आयकर अपीलीय अधिकरण, 'डी' न्यायपीठ, चेन्नई।

IN THE INCOME TAX APPELLATE TRIBUNAL
'D' BENCH: CHENNAI

श्री एन.आर.एस. गणेशन**,** न्यायिक सदस्य एवं
श्री रमित कोचर, लेखा सदस्य के समक्ष

BEFORE SHRI N.R.S. GANESAN, JUDICIAL MEMBER AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA No.842/Chny/2016
निर्धारण वर्ष **/Assessment Year: 2011-12**

Hyundai Motor India Limited Plot No. H-1, SIPCOT Industrial Park Irrungattukottai, Sriperumbudur Taluk, Kancheepuram District, Tamil Nadu-602117 **[PAN: AAACH2364M]**	**v.**	The Deputy Commissioner of Income Tax, 1775, Jawaharlal Nehru Inner Ring Road, Anna Nagar Western Extension, Chennai-600101
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr.Ashik Shah,CA along with Mr. Sriram Seshadri, CA
प्रत्यर्थी की ओर से /Respondent by	:	Mr. M.Srinivasa Rao, CIT-DR
सुनवाई की तारीख/Date of Hearing	:	13.11.2019
घोषणा की तारीख /Date of Pronouncement	:	10.02.2020

आदेश **/ O R D E R**

PER RAMIT KOCHAR, ACCOUNTANT MEMBER:

This is second round of litigation before Income-Tax Appellate Tribunal, Chennai(hereinafter called " the tribunal"). In the first round of litigation, the tribunal adjudicated assessee's appeal in ITA no. 842/Chny/2016 for assessment year 2011-12, vide its order dated 27th April 2017. The Assessee being aggrieved by aforesaid order of tribunal filed Miscellaneous Petition in M.P. No. 208/Mds/2017 stating , inter-alia, that it is aggrieved by non adjudication of ground number 35 to 37 raised

in its appeal filed with tribunal. However, said Miscellaneous Petition was dismissed by tribunal vide its orders dated 10.01.2018 so far as non-adjudication of aforesaid grounds were concerned. The assessee being aggrieved filed writ petition with Hon'ble Madras High Court in W.P. No. 25154 of 2018 seeking quashing of order dated 10.01.2018 passed by tribunal in M.P.No. 208/Mds/2017 and seeking directions to be issued to tribunal to adjudicate grounds of appeal No.s. 35 and 37 raised by assessee before tribunal. The Hon'ble Madras High allowed said writ petition in its judgment dated 03.12.2018, by observing as under:

> *"5. Since it is a factual recording by the Tribunal, this Court Is not inclined to interfere with the same. The petitioner, on affidavit , has stated that two issues, though raised , but not adjudicated upon. Learned counsel appearing for the petitioner also submits that the authorized representative of the petitioner has not made such as contention before the Tribunal nor made any endorsement to this effect.*
>
> *6. Though this Court is not able to accept the contention of the petitioner that there is no provision to ask the Tribunal to adjudicate upon the aforesaid issues, this Court is not wiling to direct the petitioner once again to approach the Tribunal for the aforesaid purpose. When the recording is made wrongly, the remedy open to the party is to approach the forum, which has done the same. However, in order to avoid further delay and in the light of assertion made by the learned counsel appearing for the petitioner, we deem it appropriate to set aside order passed in M.P. No. 208/Mds/2017 dated 10.01.2018 in so far as the two issues, which have not been adjudicated upon alone. We direct the Tribunal to undertake the above said exercise and conclude the same within a period of eight week from the date of receipt of a copy of this order. It is left open to the parties to raise all the issues to be adjudicated before the Tribunal.*
>
> *7. The writ petition is allowed on the above terms. No costs.:*

1.2 Subsequently the tribunal was pleased to recall its order dated 27.04.2017 , in Miscellaneous Petition vide order sheet entry dated 15.02.2019, which is reproduced hereunder:

> *" In view of the directions of the Hon'ble Jurisdictional High Court of Madras in W.P. No. 25154 of 2018 dated 03/12/2018 , the order of the*

Tribunal in ITA No.842/Chny/2016 dated 27/04/2017 for the Asst. year 2011-2012 is recalled for the adjudication of grounds 35 & 37 of the original grounds of appeal.

Appeal posted for hearing in regular course on 16/07/2019.

Copy of the order sheet to be provided to both parties.

No separate notice of hearing required.

M.P. stands allowed to extent directed above."

1.3 That's is how we are seized of the matter in this second round of litigation and we are called upon to adjudicate ground number 35 and 37 raised by assessee in its memo of appeal filed with tribunal.

2. The grounds of appeal No. 35 and 37 raised by assessee in memo of appeal filed with the tribunal in ITA No. 842/Chny/2016 for ay: 2011-12, read as under:-

"Issue 5: Other Issues

35. The learned AO erred in not following the directions of the DRP and levying excess interest under Section 234C of the Act.

36….

37. The learned AO has erroneously added an amount of Rs. 47,07,660 towards Dividend Distribution Tax(DDT) payable for the subject AY."

3. On the first issue raised by assessee vide ground number 35, the grievance of assessee is that interest u/s 234C of the Income-tax Act, 1961 can only be levied on 'returned income', while the AO computed interest u/s 234C of the 1961 Act on 'assessed income'. The learned DRP in para 9.1 observed that levy of interest u/s 234C is consequential and directed AO to re-compute interest after giving effect to directions in their order . So far as claim of the assessee for non-credit of TDS, the learned

DRP directed AO to verify details and allow credit as per law, vide its directions dated 28.12.2015 passed u/s 144C(5) of the 1961 Act. The AO while passing assessment order dated 28.01.2016 u/s 143(3) read with Section 144C(13) of the 1961 Act, levied interest on 'assessed income' instead of 'returned income'. We have heard both parties. It is no more res-integra that interest u/s 234C of the 1961 Act is automatic , mandatory and compensatory in nature . Reference is drawn to decision of Hon'ble Supreme Court in the case of CIT v. Anjum M.H.Ghaswala(2001) 252 ITR 1(SC). The Hon'ble Madras High Court in the case of MRF Limited v. DCIT reported in (2017) 390 ITR 18(Mad.) has elaborately discussed issue of chargeability of interest u/s 234C of the 1961 Act, wherein Hon'ble Jurisdictional High Court held as under:

> *"Heard the learned counsel for the parties and perused the materials available on record.*
>
> *20. Section 234(C) of the Income Tax, deals with Interest for deferment of advance tax and the same is reproduced hereunder:*
>
> *"Where in any financial year,—*
>
> *(a) the company which is liable to pay advance tax under section 208 has failed to pay such tax or—*
>
> *(i) the advance tax paid by the company on its current income on or before the 15th day of June is less than fifteen per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of September is less than forty-five per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than seventy-five per cent of the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one per cent per month for a period of three months on the amount of the shortfall from fifteen per cent or forty-five per cent or seventy-five per cent, as the case may be, of the tax due on the returned income;*
>
> *(ii) the advance tax paid by the company on its current income on or before the 15th day of March is less than the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of one per cent on the amount of the shortfall from the tax due on the returned income:*

Provided that if the advance tax paid by the company on its current income on or before the 15th day of June or the 15th day of September, is not less than twelve per cent or, as the case may be, thirty-six per cent of the tax due on the returned income, then, it shall not be liable to pay any interest on the amount of the shortfall on those dates;

(b) the assessee, other than a company, who is liable to pay advance tax under section 208 has failed to pay such tax or,—

(i) the advance tax paid by the assessee on his current income on or before the 15th day of September is less than thirty per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than sixty per cent of the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent per month for a period of three months on the amount of the shortfall from thirty per cent or, as the case may be, sixty per cent of the tax due on the returned income;

(ii) the advance tax paid by the assessee on his current income on or before the 15th day of March is less than the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of one per cent on the amount of the shortfall from the tax due on the returned income :

Provided that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of under-estimate or failure to estimate—

(a) the amount of capital gains; or

(b) income of the nature referred to in sub-clause (ix) of clause (24) of section 2,

and the assessee has paid the whole of the amount of tax payable in respect of income referred to in clause (a) or clause (b), as the case may be, had such income been a part of the total income, as part of the remaining instalments of advance tax which are due or where no such instalments are due, by the 31st day of March of the financial year:

Provided further that nothing contained in this sub- section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge under section 2 of the Finance Act, 2000 (10 of 2000), as amended by the Taxation Laws (Amendment) Act, 2000 (1 of 2001), and the assessee has paid the amount of shortfall, on or before the 15th day of March, 2001 in respect of the instalment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000 and the 15th day of December, 2000 :

Provided also that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge under section 2 of the Finance Act, 2000 (10 of 2000) as amended by the Taxation Laws (Amendment) Act, 2001 (4 of 2001) and the assessee has paid the amount of shortfall on or before the 15th day of March, 2001 in respect of the instalment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000 and 15th day of December, 2000.

Explanation.—In this section, "tax due on the returned income" means the tax chargeable on the total income declared in the return of income furnished by the assessee for the assessment year commencing on the 1st day of April immediately following the financial year in which the advance tax is paid or payable, as reduced by the amount of,—

(i) any tax deductible or collectible 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.

(2) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years."

21. In Revathi Equipment Ltd. (supra), the assessment year, subject matter of consideration, was 2001-02. Accounting year ended on 31st March 2001. Assessee therein filed return of income on 31th October, 2001, admitting a total income of Rs.16,67,51,520/-. Return was processed under Section 143(1) of the Income-Tax Act and completed under Section 143(3), determining the total income of Rs.17,31,76,488/-. The case of the assessee was that it was under the impression that payments made under Voluntary Retirement Scheme are allowable deductions. A new provision under Section 35DDA was introduced, for the first time, in the Finance Act, 2001, with effect from 1st April, 2001. The Assessee has failed to pay the advance tax. Hence, the Assessing Officer levied interest, under Sections 234B and 234C of the Income-Tax Act and completed the assessment. Appeal filed before the Commissioner of Income-Tax (Appeals), was dismissed. Income-Tax Appellate Tribunal allowed the assessee's appeal and hence, the Revenue preferred a Tax Case Appeal, in this Court. At the time, when deduction was made, there were two binding decisions of this Court, viz., CIT v. George Oakes Ltd. [1992] 197 ITR 288/61 Taxman 225 (Mad.) and CIT v. Simpson & Co. Ltd. [1998] 230 ITR 794/[1997] 91 Taxman 115 (Mad.). Thus, he deducted expenditure incurred, by way of payments made for Voluntary Retirement Scheme. Sections 207 and 208 of the Income-Tax Act, pressed into service are extracted hereunder:

'207. Tax shall be payable in advance during any financial year, in accordance with the provisions of Section 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as "current income".

208. Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is five thousand rupees or more.'

On the facts and circumstances of the case, a Hon'ble Division Bench of this Court, at Paragraph 7, held as follows:

'7. A combined reading of the above provisions makes it clear that the assessee has to pay taxes in advance in respect of the total income of the assessee, which would be chargeable in a particular assessment year. Now before the introduction of Section 35DDA, the legal dictum was very clear that the assessee could claim expenditure incurred on account of payment made for VRS by the assessee in view of the binding decisions of the Hon'ble jurisdictional High Court in the case of CIT v. George Oakes Ltd., [(1992) 197 ITR 288 (Mad.)] and CIT v. Simpson & Company Ltd., [(1998) 230 ITR 794 (Mad.)]. In both the decisions, it was clearly laid down by the Hon'ble jurisdictional High Court that payments to employees under VRS were in the nature of business expenditure and was deductible under Section 37. Therefore, till the introduction of new provisions under Section 35DDA, the assessee could have estimated the income legitimately after reducing the expenditure incurred on VRS. It is a common knowledge that Finance Bill is introduced on 28th February and the same is made into the Act after passing the bills in both the Houses of Parliament and receiving the consent of Hon'ble President of India some where in May or June, which means till that date no assessee can visualize that a new liability would be fastened to him. Normally, new provisions are introduced with effect from next assessment year, but this provision under Section 35DDA was introduced by the Parliament in its wisdom with effect from 01.04.2001 i.e. the same year and that is why difficult has arisen for visualizing the liability and the assessee could not deduct such expenditure. In fact in almost identical circumstances in the 3rd Member decision by the Delhi Bench in the case of Haryana Warehousing Corporation v. DCIT (75 ITD 155) it was held that in such situations the legal dictum "LEX NON COGIT AD IMPOSSIBILIA" would be attracted. The simple meaning of this dictum is that "law cannot compel you to do the impossible". In the case before us also, the assessee could not have visualize till the last instalment of advance tax i.e. 15.03.2001 that he would not be entitled to deduct VRS payments. Therefore, the assessee could not have done anything other than to estimate the liability to pay advance tax on the basis of existing provisions. We are of the considered opinion that in such situation, it cannot be said that the assessee was liable to pay advance tax. Once we come to the conclusion that the assessee was not liable to pay advance tax, there is no question of charging tax under Section 234B and 234C. In similar circumstances in the case of Priyanka Overseas Ltd. v. DCIT, where the assessee had treated the receipt of cash assistance as capital receipts, which was subsequently amended to be business receipt by the Finance Act, 1990, it was held that in such cases interest under Sections 234B and 234C was not chargeable. In these circumstances, we think that the assessee was not liable to pay advance tax and therefore levy of interest under Sections 234B and 234C is not justified. Further, it is pertinent to note that the assessee by way of abundant caution deposited a sum of Rs.90,00,000/- on 06.08.2001 i.e. much before the due date of filing of return, which also prove the bona fide credentials of the assessee. In these circumstances, we set aside the order of the ld. CIT(A) and delete the levy of interest under Sections 234B and 234C.'

22. Legal dictum "lex non cogit ad impossibilia" means, "law cannot compel you to do the impossible". In the instant case, it is the contention that, the assessee could not visualize the decision rendered by the Hon'ble Supreme Court, in favour of the assessee and thus, computed the income, for payment of advance tax, in

the quarterly installments, upto 2nd installments and therefore, levy of interest under Sections 234(B) and 234(C), has to be set aside. Whereas, it is the case of the Revenue that retrospective operation of the Act, from 01.04.2001, in the reported judgment, for the assessment year 2001-02, was the consideration and therefore, the said decision is not applicable. Question in the reported case was, whether, assessee therein has to pay advance tax or not. Whereas, in the case on hand, assessee has paid the advance tax, upto 2nd installment, and the contention is that assessee could not anticipate the event of a judgment, rendered in its favour and thus, there is no fault, in computation of income and consequently payment of advance tax.

23. In Prime Securities Ltd. (supra), the assessee filed a return of income for the year 1991-92, declaring the total income of Rs.16,62,730/- on 31st December, 1991. There were certain defects in submitting the returns, which were rectified. But there was no default in payment of advance tax. After considering a decision of the Hon'ble Apex Court in CIT v. Anjum M.H. Ghaswala [2001] 252 ITR 1/119 Taxman 352 (SC), on the aspect of charging interest, under Section 234(B) of the Income-Tax Act, a Hon'ble Division Bench of the Bombay High Court held as follows:—

"In our opinion, as in the present case, it is nobody's case that the appellant has committed a default in payment of advance tax; when it actually paid it, the appellant cannot be held liable to pay interest under s.234B. Insofar as the observations in the order of the Tribunal, that the appellant should have anticipated the events that took place in March, 1992 are concerned, in our opinion, they have no substance. In our opinion, it is rightly submitted that it was not possible for the appellant to anticipate the events that were to take place in the next financial year and pay advance tax on the basis of those anticipated events."

24. In Central Provinces Manganese Ore Co. Ltd. (supra), the court at Paragraph 7, held that,

'7. Now the question is whether orders levying interest under sub-s. (8) of s. 139 and under s. 215 are appealable under s. 246 of the Income-tax Act. Cl. (c) of s. 246 provides an appeal against an order where the assessee denies his liability to be assessed under the Act or against any assessment order under sub-s. (3) of s. 143 or s. 144 , where the assessee objects to the amount of income assessed or to the amount of tax determined or to the amount of loss computed or to the status under which he is assessed. Inasmuch as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. In this connection we may usefully refer to the decision of the Karnataka High Court where in a judgment in National Products v. Commissioner of Income- tax, Mysore,[1977] 108 ITR 935. Govind Bhat, C.J., explained the position in regard to the levy of interest under s. 139 and under s. 215. After referring to the earlier cases on the point he observed:

"All decided cases except one have uniformly taken the view that levy of interests under section 18A(6) or section 18A(8) of the 1922 Act or levy of interest under section 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take every contention which, if accepted, must result in the Income-tax Officer holding that there was no liability to pay advance tax and, therefore, there was no liability to pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of

advance tax determined as payable by the Income-tax Officer is not correct; but if the assessee does not dispute the amount of advance tax determined as payable by the Income-tax Officer, he merely cannot object to the levy of penal interest or question its quantum.

The levy of penal interest under section 139 or section 215 is made in the regular assessment order; the demand issued pursuant to the assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest under section 18A of the 1922 Act up to 1st April 1952, was automatic as was noticed by Chagla, C.J. in Ramnath's case [1955] 27 ITR 192 (Bom.), under the Act such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in rule 117A and rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the said Rules, the Income-tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under sections 1 39 and 215 is part of assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under section 215 by the order or assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income-tax Officer as payable ought to be reduced. In either case he denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied under section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the return was not belated or that the penal provision was not attracted at all to his case. In such a case also he denies his liability to be assessed to interest."

8. The decision was noted with approval by the Gujarat High Court in Bhikhoobhai N. Shah v. Commissioner of Income-tax, Gujarat-V, [1978] 114 ITR 197. The only dissent expressed in the matter by the Gujarat High Court arose on the question whether the assessee could challenge in appeal his partial liability to be assessed to interest. In this area of dissent we need not enter. But we have no hesitation in endorsing the legal position which has commonly found favour with the two High Courts. We hold that the question whether a case is made out for waiver or reduction of the interest levied under sub-s. (8) of s. 139 or under s. 215 cannot be the subject of an appeal under clause (c) of s. 246 of the Income-tax Act. That is a matter which can more appropriately be dealt with by the Commissioner of Income- tax in the exercise of his revisional jurisdiction.

But before the revisional jurisdiction of the Commissioner of Income-tax can be invoked in such a case, it is obviously necessary for the assessee to demonstrate before the Income-tax Officer that there is a case for waiving or reducing the levy of interest. We do not find from the record before us that any such attempt was made by the assessee. Since the statute provides for the waiver or reduction of interest it is open to the Income-tax Officer before imposing a levy under sub-s. (8) of s. 139 and to the Inspecting Assistant Commissioner before doing so under s. 215 to issue notice to the assessee and hear him in the matter. In cases where the jurisdictional fact attracting the levy cannot be disputed, for example that the return has been furnished under s. 139 with delay, it will be a quest ion merely of satisfying the relevant authority that there are circumstances calling for a reduction or waiver of the interest. If an opportunity to do so has not been made available to the assessee before the order levying interest is made, it will be open to the assessee to apply to the Income- tax Officer after such order has been

made to show that a reduction or waiver of interest is justified. We have been referred to the judgment by one of us (Sabyasachi Mukharji, J.) in Premchand Sitanath Roy v. Addl. Commissioner of Income-tax, West Bengal-III, [1977] 109 ITR 751. In that case the question was a very different one. The question was whether a right of appeal was available in regard to the improper exercise of discretion under sub-s. (8) of s. 139. We think that in holding that no right of appeal lay in such a case the High Court was plainly right.

As the assessee has made no application to the Income-tax Officer for reduction or waiver of the interest under sub-s. (8) of s. 139 or under s. 215 no question arises of the relevant authority having denied improperly a reduction or waiver of the interest and that being so, no revision petition can be maintained in that regard by the assessee before the Commissioner of Income-tax.

9. In the result we affirm the orders of the Commissioner of Income-tax rejecting the revision petitions but on grounds different from those adopted by the Commissioner. We leave it open to the assessee to apply to the Income-tax Officer for waiver or reduction of interest under sub-s. (8) of s. 139 and under s. 215 of the Income Tax Act. If the assessee does so within six weeks from today, the Income-tax Officer will dispose of the applications on the merits expeditiously. Subject to the aforesaid observations the appeals are dismissed. In the circumstances there is no order as to costs.'

25. In Bhagat Construction Co. (P.) Ltd. (supra), the Hon'ble Supreme Court considered, an issue, as to whether, Section 234B applies the moment, an assessee, liable to pay advance tax, has failed to pay such tax or there is any shortfall in payment of tax, and after referring to Explanation 1 to Section 234B of the Act, held as follows:

"It will be seen that under the provisions of Section 234B, the moment an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 per cent of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. The levy of such interest is automatic when the conditions of Section 234B are met. [Para 8]

The facts of the present case are squarely covered by the decision contained in Kalyankumar Ray v. CIT [(1991) 191 ITR 634 (SC)] inasmuch as it is undisputed that Form I.T.N.S. 150 contained a calculation of interest payable on the tax assessed. This being the case, it is clear that as per the said judgment, this Form must be treated as part of the assessment order in the wider sense in which the expression has to be understood in the context of Section 143, which is referred to in Explanation 1 to Section 234B. [Para 9]"

26. As per the provisions of the Income Tax Act, 1961, advance tax has to be paid in installments, on the specified dates, and during the financial year. As per the provisions, in the case of deferment, in payment of installment of advance tax i.e. failure to pay the amount of advance tax or shortfall, as stipulated in Section 211 of the Income Tax Act, 1961, interest, is attracted under Section 234C of the Act. Going through the provisions, it could be seen Sections 234A, 234B and 234C have been inserted in the Act to provide for a mandatory charging of interest. If there is default or deferment of payment of advance tax as required under Sections 208 to 211, interest under Section 234C is chargeable. Interest under Section 234C of the Act is required to be calculated and mentioned in the return of income, and the assessee has to pay the same, along with the self assessment. Constitutional validity of the above sections have been upheld on the ground that

the provisions relating to interest, are not penal, but, compensatory in character. Courts have also held interest is payable, because the Revenue, should not be deprived of tax, if proper amount of advance tax, is not paid.

27. In Anjum Mohd. Hussain Ghaswala (supra), considering the facts and circumstances of the case, the High Court held that the assessee is not supposed to pay interest, on the payment of tax, which may be assessed in regular assessment under Section 143(3) or best judgment under Section 144, as he is not supposed to know or anticipate his return of income. The High Court further held that interest is payable, in future only, after the dues are finally determined. When the matter was taken on appeal, on the above facts and circumstances of the case, the Hon'ble Supreme Court observed as under:—

'Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression "shall" used in the said section cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in sections 234A, 234B and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may". This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression "may" thereby giving a discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory interest mandatory.'

28. Thus, from the above, it could be deduced that once it is held that interest under Section 234C of the Act, is mandatory and automatic, then the reason, or the cause for the delay and justification for deferment of payment of advance tax, is immaterial. Reading of the above judgment makes it clear whatever be the reason, when there is deferment in payment of advance tax, and if the stipulated amount has not been paid on the required date, as per Section 211 of the Act, then the consequences follow automatically and compensatory interest under Section 234C becomes payable. Section 234C is a complete code in itself and proviso to sub-section (1) to Section 234C only provides has two exceptions, when deferment or shortfall in the payment of installment of advance tax can be condoned, where there is under estimate or failure to estimate on account of capital gains or income by way of winnings from lottery, cross word, puzzles etc. Section 234(C) provides no other exception.

29. As stated supra, the assessee has to pay tax in advance, in respect of total income which would be chargeable to tax for the assessment year immediately following the financial year. The assessee has to estimate the income and pay the tax in three installments, as stated above. The fact that an unanticipated income accrued in the last financial year, cannot be a ground not to pay advance tax with regard to the returned income, which includes the total income, on which tax is chargeable and on the failure to pay the advance tax, in instalments as provided for, under the Act or when the less amount is paid, the assessee is liable to pay interest. Line of judgments indicate that Section 234C of the Act is mandatory, unlike earlier provisions. No discretion is left to the authority, except in those cases, for which, provision has been made under Section 234(C) of the Act. Section 234C of the Act is applicable to cases, where there is shortfall in the making of payment, by the assessee, on the returned income, whether it be on

account of underestimate or failure to estimate the amount of capital income or the income of the nature referred to in sub-clause (ix) of clause (24) of Section 2 of the Act; except in the case of income from any winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from any gambling or betting of any form or nature whatsoever.

30. In view of the above discussion and decisions, substantial question of law raised by the appellant is answered in the negative, against the appellant. In the result, the Tax Case Appeal is dismissed. No costs."

3.2 As could be seen , Hon'ble Jurisdictional High Court in the case of MRF Limited(supra) held that levy of interest u/s 234C is mandatory , automatic and compensatory in nature. The Hon'ble High Court referred to provisions of Section 208 to 211 of the 1961 Act and held that the assessee has to pay tax in advance, in respect of total income which would be chargeable to tax for the assessment year immediately following the financial year.

3.3 Section 207 of the 1961 Act stipulates that assessee is liable to pay tax in advance during financial year in accordance with provisions of Section 208 to 219 of the 1961 Act , in respect of **total income chargeable to tax** for the assessment year immediately following that financial year, which income is referred to as **'current income'**. Section 211 of the 1961 Act stipulates that advance tax has to be paid in specified installments on the 'current income' laid down in Section 209 of the 1961 Act. The assessee is required to estimate its 'current income' for the previous year and accordingly pay advance tax on the said current income. Thus, if there is any shortfall in the payment of tax or under-estimation of current income(except in the circumstances as provided in the first proviso to Section 234C) , the assessee will be liable to pay

interest u/s 234C of the 1961 Act. The assessee is expected to estimate its current income correctly for financial year and then pay advance tax as provided under statute. If there is any shortfall or under-estimation in estimating current income and payment of advance tax , the assessee is required to pay interest u/s 234C which is automatic , mandatory and compensatory in nature. The interest u/s 234C is not penal in nature. If the additions are made by virtue of assessment framed by AO u/s 143(3) and 144 of the 1961 Act and income assessed is higher than returned income, the interest u/s 234C will get attracted , the assessee having not computed its income chargeable to tax correctly while filing its return of income with Revenue. The assessee could always dispute in higher appellate forums very liability to pay tax on the income which has been held to be chargeable to tax in the hands of assessee by the AO . The ultimate liability to pay interest u/s 234C will depend finally on the out-come of the appellate proceedings in higher forums, whether the amount added by the AO to returned income is sustainable in the eyes of law or not, which ultimately will consequentially crystalize whether assessee correctly estimated its 'current income' while paying advance tax or not , but if it is finally held that the assessee did not estimated its 'current income' correctly as it under-estimated it, then obviously return of income was not filed with true and correct income and hence there will be no escape from rigors of Section 234C of the 1961 Act . Attention is also drawn to provisions of Section 139(1) of the 1961 Act which requires assessee to file its return of income in prescribed form and **verified** in the

prescribed manner. The said verification to be executed by taxpayer contains an solemn affirmation that to the best of knowledge and belief of the taxpayer the information given in return of income and schedules is correct and complete and is in accordance with provisions of the 1961 Act. The mandate of the 1961 Act is to bring to tax correct income of the correct assessment year in the hands of the correct tax-payer. The tax-payer are required to file return of income declaring correct income for the correct assessment year. If the returned income is not correctly declared, the same can be tinkered by AO in assessment proceedings. The interest u/s 234A , 234B and 234C are mandatory, automatic and compensatory in nature and hence consequences will follow. Thus, we hold this issue against assessee and in favor of the Revenue by deciding Ground No. 35 in favour of Revenue. We order accordingly.

4. Ground Number 37 . The short question which is raised before us for adjudication by learned counsel for assessee concerns itself with chargeability of surcharge on Dividend Distribution Tax(DDT) with respect to dividend paid by the assessee. The assessee has claimed that dividend was declared on 25.07.2011 which was paid on 06.08.2011 viz. in previous year 2011-12, albeit it was pertaining to accounts for financial year 2010-11. It is claimed that since dividend was declared and paid in financial year 2011-12,provisions of Finance Act, 2011 will be applicable and hence stipulated surcharge on DDT as prescribed by Finance Act, 2011 will be applicable , and not the surcharge on DDT as prescribed by

Finance Act, 2010 as applicable to ay: 2011-12 . The learned CIT-DR agreed that dividend was admittedly paid on 06.08.2011 although it pertained to financial year 2010-11 . After hearing both the parties, we are of the considered view that no doubt shares carries with it a statutory right to receive dividend by shareholders but it is not a vested right in favor of shareholders to receive dividend and the shareholders cannot enforce it as a matter of right by compelling company to compulsory declare and pay the dividend . The payment of dividend by companies is also regulated and controlled by provisions of the Companies Act, such as availability of profits, transfer to reserves etc.. The Board of Directors decide about declaration of dividend which again would be subject to approval by shareholders in Annual General Meeting. Until, it is finally approved by shareholders in Annual General Meeting, no right is vested in favour of shareholders to receive dividend. In the present case, albeit dividend pertains to financial year 2010-11, it was only declared on 25.07.2011 and was paid on 06.08.2011, thus right to receive dividend got crystallized in favour of shareholders in financial year 2011-12 relevant to ay: 2012-13 albeit it pertained to financial year 2010-11 relevant to ay: 2011-12. Attention is also drawn to provisions of Section 115O(3) of the 1961 Act, which stipulates that that principal officer of the domestic company and the company shall be liable to pay tax on distributed profits to the credit of Central Government within fourteen days of from the date of declaration, distribution or payment of dividend , which ever is earliest. In our considered view, provisions of the Finance

Act, 2011 shall be relevant and applicable for payment of DDT including surcharge on DDT , thus consequently, inter-alia, applicable surcharge as provided by Finance Act, 2011 shall be applicable . as rightly contended by assessee. Thus, the AO is directed to apply surcharge on DDT as provided by Finance Act, 2011 and not as was provided by Finance Act, 2010. Our view is strengthened by decision of ITAT, Jaipur in the case of Drawmet Wires Private Limited v. ACIT reported in (2017) 167 ITD 357(Jaip.-trib.) This issue is decided in favour of the assessee. We order accordingly.

5. In the result, the appeal filed by assessee in ITA No.842/Chny/2016 for ay: 2011-12 is partly allowed (Ground No. 35 and 37), as indicated above. So far as other grounds are concerned, the tribunal order dated 27.04.2017 holds the field.

Order pronounced on the 10th day of February , 2020 in Chennai.

Sd/-	***Sd/-***
(एन.आर.एस. गणेशन**)**	**(**रमित कोचर**)**
(N.R.S. GANESAN)	**(RAMIT KOCHAR)**
न्यायिक सदस्य**/JUDICIAL MEMBER**	लेखा सदस्य**/ACCOUNTANT MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 10th February, 2020.
TLN

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF