

## IN THE INCOME TAX APPELLATE TRIBUNAL, BENCH "C", KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM &amp; Hon'ble Sri M.Balaganesh, AM]

ITA No.507/Kol/2010  
Assessment Year : 1992-93

A.D.I.T., (International Taxation)-3(1) Kolkata (Appellant)	-vs M/s. White Industries Australia.Ltd., Kolkata (PAN AAACW 2447 C) (Respondent)
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ITA Nos.477 & 478/Kol/2010  
Assessment Year : 1992-93

M/s. White Industries Australia.Ltd., Kolkata (PAN AAACW 2447 C) (Appellant)	A.D.I.T., (International Taxation)-3(1) Kolkata (Respondent)
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For the Department: Shri.N.B.Som, Addl.CIT, Sr.DR  
For the Assessee : NoneDate of Hearing : 30.3.2017  
Date of Pronouncement : 05.04.2017.**ORDER****Per N.V.Vasudevan, JM**

I.T.A. No.507/Kol/2010 is an appeal by the revenue against the order dated 31.12.2009 of CIT(A)-IV, Kolkata relating to A.Y.1992-93. This appeal arises out of an order passed by CIT(A) in Appeal No.3A/CIT(A)-VI/08-09/IT-3(1)/Kol. The fact that this appeal is against the order passed in **Appeal No.3A** is clear from the direction of the D.I.T.(International taxation) Kolkata dated 11.03.2010 u/s 253 of the Act. Revenue has filed the present appeal before the Tribunal.

2. ITA No.478/Kol/2010 is an appeal by the assessee against the very same order of CIT(A) against which the revenue has filed ITA No.507/Kol/2010.

3. ITA No.477/Kol/2010 is an appeal filed by the assessee against order dated 31.12.2009 of CIT(A)-VI, Kolkata passed in **Appeal No.3/CIT(A)-VI/08-09/IT-3(1)/Kol** relating to A.Y.1992-93.

4. A brief history as to how all these appeals arise for consideration has to be explained. The Assessee is a non resident company incorporated in Australia. It entered into a contract on 28.09.1989 with Coal India Ltd. (CIL) in connection with the project for development of an open cast mine at Piparwar undertaken by Central Coalfields Ltd., a subsidiary of Coal India Ltd. For A.Y.1992-93 the assessee filed return of income declaring fees received for rendering managerial technical and consultancy services at Rs.20,33,59,140/- which included procurement of fees of Rs.3,57,35,557/-.

5. In accordance with the provisions contained in section 115A of the Income Tax Act (hereinafter referred to as the "Act"), tax @ 30% on the aforesaid fees was computed at Rs. 6,10,07,742/-. The entire tax of Rs. 6,10,07,742/- was paid by CIL. The Assessing Officer vide his order under section 143(3) of the Act dated 28th February, 1995 held that the services rendered by the Assessee for which procurement fees were paid are in the nature of Agent's service and hence the procurement fees paid by CIL were basically in the nature of commission and commission cannot be termed as technical fees. Against the said order the appellant preferred appeal before the CII'(Appeals) and the Learned CIT(Appeals) vide his order dated 6th December, 1996 decided the issue against the appellant. The appellant preferred an appeal before the Hon'ble Tribunal against such order of the CIT(Appeals). The Hon 'ble Tribunal agreed with the findings of the lower authorities and regarded that the procurement fees received by the Assessee was in the nature of business income and remanded to the AO, the issue relating to the determination of the quantum of such income that can be regarded as accruing or arising in India. The order giving effect to the order of the Hon'ble Tribunal was passed by the Assessing Officer by the order under section 143(3)/253 dated 30th March 2001.

6. Subsequently the Assessing Officer issued a notice under section 148, which was served on the assessee on 14th March 2001. Against the said notice the Assessee had filed a Writ petition No. 745 of 2001 in the High court at Kolkata. By order dated 16th April 2001, the Hon'ble High Court stayed the proceedings pursuant to the notice u/s.148 of the Act for a period of five weeks from date i.e. 16th April 2001. On expiry of such period the Assessing officer issued notice under section 142(1) and 143(2) and ultimately passed an order under section 147/143(3) dated 2nd March 2003. In the said order the Assessing Officer made an addition of Rs. 2,32,28,112/- on the ground that procurement fees were in the nature of commission and therefore tax paid by CIL on behalf of the Assessee needs to be grossed up and hence such tax paid by the CIL on behalf of the Assessee would constitute as the income of the Assessee. Against this impugned addition the Assessee preferred an appeal before CIT(A) in appeal No.102/04-05 who upheld the order of the AO in his order dated 27.01.2005. On further appeal the ITAT vide its order dated 08-06-2006 held as follows (for ITA No. 8321K01/05) (relevant part) -

*“However, in the instant case, we find that the Assessing Officer has not passed a speaking order while disposing of the reply of the assessee filed by him to notice issued u/s 148 of the IT Act'61. Therefore, respectfully following the said decision of the Hon 'ble Supreme Court in the case of GKN Driveshafts (1) ltd [supra] [259 ITR 19 (SC)] the matter is restored back to the file of the Assessing Officer for passing a speaking order on this issue after giving an opportunity of hearing to the assessee as per law. The assessee is directed to cooperate with the Assessing Officer in prosecuting its case. Since we have remitted the matter back to the file of the Assessing Officer on technical point raised by the assessee, therefore, the other grounds of the assessee does not require any adjudication.”*

7. As we have already seen that the AO passed the order u/s 147 r.w.s. 143(3) of the Act on 27.03.2003. The AO by another order dated 27.05.2004 passed u/s 154 of the Act levied interest u/s 234B of the Act and further held that the assessee is also liable to pay interest u/s 220(2) of the Income Tax Act, 1961 (Act.).

8. Against the aforesaid order the assessee preferred an appeal before CIT(A) in Appeal No.103/2004-05. But CIT(A) vide its order dated 27.01.2005 confirmed the order of the AO. Against the order of CIT(A) the assessee preferred an appeal before

the Tribunal vide ITA No.831/Kol/2005 dated 08.06.2006 who restored the issue to the AO for fresh consideration.

9. Consequent to the aforesaid order of ITAT in ITA Nos.831 and 832/Kol/2005 the AO passed order giving effect to the directions of the tribunal. In so far as the direction to consider the issue of validity of initiation of proceedings u/s 147 of the Act is concerned it was the subject matter of ITA No.832/Kol/2005, the AO by its order dated 21.01.2009 held that the reopening of assessment was proper. The AO found that the objections to the validity of initiation of reassessment proceedings u/s.148 of the Act were as follows:

1) Issuance of notice u/s 148 without disclosing the reasons to believe (that income has escaped assessment) in the notice does not automatically confer jurisdiction on the Assessing Officer to take action u/s 147 of the Act.

2) That the Assessing Officer could not have had any reason to believe that the income chargeable to tax for AY 1992-93 had escaped assessment and the notice u/s 148 was issued mechanically and/or without application of mind, arbitrarily and with a view to make a fishing enquiry and/or roving investigation presumably on a mere change in opinion.

3) That no income of the assessee chargeable to tax for the AY 1992-93 has or can have escaped assessment and there/lire the primary condition precedent for assuming jurisdiction u/s 147 is not satisfied.

4) That the assessment u/s 143(3) had been completed for the AY 1992-93 and reassessment proceedings u/s 147 and the notice u/s 148 are void ab initio as the reassessment proceedings have been initiated after the expiry of four years from the end of the relevant assessment year without fulfilling the conditions laid down for the same in the proviso to the section 147 of the IT Act since neither the assessee failed to make a return u/s 139(1) nor any notice u/s 142(1) or u/s 148 was issued to the assessee requiring the assessee to file a return nor was there any failure on the part of the assessee to disclose fully and truly all materials fact necessary for his assessment for that assessment year.

10. The AO however rejected the above contentions. He made a reference to the reasons recorded by the AO before issue of notice u/s.148 of the Act, which reads thus:

Reasons for reopening the assessment u/s 148:

"On perusal of the record it is seen that the assessing officer in the year under consideration has segregated the gross receipt/ram Coal India Ltd., into two:

(1) Technical Fee or, Management Fee	Rs.16,76,23,585/-
(2) Procurement Fee.	<u>Rs. 3,57,35,557/-</u>
TOTAL:	Rs.20,33,59,142/-

The technical fee was taxed @ 30% whereas Procurement Fee was treated as Commission and taxed at the rate 65%. It is relevant to note that these payments are net of taxes implying thereby that the payee i. e., Coal India Ltd., is required to pay the tax in respect of the said income in the hands of the assessee M/s white Industries Ltd. Now, the income tax liability being discharged by Coal India Ltd., on behalf of White industries Ltd. should form part of the income in the hands of M/s White Industries Ltd. In other words grossing up is required in respect of the receipt.

In this regard, it is relevant to note that such income tax liability in respect of technical service is exempt U/S 10(6A). However, no exemption has been envisaged in respect of procurement fee commission.

Thus grossing up will be required at the rate of 65% in respect of Procurement Fee of Rs. 3,57,35,557/- which works out to Rs. 5,89,63,669/-. Hence, the difference amounting to Rs. 2,32,281,112/- representing tax liability discharged! dischargeable by CIL on behalf of the 'A' for making the payment of Rs. 3,57,35,5571- (net of tax) requires to brought to tax.

Since the said income of Rs. 2,32,28, 112/- has escaped assessment and the assessee had failed to disclose fully and truly all material/acts in respect of the said transaction and its nature/mislead the department while making the claim, I have reasons to believe that this is a fit case for invoking provisions under section 148 of the I. T.Act, 1961 .”

11. According to the AO, it was clear from the above that the Assessing Officer had **very specific reasons to believe** that the income had escaped assessment and that **after recording these reasons** and after taking the necessary approvals the Assessing Officer issued the notice u/s 148 of the Act. Thus in no way it can be said that the notice U/S 148 was issued mechanically and/or without application of mind,

arbitrarily and with a view to make a fishing enquiry and/or roving investigation presumably on a mere change in opinion. He also held that the question of a 'change in opinion' also does not arise in the instant case as it is evident from the order U/S 143(3) of the Act that the Assessing Officer had nowhere in the order formed any opinion regarding the fact of payment being 'net of taxes' or the issue of 'grossing up'. In fact this issue was never dealt with by the Assessing Officer nor had any analysis of the same been done. There had been no conscious application of mind on this issue.

12. In so far as the directions in ITA NO.831/Kol/2005 with regard to levy of interest u/s 234B of the Act and levy of interest u/s 220(2) of the Act, the AO by his order dated 29.01.2009 held that interest u/s 234B of the Act is leviable and that interest u/s 220(2) of the Act is also chargeable as demand was outstanding.

13. Against the order of AO dated 21.01.2009 upholding the validity of initiation of re-assessment proceedings the assessee filed an appeal before CIT(A) which was appeal No.3/CIT(A)-VI/08-09/IT-3(1)/Kol.

14. Against the order dated 29.01.2009 whereby the CIT(A) upheld the order of AO levying interest u/s 234B of the Act and u/s 220(2) of the Act the assessee filed appeal before CIT(A) which was Appeal No.3A/CIT(A)-VI/08-09/IT-3(1)/Kol.

15. The CIT(A) passed two separate orders both dated 31.12.2009. In so far as the validity of initiation of re-assessment proceedings is concerned the CIT(A) upheld the order of AO. In so far as levying of interest u/s 234B and u/s 220(2) of the Act is concerned, the CIT(A) held that in so far as the levying of interest u/s 234B is concerned since the assessee was a non resident the key person making the payment has to deduct tax at source in terms of section 195 of the Act. Since the provision of section 209(1)(d) of the Act the liability of the assessee to pay advance tax has to be computed after giving credit to the tax deductible (where actually deducted or not) the

assessee cannot be called upon to pay interest u/s 234B of the Act. Thus levying of interest u/s 234B was deleted by CIT(A).

16. In so far as levying of interest u/s 220(2) of the Act is concerned, the CIT(A) quoted CBDT Circular No.334 dated 3.4.1982 wherein it was laid down as follows:

*"1. Doubts have been raised as to the quantum of interest chargeable under section 220(2) when the original assessment order passed by the Income-tax Officer is*

*(a) Cancelled by him under section 146;*

*(b) set aside/cancelled by an appellate/revisonal authority and such appellate/revisonal order has become final ; or*

*(c) set aside by one appellate authority but, on further appeal, the order setting aside the assessment is varied by the second appellate authority and the demand gets finally determined.*

*2. These issues were comprehensively examined in consultation with the Ministry of Law and the Board has been advised:*

*1. Where an assessment order is cancelled under section 146 or cancelled/set aside by an appellate/revisonal authority and the cancellation/setting aside becomes final (i.e. it is not varied as a result of further appeals/revisions), no interest under section 220(2) can be charged pursuant to the original demand notice. The necessary corollary of this position will be that even when the assessment is reframed, interest can be charged only after the expiry of 35 days from the date of service of demand notice pursuant to such fresh assessment order.*

*2. Where the assessment made originally by the Income-tax Officer is either varied or even set aside by one appellate authority but on further appeal, the original order of the Income-tax Officer is restored either in part or wholly, the interest payable under section 220(2) will be computed with reference to the due date reckoned from the original demand notice and with reference to the tax finally determined. The fact that during an intervening period, there was no tax payable by the assessee under any operative order would make no difference to this position.*

*3. The foregoing legal position will apply mutatis mutandis to the proceedings under other direct taxes also"*

17. The CIT(A) directed the AO to calculate interest u/s.220(2) of the Act as per CBDT Circular no.334 dated 03-04-1982.

18. Aggrieved by the order of CIT(A) in upholding the validity of initiation of re-assessment proceedings u/s 147 of the Act the assessee has preferred ITA NO.477/Kol/2010. Aggrieved by the order of CIT(A) in deleting the levy of interest u/s 234B of the Act the revenue has filed an appeal before the Tribunal vide ITA NO.507/Kol/2010. Aggrieved by the order of CIT(A) in Appeal No.3A/CIT(A)-VI/08-09IT-3(1)/Kol levying of interest u/s 220(2) of the Act the assessee has filed ITA No.478/Kol/2010.

19. This appeal was taken up for hearing. Attempts were made to service notice on the assessee M/s. Price Waterhouse Coopers Pvt. Ltd., filed appeals on behalf of the assessee had appeared in the proceedings. Later they have chosen not to appear in these proceedings. M/s. Coal India Ltd are the limited persons who have been bearing the tax liability also appeared in the proceedings and in a letter dated 13.05.2015 had informed the bench that Price Waterhouse Coopers was not the consultant and that the matter was referred to the assessee for advice which was yet to be received. Thereafter CIL also did not appear in its proceedings. In these circumstances taking note of the fact that the appeals are very old appeals pertaining to A.Y.1992-93 and keeping in mind the lack of interest shown by the assessee to prosecute the appeals, we dismiss the appeals filed by the assessee for non prosecution. For doing so, we find support from the following decisions :-

*“1. In the case of CIT vs B.N.Bhattachrgee and another, reported in 118 ITR 461 [relevant pages 477 & 478] wherein their Lordships have held that :*

*“The appeal does not mean merely filing of the appeal but effectively pursuing it.”*

2. In the case of Estate of late Tukojirao Holkar vs CWT; 223 ITR 480 (MP) while dismissing the reference made at the instance of the assessee in default made following observation in their order :

*“If the party, at whose instance the reference is made, fails to appear at the hearing, or fails in taking steps for preparation of the paper books so as to enable hearing of the reference, the court is not bound to answer the reference.”*

3. In the case of Commissioner of Income-tax vs Multiplan India (P) Ltd.: 38 ITD 320(Del), the appeal filed by the revenue before the Tribunal, which was fixed for hearing. But on the date of hearing nobody represented the revenue/appellant nor any communication for adjournment was received. There was no communication or information as to why the revenue chose to remain absent on that date. The Tribunal on the basis of inherent powers, treated the appeal filed by the revenue as unadmitted in view of the provisions of Rule 19 of the Appellate Tribunal Rules, 1963.

20. The assessee, if so desired, shall be free to move this Tribunal praying for recalling this order and explaining reasons for non-compliance etc. then this order may be recalled. In view of the above ITA Nos. 477 & 478/Kol/2010 filed by the assessee are dismissed for non prosecution.

21. In the result ITA Nos. 477 & 478/Kol/2010 filed by the assessee are dismissed.

**ITA NO.507/Kol/2010 : (Revenue's appeal) :**

22. As far as this appeal by the revenue is concerned the person making payment to the Assessee was duty bound to deduct tax at source u/s.195 of the Act on payment made to the Assessee, as the Assessee was a non-resident. In estimating the advance tax payable, the Assessee was bound to take note (give credit to) tax deductible at source (whether actually deducted or not). If such credit is given then there would be no liability to pay advance tax of the Assessee would be less than Rs.5000 and therefore no interest u/s.234B of the Act could be levied. In this regard reference may be made to the decision of the ITAT Delhi in the case of Sedco Forex International Drilling Vs. DCIT 72 ITD 415 (Del). In this regard reliance may also be placed on the decision in the case of Motorola Inc. and others v. DCIT (supra), wherein the Hon'ble Tribunal has held that no interest is payable by a taxpayer if his entire tax was deductible at source, and this is true even if the tax was not actually deducted. The relevant extracts of the said decision is produced below:-

*"All the payments made to the assessee are tax deductible at source (even assuming that they are taxable) as rightly held by the CIT(A) and also*

*contended before us. In that case, having regard to the provisions of section 201(1) & 201(1A) to which our attention was drawn on behalf of the assesseees. the assesseees cannot be held to have committed default in paying the advance-tax. They are entitled to take into account the tax which is deductible by the payer. though not actually deducted. Consequently, there is no liability to pay interest. The decision of the CIT(A) to cancel the interest U/S 234B is upheld on merits. "*

23. The issue was confirmed by the Delhi HC in the case of **DIT vs. Ericsson AB [2011] 16 taxmann.com 371 (Delhi)**. Reliance was also placed on the decision in the case of **DIT vs. Jacobs Civil Incorporated [2010] 194 Taxman 495 (Delhi) (Page 726 to 742)**, wherein the Hon'ble Delhi High Court has held as under:

*"No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments. the non - resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of Section 191 of the Act along with Section 209 (1) (d) of the Act. For this reason. it would not be permissible for the Revenue to charge any interest under Section 234B of the Act. .*

24. Reliance may also be placed on following decisions laying down identical proposition as set out above. DIT(International Taxation) v Maersk Co. Ltd. 2011) 198 Taxman 518 (Uttarakhand) (FB). Sedco Forex International Drilling v Dy CIT [2000] 72 ITD 415 (Del); Rheinbraun Engg. & Wasser Gmbh v DCIT 1. T. A 0.1915/ Born / 96 dated 3 October 1997 (Bom); M.M. Ratnam v ITO [1997] 62 ITD 21 (Bom); Asia Satellite Telecommunications Co. Ltd v DCIT [2003] 78 TTJ 489 (Del); DIT v NGC Network Asia LLC [2009] 313 ITR 187 (Bom); CIT v Tide Water Marine International Inc. [2009] 309 ITR 85 (Uttaranchal); and Commissioner of Income-tax and Others v Ranchi Club Ltd (2001) 247 ITR 209. Therefore, the provisions of section 234B & 234C are not applicable to the Assessee.

25. Under Section 209(1)(a) to (d) lays down four situations under which advance tax payable by the assessee is to be computed. In the present case we are not concerned with clauses (a) to (c). Clause (d) of sub-Section (1) of Sec.209 is relevant for the present case and it reads thus:-

"(d) The income-tax calculated under clause (a) or clause (b) or clause(c) shall, in each case, be reduced by the 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 deductions 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."

26. A reading of the above clause shows that the clause categorically uses the expression "deductible or collectible at source". Under Sec.195 of the Act, there is an obligation on the payer, i.e. any person responsible for paying to a non-resident, to deduct income tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the non- resident. Sec.201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident but also penalties etc. Once it is found that the liability was that of the payer and the said payer has defaulted in deducting the tax at source, the Department is not remedy-less and therefore can take action against the payer under the provisions of Sec.201 of the Income Tax Act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non- resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. The provisions of Sec.209(1)(d) have been amended by the Finance Act, 2012 but those amendments are not relevant for the present case which relates to AY 1992-92. We therefore hold that the assessee was not liable to pay any interest under sec.234-B of the Act following the judgments referred to earlier.

27. We find no merits in the relevant grounds of appeal of the revenue wherein the revenue has challenged the order of the CIT(A) holding that charging of interest u/s.234B of the Act in the present case was not in accordance with law.

28. As far as the levy of interest u/s.220(2) of the Act is concerned, the CIT(A) has not given any finding as to whether interest is chargeable u/s.220(2) of the Act or not. He has only directed the AO to follow the CBDT Circular No.334 dated 3.4.1982 and charge interest u/s.220(2) of the Act in accordance with the said circular. The Assessing Officer and the Assessee will be at liberty to put forth their claim as to whether para 2.1 or 2.2 of the CBDT Circular will apply. The CIT(A) ought to have rendered a finding on this aspect. We are of the view that the order of assessment by the AO u/s.147 of the Act as well as the order u/s.154 of the Act were only set aside in appeal and such setting aside did not render the assessment final and issues were set aside for fresh consideration by the AO. In such circumstances, the charging of interest would be governed by para 2.2 of the Circular and charging of interest u/s.220(2) as done by the AO should be held to be proper. We hold accordingly. Consequently, the relevant grounds of appeal regarding levy of interest u/s.220(2) of the Act raised by the Revenue in its grounds of appeal are allowed.

29. In the result the appeals by the Assessee are dismissed, while the appeal by the Revenue is partly allowed.

**Order pronounced in the open court on 05.04.2017.**

Sd/-  
[M.BALAGANESH]  
Accountant Member

Sd/-  
[ N.V.VASUDEVAN ]  
Judicial Member

Date: 05.04.2017.

R.G.(P.S.)

Copy of the order forwarded to:

1. M/s. White Industries Australia Ltd., C/o Pricewaterhouse Coopers Pvt. Ltd., Plot-Y-14, Block-EP, Sector-V, Salt Lake, Kolkata-700091.
2. A.D.I.T., (International Taxation)-3(1), Kolkata
3. CIT(A)-VI, Kolkata
4. CIT – II, Kolkata.
5. CIT DR, Kolkata Benches, Kolkata

True Copy,

By order,

Deputy /Asst. Registrar, ITAT, Kolkata Benches