

आयकर अपीलीय अधिकरण “ए” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, CHENNAI

माननीय श्री एबी टी. वर्की, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।
BEFORE HON’BLE SHRI ABY T. VARKEY, JM AND
HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ ITA No.1344/Chny/2023
(निर्धारण वर्ष / Assessment Year: 2008-09)

ITO International Taxation Ward-2(1) Chennai.	बनाम / Vs.	Shri Rohitkumar Nemchand Piparia #34 (Old #77), Meddox Street, Choolai, Chennai-600 112.
स्थायी लेखा सं./जी आइ आर सं./PAN/GIR No.		AKZPP-0661-M
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से/ Assessee by	:	Shri T. Banusekar & Ms. Samyuktha Banusekar (Advocates) - Ld. ARs
प्रत्यर्थी की ओर से/ Revenue by	:	Shri Nilay Baran Som (CIT) - Ld. DR
सुनवाई की तारीख/ Date of Hearing	:	07-10-2024
घोषणा की तारीख / Date of Pronouncement	:	31-12-2024

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid appeal by Revenue for Assessment Year (AY) 2008-09 arises out of an order passed by learned Commissioner of Income Tax (Appeals), Chennai-16 [CIT(A)] on 29-09-2023 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143(3) r.w.s 254 of the Act on 31-12-2018.

1.2 The grounds of appeal read as under: -

1. The Ld. CIT(A) erred in facts and law in deleting the addition made amounting to Rs.98,54,160/- on account of interest levied u/s 234B of the Act.

2. The Ld.CIT(A) has relied on the principle of law as laid down by the Hon'ble Supreme Court in the case of Director of Income-tax, New Delhi Vs. Mitsubishi Corporation dated 17.09.2021 in Civil Appeal Nos. 1256 & 1262 of 2016 and others and held that the interest is not chargeable in this case u/s 234C. But, the Ld. CIT(A) has confirmed the charging of interest u/s 234C of the Act amounting to Rs.3,31,564/- which is actually for deferment of Advance tax. The above decision is contrary to the provisions of the Act, since, the charging of interest u/s 234C emanate only from the existence of advance tax liability and also from the shortfall of advance tax payable by the assessee. To explain further, the interest u/s 234C is chargeable for the default in payment of installment(s) / shortfall of advance tax payable by the assessee with relevant interest u/s 234B in case of default. The Ld.CIT(A) by the above decision on upholding the charging of interest u/s 234C, has indirectly asserting that the assessee is liable to pay interest u/s 234B as the assessee had defaulted in payment of advance tax u/s 234B of the Act out of the total tax liability.

3. Further, the assessee had utterly failed to declare the income as well as the TDS deducted from the STCG in the original return of income as well as in the return of income filed in response to notice u/s 148 of the Act. By the above action, It is clear that the assessee did not come with clean hands before the authorities' by declaring the actual income earned during the relevant year, but is shifting the blame on the payer for not deducting the proper TDS on the amounts paid to him to evade the interest chargeable for his default. It is also seen that the assessee is aware of the amounts credited to his bank account out of the sale proceeds from the shares and the actual STCG earned out of it during the relevant year, but had failed to disclose the same in the returns of income filed.

4. The assessee having failed to disclose the actual income in the returns of income should not be given the benefits provided in the relevant sections of the Act available. The Hon'ble Apex Court in Civil appeal no.11113 of 2016, in the case of M/S. ADVANTA INDIA LTD, Vs B.N.Shivanna has held that "nullus commodum capere potest de injuria sua propria- meaning no man can take advantage of his own wrong". The above judgment is squarely applicable in the case of the assessee that no man shall take advantage of his own wrong, This maxim, based on elementary principles of law, which is fully recognized in Courts of law and of equity, and indeed, admits of illustration from every branch of legal procedure, It is also held by Hon'ble Courts that "a man shall not take advantage of his own wrong to gain the favourable interpretation of the law- maxim frustra legis auxilium quoritur qui in legem committit". The Hon'ble Court also stated that "a wrong doer ought not to be permitted to make a profit out of his own wrong",

5. The assessee being a regular tax payer tried his best to conceal his income from STCG which is evident from the fact that the assessee has not included this income in his original ITR as well as in the ITR filed in response to the notice u/s 148. This clearly proves that the assessee has an intention to conceal the particulars of income by not disclosing the Capital Gains earned during the relevant year in both the return of income filed.

As is evident, the sole issue that arises for our consideration is computation of interest u/s 234B. The provisions of Sec.234B obligate an assessee to pay advance tax in installments in prescribe manner. The default in the same would attract interest of 1% for every month or part of

every month on the outstanding advance tax installments. Though the Ld. AO levied the same in the assessment order, Ld. CIT(A) deleted the same and hence, the grievance of the revenue.

1.3 The Ld. CIT-DR supported the levy of interest and submitted that the same was mandatory in nature whereas Ld. AR advanced arguments by citing various judicial pronouncements. Having heard rival submissions and upon perusal of case records, our adjudication would be as under. The assessee being non-resident individual filed his return of income for this year on 05-02-2009 declaring income of Rs.3.10 Lacs which was subjected to scrutiny assessment.

Assessment Proceedings

2.1 An assessment was framed against the assessee u/s 143(3) r.w.s. 147 on 25-02-2016 wherein the issue of chargeability of Short-Term Capital Gains (STCG) on sales of shares of an entity by the name M/s Rajesh Exports Ltd. was identified. The case was reopened pursuant to receipt of information from investigation wing that the assessee entered into high value share transactions for Rs.155 Crores but the income was not reported in the Income Tax return. The assessee filed various replies and submissions during the course of assessment proceedings.

2.2 In the assessment order dated 25-02-2016, STCG was brought to tax raising tax demand of Rs.479.08 Lacs which was reduced to Rs.283.75 Lacs in rectification order passed u/s 154 on 31-03-2016. The matter reached up-to Tribunal wherein the matter was restored back to the file of Ld. AO for re-computation of capital gains since there was error in the computation of STCG. Pursuant to the same, another assessment order was passed on 31-12-2018.

2.3 In the latest assessment order passed u/s 143(3) r.w.s. 254, the income of the assessee has been determined as under: -

Short Term Capital Gain on Shares		
Sales	Rs.229,96,19,403/-	
Less: Purchases	Rs.189,63,15,388/-	Rs.40,33,04,015/-
Income from other sources		Rs. 3,80,226/-
		Rs.40,36,84,241/-
Less: Deduction u/s 80C		Rs. 70,000/-
Assessed Total Income		Rs.40,36,14,241/-

The above computation is not in dispute. The subject matter of appeal is computation of interest u/s 234B.

2.4 The assessee pleaded that responsibility to deduct tax at source on the stated transactions lie with remitter of income from India. Since remitter bank was responsible to deduct TDS, there was no need for him to pay advance tax in respect of such income. However, Ld. AO held that the assessee's claim that it is the duty of the bank to deduct tax before making payment and that he should not be penalized for the default of the banker to deduct TDS is not tenable. The tax liability has to be paid by the person who is liable to pay taxes and TDS is one of the means of discharging the tax liability. The default on the part of the deductor would not absolve the taxpayer from paying due taxes. The other ways of discharging the liability were by way of advance tax and self-assessment tax. The failure to do so would attract interest u/s 234B and 234C which is mandatory in nature as held by Hon'ble Supreme Court in the case of **Anjum B. Ghaswala (252 ITR 1)**. Finally, Ld. AO charged interest u/s 234B & 234C while raising tax demand against the assessee. The demand aggregated to Rs.566.53 Lacs including interest u/s 234A, 234B and 234C.

Appellate Proceedings

3.1 During appellate proceedings, the assessee assailed charging of interest u/s 234B and 234C and stated that such interest is payable only if there was default in paying 'Advance Tax'. The definition and scope of 'Advance Tax' includes clause (d) of sub-section (1) of Sec. 209 of the Income Tax Act, 1961 which provide that such advance tax is to be reduced by amount of income tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income (as computed before allowing any deduction admissible under this Act) which has been taken into account in computing the current income or, as the case may be, the total income aforesaid; and the amount of income tax as so reduced shall be the advance tax payable; Provided that for computing liability for advance tax, income-tax calculated under clause under clause (a) or clause (b) or clause (c) shall not, in each case, be reduced by the aforesaid amount of income-tax which would be deductible or collectible at source during the said financial year under any provision of this Act from any income, if the person responsible for deducting tax has paid or credited such income without deduction of tax or it has been received or debited by the person responsible for collecting tax without collection of such tax.

3.2 On the basis of the same, the assessee contended that the amount deductible at source should be reduced from the total tax due in order to arrive at the amount of advance tax payable. In the present case, the TDS deductible for Rs.456.94 Lacs should accordingly be reduced. Reference was made to the decision of Hon'ble Supreme Court in the case of **Ian Peter Morris Vs. ACIT** holding that interest for default in payment of advance tax would have no application since the TDS is

liable to be paid by the payer failing which he is liable to pay simple interest thereon. The case law of Hon'ble High Court of Madras in the case of **Madras Fertilizers Ltd. (149 ITR 703)** as well as other judicial decisions were also cited in support of the same.

3.3 It was also submitted by the assessee that the case was reopened on the ground that the assessee carried out share transactions amounting to Rs.155.20 Crores during the year but it did not report the same in the Income Tax Return. It was explained that the assessee had purchased and sold shares of M/s Rajesh Exports Ltd. through Ventura Securities Ltd., Mumbai utilizing the funds lying in the assessee's equity portfolio investment account (NRE Account) which was managed by the Mumbai branch of Abu Dhabi Commercial Bank Ltd. (Bank). During this year, the assessee earned profit on sale of shares which were both in the nature of Short-Term and Long-Term Capital Gains. As per extant laws, the amount of Long-Term Capital gains was exempt from tax whereas Short-Term Capital Gains was taxable at rate in force during such year. Since the assessee did not report the transaction of purchase and sale of shares during the year, the case of the appellant was reopened and the said transactions were assessed to tax by the AO. The assessment was framed on 25-02-2016 wherein Ld. AO computed STCG of Rs.52.10 Crores and raised tax demand of Rs.4.79 Crores. Since there were discrepancies in the working, the assessee filed rectification u/s 154 wherein the total income was revised to Rs.43.07 Crores and tax demand was reduced to Rs.2.28 Crores. Still aggrieved, the assessee further appeal which reached up-to the level of Tribunal and the computation of capital gains was set aside to the file of Ld. AO. Pursuant to the same, another order was passed assessing total income

of Rs.40.36 Crores and revising the tax demand to Rs.1.45 Crores against the assessee which include interest u/s 234B for Rs.98.54 Lacs. The provisions of Sec. 195, inter-alia, cast an obligation on any person responsible for paying to non-resident any other sum chargeable to tax to deduct tax at source at the time of credit or payment thereof. Therefore, the responsibility to deduct tax at Source would lie on Abu Dhabi Commercial Bank Ltd. The Bank inadvertently deducted TDS of Rs.353.59 Lacs instead of Rs.456.94 Lacs. The assessee was under a bona-fide belief that since the transaction was subjected to tax by the bank, it would not have any further obligation towards payment of tax amount. To support the same, the assessee referred to the decision of Hon'ble Supreme Court in the case of **Mitsubishi Corporation Ltd. (438 ITR 174)** as well as the decision of Hon'ble Bombay High Court in the case of **NGC Network Asia LLC (313 ITR 187)**.

3.4 Considering the submissions of the assessee, Ld. CIT(A) concurred that the tax deductible by the bank was to be reduced while computing interest u/s 234B and accordingly, interest u/s 234B was deleted whereas levy of interest u/s 234C was upheld. The levy of interest u/s 234C has been accepted by the assessee. Aggrieved, the revenue is in further appeal before us.

Our findings and Adjudication

4. From the facts, it emerges that the assessee is a non-resident. During the year, the assessee has sold shares of an entity which gave rise to Long-Term Capital Gains as well as Short-Term Capital gains (STCG) in the hands of the assessee. The gains were not reflected by the assessee in its return of income. Therefore, the case was reopened on receipt of such information from investigation wing and an

assessment was framed against the assessee on 25-02-2016 wherein STCG was brought to tax and the same was computed at Rs.52.10 Crores raising tax demand of Rs.479.08 Lacs. However, the computation was erroneous and accordingly, the order was rectified u/s 154 and the STCG were recomputed and corresponding tax demand was reduced to Rs.283.75 Lacs in rectification order passed u/s 154 on 31-03-2016. The matter reached up-to Tribunal wherein the matter was restored back to the file of Ld. AO for re-computation of capital gains since there was error in the computation of STCG. Pursuant to the same, another assessment order was passed on 31-12-2018 wherein STCG has been re-computed at Rs.40.33 Crores and finally, tax demand of Rs.1.45 Crores against the assessee which include interest u/s 234. It could very well be seen that the impugned transaction resulted into Long-Term Capital Gains as well as Short Term Capital Gains in the hands of the assessee. It could also be seen that initially the assessee has not computed gains on this transaction and never offered the same in the return of income. The same is ostensibly on the assumption that whatever tax was deducted at source by the bank was final tax liability for the assessee. However, it is quite discernible that computation of gains has undergone change thrice. Initially, the gains were computed by Ld. AO in the assessment order which got rectified u/s 154. The same has again undergone change pursuant to the directions of Tribunal setting aside the computation of STCG to the file of Ld. AO. In our opinion, there was no mechanism with the bank to compute the final tax liability of the assessee with respect to such transactions nor was it the obligation of the bank to compute the tax liability of the assessee. The bank was merely obligated to deduct tax at source at prescribed rates

and do nothing more. Nothing has been shown to us that any default has been made by the bank in deducting TDS against the assessee that was required to be deducted under law. The obligation to compute final tax liability, in our considered opinion, squarely was on the assessee and consequences of any default in the same would have to be borne by the assessee only. As rightly held by Ld. AO, the tax liability has to be paid by the person who is liable to pay taxes and TDS is only one of the means of discharging the tax liability. The default on the part of the deductor would not absolve the payer from paying due taxes. The other ways of discharging the liability were by way of advance tax and self-assessment tax. The failure to do so would attract interest u/s 234B and 234C which is mandatory in nature as held by Hon'ble Supreme Court in the case of **Anjum B. Ghaswala (252 ITR 1)**. The interest compensatory in nature and the same is levied since the revenue was deprived-off of its legitimate dues. The argument that it was wholly the obligation of the remitter bank to deduct due taxes arising out of these transactions is clearly fallacious for the reason that nothing has been shown that the bank has defaulted in deducting due TDS that was required under the law. Secondly, the obligation to compute quantum of advance tax as well as final tax liability was on assessee only considering the provisions of Sec.209(1). The assessee merely presumed that whatever was the TDS, the same constituted final tax liability of the assessee. The same is erroneous presumption. It could be noted that the case was specifically reopened to bring to tax capital gains arising out of the impugned transactions. Even in response thereof, the assessee continued to have the said belief and still did not offer any gains to tax. Under these circumstances, the argument of

bona-fide belief or presumption could not be accepted. Ignorance of law is no excuse. When the revenue is deprived of its legitimate dues on time, it is certainly entitled for compensatory interest. The Hon'ble Supreme Court in the case of **Anjum B. Ghaswala (252 ITR 1)** has held that levy of interest is mandatory in nature and the same cannot be waived-off.

5. The decision of Hon'ble Supreme Court in the case of **Mitsubishi Corporation Ltd. (438 ITR 174)** is on the interpretation of proviso to Sec. 209(1) issued by Finance Act, 2012 providing that if a non-resident assessee received any amount including tax deductible at source, assessee could not reduce such tax while computing its advance tax. The Hon'ble Court held that the said proviso was applicable after AY 2012-13. It was held by Hon'ble Court that the amount of income-tax which is deductible or collectible at source could be reduced by the assessee while calculating advance tax. In such a case, the assessee could not be held to have defaulted in payment of its advance tax liability. The revenue is not remediless and there are provisions enabling the revenue to proceed against the payer who has defaulted in deducting tax at source. However, in the present case, there is nothing on record that the bank has made any default in deduction of tax at source against these payments. It is not a case that no tax has been deducted by the remitter bank. Similar are the facts in the case law of Hon'ble High Court of Madras in the case of **Madras Fertilizers Ltd. (149 ITR 703)**. Similar is the case law in Hon'ble Bombay High Court in the case of **NGC Network Asia LLC (313 ITR 187)** wherein the payer failed to deduct applicable tax at source. The same is not the case here. In the present case, the assessee has neither computed its advance tax liability nor has

any default been shown on the part of remitter bank. Therefore, these case laws do not render any assistance to the case of the assessee. The Ld. CIT(A), in our considered opinion, has erred in applying the ratio of these decisions. The same is also contradictory in nature since levy of interest u/s 234C has been upheld by Ld. CIT(A) which has attained finality. The interest u/s 234C is applicable for deferment of payment of advance tax only.

6. Considering the facts and circumstances of the case, levy of interest u/s 234B by Ld. AO could not be faulted with. The revenue is very well entitled for compensatory interest for default in payment of advance tax. We order so. The Ld. AO is directed to re-compute the interest component by considering the first date from the which capital gains have arisen to the assessee.

7. The appeal stand allowed in terms of our above order.

Order pronounced on 31st December, 2024.

Sd/-
(ABY T. VARKEY)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखक सदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated : 31-12-2024
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आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Assessee
2. प्रत्यर्थी/Revenue
3. आयकरआयुक्त/CIT Chennai.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF