax. The learned Bench of the Madras High Court was of the view that levy of interest under Section 215 on assessee was not justified.*

8. *We are in respectful agreement with the view taken in the case of Commissioner of Income-Tax & anr. v/s Sedco Forex International Drilling Co. Ltd., by the Uttaranchal High Court. We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee-assessee.”*

15. This decision squarely applies to the facts of the assessee's case. Thus, following the decision of the Hon'ble Jurisdictional High Court we direct the Assessing Officer to delete the interest levied u/s. 234B of the Act.

16. The last ground of grounds of appeal is in respect of charging interest u/s. 234C of the Act.

17. Ld. Counsel for the assessee submitted that as per section 234C of the Act, interest is chargeable on the tax due on the returned income and there was no tax due as per the return of income and therefore interest

u/s.234C of the Act is not attracted. Ld. Counsel for the assessee submitted that computation of income for A.Y. 2012-13 was placed at Page Nos. 143 and 144 of the paper book and further submitted that the Assessing Officer may be directed to verify the contention of the assessee and decide the issue in accordance with law. Keeping in view the submissions of the Ld. Counsel for the assessee we restore this issue to the file of the Assessing Officer for verification and to adjudicate in accordance with law.

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18. Coming to the revenue's appeal, the following grounds have been raised: -

"1. Whether on the facts and circumstances of the case, CIT(A) was right in holding that foreign exchange loss on underlying Forward Foreign Exchange Contracts has to be considered on capital account and hence constitute a capital loss when such a contract is not a capital Asset?

2. Whether on the facts and circumstances of the case, CIT(A) was right in holding that foreign exchange loss on underlying Forward Foreign Exchange Contracts is not taxable under the head Income from Other sources, when Forward Foreign Exchange Contract is neither a Capital Asset, nor, it is the business of the assessee to enter into such contracts?

3. The Appellant prays that the order of the Ld. CIT(A) on the above grounds be set aside and that of the Assessing Officer restored."

19. At the outset, Ld. Counsel for the assessee submitted that Assessing Officer assessed income/loss on rollover/cancellation of forward foreign exchange contracts under the head "Income from income from other sources". It is submitted that the Ld. CIT(A) relying on the order of the Tribunal for the A.Y. 2009-10 in assessee's own case held that the gains on rollover/cancellation on forward foreign exchange contracts is taxable under the head "Capital Gains". Therefore, the Ld. Counsel for the assessee submits that this issue has been decided by the Tribunal in assessee's own case for various assessment years from assessment years 2001-02 to 2013-14 by the Tribunal as under: -

- (i) ITA.No. 4436/Mum/2005 (A.Y. 2001-02) dated 21.12.2012.
- (ii) ITA.No. 7044/Mum/2010 (A.Y. 2006-07) dated 16.01.2013.
- (iii) ITA.No. 7032/Mum/2013 (A.Y. 2007-08) dated 05.01.2018.
- (iv) ITA.No. 5479/Mum/2014 (A.Y. 2009-10) dated 24.03.2017.
- (v) ITA.No. 6510/Mum/2016 (A.Y. 2011-12) dated 16.11.2018.
- (vi) ITA.No. 831/Mum/2018 (A.Y. 2013-14) dated 16.07.2019

20. Ld. DR vehemently supported the orders of the Assessing Officer.

21. We have heard the rival submissions and perused the orders of the authorities below and the orders of the Tribunal. We observe that Ld. CIT(A) following the order of the Tribunal for various assessment years for 2001-02, 2006-07 and 2007-08 decided this issue holding that the gain

arising from rollover of foreign exchange contracts is assessable as capital gains/losses observing as under: -

“4. I find that the matter has been adjudicated by Hon'ble ITAT in case of assessee itself for earlier AYs as taxable income under head capital gains. For A.Y. 2009-10, the Hon ITAT in their order in ITA.No 5479/Mum/2014 r.w CO No.19/Mum/2016 dated 15.03.2017 has given their findings in paragraph 4 based on their earlier decisions for AY 2001-02,2006-07 and 2007-08. The Assessing officer in assessment order has not accepted same in view of departmental appeal before Bombay High Court.

5. The concluding part of written submission of appellant against ground 4 is as under:

“2.4 In view of the above the appellants pray that the gain of 216,30,000 arising from rollover of foreign exchange forward contracts should be treated as capital gains and allow set off of brought forward capital loss in accordance with the provisions of section 74 of the Income-tax Act.”

6. The matter is examined. Considering the decision of my predecessor and the orders of ITAT relied upon, I find that no material to deviate from same. As facts and circumstances remain same, I direct Assessing officer to treat the income under head capital gain. Accordingly grouped grounds 1 to 4 is disposed of as partly allowed.”

22. On a perusal of the order of the Ld.CIT(A), we do not see any infirmity in the order passed by the Ld. CIT(A) in holding so and his decision is based on the order of the Tribunal in assessee's case for various assessment years. Accordingly, we reject the ground raised by the revenue.

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23. Since we have dismissed appeal of the revenue, the cross objection of the assessee becomes infructuous and accordingly dismissed.

24. In the result, appeal of the assessee is partly allowed as indicated above, the appeal of the revenue and cross objection of the assessee are dismissed.

Order pronounced in the open court on the 10th January, 2020

Sd/-
(MANOJ KUMAR AGGARWAL)
ACCOUNTANT MEMBER

Mumbai / Dated 10/01/2020
Giridhar, Sr.PS

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

Copy of the Order forwarded to:

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

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum