IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "L", MUMBAI

BEFORE SHRI G.S.PANNU, ACCOUNTANT MEMBER
AND
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.6578 /MUM/2012,(A.Y. 2008-09)
ITA No.6605 /MUM/2012,(A.Y. 200910)

M/s. Meridien SA,
C/o. NANGIA & Co.,
The Submit, Level 2,
Unit No.210, Western Express Highway,
Vile Parle(East),Mumbai 400057
PAN:AAECM 1881E ... Appellant

Vs.

Dy.Director of Income Tax,
International Taxation, Circle – 4(1),
Mumbai. .... Respondent

Appellant by : Shri Neeraj Agarwal
Respondent by : Shri Harshad Vengurlekar

Date of hearing : 25/07/2016
Date of pronouncement : 26/08/2016

ORDER

PER Ravish Sood, J.M :

The present appeals filed by the assessee company pertaining to assessment years 2008-09 and 2009-10 are directed against a common order passed by CIT(A)-11, Mumbai dated 30/07/2012, which in turn have arisen out of orders passed by the Assessing Officer (in short 'A.O')

under section 143(3) r.w.s. 144C(3) of the Income Tax Act, 1961 (in short 'the Act') dated 07/02/2011 and 14/02/2012, respectively.

2. The Grounds of appeal raised by the assessee company in both the assessment years are identical except for difference in figures. The Grounds of appeal for assessment year 2008-09 and 2009-10 read as under:-

(A). A.Y. 2008-09 :

1. The Ld. CIT(A) has erred in confirming the action of Ld. AO in making an addition of Rs. 1,71,13,377/- being the amount of service tax deducted by the customers from the amounts payable to the appellant in terms of section 66A of the Finance Act, 1994, by holding that the same is to be included in the taxable income of the appellant for the relevant assessment year.

1.1 The Ld. CIT(A) has erred in confirming the action of Ld. AO in failing to appreciate that the liability to deposit service tax applicable on the services rendered by the appellant vests with the customers of the appellant under the reverse charge mechanism in terms of section 66A of the Finance Act, 1994.

1.2 The Ld. CIT(A) has erred in confirming the action of Ld. AO in failing to appreciate that the above amount did not accrue to the appellant and, therefore, the same cannot form part of the income earned by the appellant.

2. The Ld. CIT(A) has erred in confirming the action of the Ld. AO in levying interest under section 234B of the Act.

The appellant craves leave to add, alter, modify or delete any grounds of appeal at or before the time of hearing."

(B). A.Y. 2009-10 :

1. The Ld. CIT(A) has erred in confirming the action of Ld. AO in making an addition of Rs.1,88,47,745/- being the amount of service tax deducted by the customers from the amounts payable to the appellant in terms of section 66A of the Finance Act, 1994, by holding that the same is to be included in the taxable income of the appellant for the relevant assessment year.

1.1 The Ld. CIT(A) has erred in confirming the action of Ld. AO in failing to

appreciate that the liability to deposit service tax applicable on the services rendered by the appellant vests with the customers of the appellant under the reverse charge mechanism in terms of section 66A of the Finance Act, 1994.

1.2 The Ld. CIT(A) has erred in confirming the action of Ld. AO in failing to appreciate that the above amount did not accrue to the appellant and, therefore, the same cannot form part of the income earned by the appellant.

2. The Ld. CIT(A) has erred in confirming the action of the Ld. AO in levying interest under section 234B of the Act.

The appellant craves leave to add, alter, modify or delete any grounds of appeal at or before the time of hearing."

2. We herein advert to the facts involved in the appeal of the assessee company for the A.Y. 2008-09, marked as ITA No. 6578/Mum/2012. The facts of the case are that the assessee company is a non-resident company incorporated under the laws of France since 2005 and engaged in the business of providing hotel related services to hotels across the world including India. The assessee company had consistently followed 'Cash system' of accountancy in India, and pursuant thereto had been offering its revenues to tax on receipt basis. The assessee company had entered into license agreements with various hotels in India (hereinafter referred to as 'Customers'), and as per the terms of the said agreements had permitted the use of its Trade mark, "LE MERIDIEN", by the hotels, as well as provided advertising and promotional services, reservation services to the respective hotels. The assessee company pursuant to the aforesaid services so rendered by it, as per the terms of its agreements earned licenses fees, which were reflected as 'Royalty' and offered for tax at the rate of 10% in terms of Article 13 of the 'Double Taxation Avoidance Agreement' between

India and France (for short "DTAA").

2.1. The assessee company E-filed its return of income as on 27/09/2008 declaring total income at Rs.18,86,36,050/-, which was processed as such u/s. 143(1) of the 'Act'. Thereafter, the case of the assessee company was taken up for scrutiny proceedings, wherein the A.O taking cognizance of the fact that as against the amount of royalty of Rs. 24,82,77,879/- on which tax had been deducted at source by the customers, as revealed by the TDS certificates for the year under consideration, the assessee company in its 'Return of income' had only accounted for royalty amount of Rs.18,86,36,050/-, therefore called upon the assessee company to put forth an explanation as regards the short/deficit amount of royalty of Rs. 5,96,41,829/-[i.e Rs. 24,82,77,879/- (-) Rs. 18,86,36,050/-], which was reconciled by the assessee company as under:-

S.No	Particulars	Amount
1.	Difference for the reason that as against accounting of the royalty income on the basis of 'Cash system' of accountancy followed by the assessee company, tax was deducted at source by the customers on 'accrual' or 'receipt', whichever was earlier.	Rs. 4,25,28,452/-
2.	Difference for the reason that the A.O had included the amount which was reduced by the customers from the fee/royalty payable to the assessee company on account of the	Rs.1,71,13,377/-

	'Service tax' deposited by them with the government exchequer, as per the 'reverse charge' mechanism as was made available on the statute vide Sec. 66A of the Finance Act, 2006.	
	Total	Rs.5,96,41,829/-

The A.O however did not find favor with the submissions of the assessee company and after making an addition of the aforesaid variance of Rs. 5,96,41,829/-(supra) to the 'Returned income', assessed its income u/s. 143(3) r.w.s. 144C(3) of the 'Act' at an amount of Rs. 24,82,77,880/-.

2.2. That on appeal by the assessee company, the Ld. CIT(A) dealing with the issue as regards the variance to the extent of Rs. 4,25,28,452/-(supra), directed the A.O to tax the amount of royalty as per the gross amount credited in account of the assessee company by the customers in their 'books of accounts', irrespective of whether amount was actually paid or not, while for as regards the variance of Rs. 1,71,13,377/-(supra), the Ld. CIT(A) relying on the following case laws:

(i). DDIT(Intl). Vs. Technichip Offshore Contracting Br.

(Appeal No. ITA 4613/D/07; dated. 16/01/2009)(ITAT Delhi-I, Bench)

(ii). Chowringhee Sales Bureau (P) Ltd. Vs. CIT

(1973)87 ITR 542 (SC)

, being of the view that as the gross royalty income of the assessee company

was to be subjected to tax as per the rate provided in the India-France treaty, therefore upheld the order of the A.O.

3. That before us the assessee company has assailed the order of the CIT(A) to the extent the latter had upheld the addition of Rs. 1,71,13,377/- (supra) made by the A.O. The Ld. Authorized representative (for short 'A.R') for the assessee company taking us to the genesis of the issue under consideration, therein submitted that as a fallout of the mechanism of 'reverse charge' as per Sec. 66A made available on the statute vide the Finance Act, 2006, w.e.f 18.04.2006, the customers on being subjected to the statutory obligation of depositing service tax as regards the value of services received from the assessee company, however declined to yield to the enhanced cost of services and bear the resultant financial burden on their own, and therefore unilaterally reduced the amount of the service tax from the fee/royalty payable to the assessee company before remitting the same outside India. It was submitted by the Ld. A.R that though the assessee company initially objected to the said act of the customers, but thereafter being left with no option, accepted the said act of the customers. It was thus submitted by the Ld. A.R that as neither any income equivalent to the amount of the service tax reduced by the customers from the fee/royalty payable to the customers had at any point of time ever accrued to the assessee company, nor was ever received by the latter, as a result whereof, as the said amount did never partake the color and character as that of 'Income', therefore the assessee company could not be saddled with taxes as regards the same. The Ld. A.R for the assessee company took us through section 66A, as had been made available on the statute vide the Finance Act, 2006, w.e.f 18.04.2006, providing for levy of service tax in cases where

specified services are provided by a non-resident to a resident from outside India, as per which, on the basis of mechanism of 'reverse charge', where an Indian resident receives taxable services from a non-resident, then such recipient of service is treated as deemed service provider and is liable for payment of service tax, as if he himself had provided the services in India. In the backdrop of the aforesaid settled position of law, it was submitted by Ld. A.R that as in the case of the assessee company the specified services, being business auxiliary services were provided by non-resident (i.e. the assessee company) to a resident (i.e. the customers), the statutory obligation for payment of service tax was cast upon the customers, who were required to deposit the same with the Government exchequer by virtue of the above mechanism of 'reverse charge'. The Ld. A.R on a clarification sought by the bench as to whether the assessee company had raised any claim against the customers as regards the amounts which had been reduced by them from the fee/royalty payable to the assessee company, specifically in light of the fact that the statutory obligation as regards depositing of service tax with the government exchequer was cast upon the customers, therein placed on record a letter dated. 25.07.2016, wherein it was averred that as the levy of service tax u/s 66A by way of 'reverse charge' mechanism was a new levy which could not have been anticipated at the time when the agreements were executed between the assessee company and the customers, therefore initially a dispute arose between the parties as to who would bear the service tax cost, and the customers declining to bear the financial burden so cast upon them, therefore resorted to reduction of the amount of Service tax from the fee/royalty payable to the assessee company and remitted only the balance amount to the assessee company, which though was initially objected by the assessee company, but thereafter the assessee company

agreed to the aforesaid act of the customers, as a result whereof no amount so reduced by the customers from the amount of fee/royalty was payable by the customers to the assessee company. It was thus submitted by the Ld. A.R that the amount of service tax reduced by the customers from the fee/royalty of the assessee company, had at no stage either accrued as income to the assessee company, nor was ever received by it, therefore the A.O had erred in assessing the amount of Rs.1,71,13,377/-(supra) as royalty in the hands of the assessee company, which thereafter had wrongly been upheld by the Ld. CIT(A), and the same may therefore kindly be deleted.

3.1. Thus, to be brief and explicit, the contention of the Ld. A.R for the assessee company was that as regards the amount of service tax reduced by the customers from the fee/royalty payable to the assessee company, now when no income to the said extent had resulted at all to the assessee company, therefore the issue of bringing the said amount to tax in the hands of the assessee company did not arise at all. That alternatively, it was further submitted by Ld. A.R that as the assessee company was consistently maintaining its 'books of accounts' on 'Cash basis', as per which income could only be recognized when the assessee company received the same, therefore as no amount was ever received by the assessee company to the extent the same had been reduced by the customers on account of service tax, thus on the said count too the amount could not be brought to tax in the hands of the assessee company. The Ld. A.R in support of his aforesaid contention therein relied upon the following case laws:-

(i). DIT-I vs. Mitchell Drilling Internation (P) Ltd., (2015), 62 taxamann.com 24(Del)

(ii). The ADIT(IT) 3(1) vs. Haldor Topsoe A/c., ITA No.4431/M/05

& 6868/Mum/2007 order dated 25/04/2012.

(iii). Marubeni Corporation vs. ADIT (IT)-4(1),(2013), 37 taxamann.com 318 (Mum-Trib)

(iv). Veolia Eau-Compagnie vs. ADI, ITA No.2131/Mds/2010, Order dated 23/6/2011.

(v). ACIT, Cir.2(2) vs. Louis Berger International Inc. , (2010) 40 SOT 370 (HYD)

3.2. The Ld. Departmental Representative (for short 'D.R') on the other hand supported the orders of the lower authorities and therein submitted that the A.O had rightly included the amount of the service tax deposited by the customers as a part of the royalty income of the assessee company, which thereafter had rightly been sustained by the Ld. CIT(A). The Ld. D.R in order to support his aforesaid contention, therein heavily relied upon the judgment of the **Hon'ble Supreme Court** in the case of **Chowringhee Sales Bureau (P) Ltd. (supra)**, wherein it was held as under:-

> *"8.It is apparent from the order of the AAC and has not been disputed before us in the present case that in the cash memos issued by the appellant to the purchasers in the auction sale it was the appellant who was shown as the seller.* ***The amount realized by the appellant from the purchasers included sales tax. The appellant, however, did not .pay the amount of sales tax to tile actual owner of the goods auctioned because the statutory liability for the payment of that sales tax was that of the appellant. The appellant company did not also deposit tile amount realized by it as sales tax in the State exchequer because it took the position that the statutory provision creating that liability upon it was not valid****. As the amount of sales tax was received by the appellant in its character as an auctioneer, the amount, in our view, should be held to form part of its trading or business receipt. The appellant would of course, be entitled to claim deduction of the amount as and when it pays it to the State Government,*
>
> *9. The fact that the appellant credited the amount received as sales tax under the head "Sales tax collection account" would not, in our opinion, make any material difference. It is the true nature and the quality of the receipt and not the head under which it is entered in the account books as*

would prove decisive. If a receipt is a trading receipt, the fact that it is not so shown in the account books of the assessee would not prevent the assessing authority from treating it as trading receipt. We may in the context refer to the case of Punjab Distilling Industries Ltd. v. CIT(1959) 35 ITR 519 (SC). In that case certain amounts received by the assessee were described as security deposits. This Court found that those amounts were an integral part of the commercial transaction of the sale of liquor and were the assessee's trading receipt. In dealing with the contention that those amount were entered in a separate ledger termed "empty bottles return security deposit account", this Court observed: "So the amount which was called security deposit was actually a part of the consideration for the sale and, therefore, part of the price of what was sold. Nor does it make any' difference that the price of the bottles was entered in the general trading account while the so-called deposit was entered in a separate ledger termed 'empty bottles return deposit account' for, what was a consideration for the sale cannot cease to be so by being written in the books in a particular manner"

10. We, therefore, agree with the High Court in so far as it has answered the question referred to it in the negative and against the appellant. The appeal consequently fails and is dismissed with costs. "

The Ld. D.R further placed reliance on the decision of the ITAT Delhi 'I' Bench in the case of :Technichip Offshore Contracting Br. (supra) to substantiate his contention that the service tax deposited by the customer had rightly been included in the income of the assessee company by the A.O, and upheld as such by the Ld. CIT(A).

4. We have considered the rival submissions of either side and perused the relevant materials on record, including the orders of the authorities below. The facts leading to the issue under consideration are that pursuant to section 66A being made available on the statute vide the 'Finance Act, 2006', w.e.f 18/04/2006, as per which specified services provided by a non-resident to a resident from outside India were brought within the sweep of levy of service tax by way of 'Reverse charge', as a fall out of which a statutory obligation in the present case was cast upon the customers to deposit service tax as regards the services received by them from the

assessee company, as the customers were to be treated as the deemed service providers. The customers however declined to bear the financial burden and deducted an amount of Rs. 1,71,13,377/-(supra) towards 'Service tax' from the fee/Royalty payable by them to the assessee company, deposited the said amount with the government exchequer and remitted only the balance amount of fee/royalty to the assessee company outside India. That as stands gathered on the basis of the letter dated. 25/07/2016(supra) furnished by the Ld. A.R during the course of hearing of the appeal, it had categorically been stated that the assessee company had agreed to the reduction of the aforesaid amount of the service tax from the fee/royalty received by it from the customers, and had further clearly averred that neither the aforesaid shortfall/deficit in the amount of fees/royalty remitted by the customers, was payable by the customers, nor the assessee company had retained with it any right/claim as regards recovery of any such amounts deducted by the customers qua the liability towards service tax as was so cast upon them. Thus it is in the backdrop of the aforesaid factual position, that we herein proceed to adjudicate as to whether the shortfall/deficit of the amount of fee/royalty of Rs. 1,71,13,377/-(supra), which as observed hereinabove is neither payable by the customers to the assessee company, nor the latter stands vested with any right to recover such amount from the said customers, can be construed as the income of the assessee company, or not.

4.1. We are persuaded to agree with the contention of the Ld. A.R that in light of the facts involved in the case of the present assessee company, the amount of Rs. 1,71,13,377/-(supra) reduced by the customers on account of service tax liability from the amount of fees/royalty, which otherwise but for

the said reduction would had been payable to the assessee company, and remitting of only the balance amount by the customers in full and final discharge of their liability as regards the fees/royalty payable to the assessee company, which had been accepted, agreed upon and acknowledged by the assessee company, as such, coupled with the fact that the assessee company had not retained with itself any right as regards recovery of any such amounts deducted by the customers qua the liability towards service tax as was so cast upon them, therefore in light of the aforesaid facts as they so remain, cannot be treated as the income of the assessee company. In this regard it would be relevant and pertinent to point out that as neither any part of the aforesaid amount so reduced by the customers from the amount of fees/royalty which otherwise would had been payable to the assessee company, had at any point of time accrued as income to the assessee company, nor was the same ever received by the latter, as a result whereof it can safely and inescapably be concluded that no part of the said amount did ever partake the color and character as that of 'Income' in the hands of the assessee company, pursuant whereto we are of the considered view that the authorities below had erred in including the said amount as income in the hands of the assessee company. The view taken by us stands fortified by the judicial pronouncements relied upon by the Ld. A.R.

4.2. We now advert to the judicial pronouncements relied upon by the Ld. D.R. to drive home his contention that the authorities below had rightly concluded that the amount of service tax was liable to be included in the income of the assessee company. The authorities below as well the Ld. D.R had placed heavy reliance on the judgment of the **Hon'ble Apex Court** so passed in the case of : **Chowringhee Sales Bureau (P) Ltd. Vs. CIT (1973)**

87 ITR 542 (SC). However, we are of the considered view that the judgment of the Hon'ble Apex Court so relied upon by the Ld. D.R is distinguishable on facts, and thus for the sake of clarity we have purposively reproduced the relevant extract of the said judgment at Para 3.2 hereinabove. That a perusal of the facts involved in the case before the Hon'ble Apex Court therein reveals that in the case before the Hon'ble Apex Court, the assessee who was an auctioneer of goods collected amounts from the purchasers, which included sales tax, but did not pay the amount of sales tax to the actual owner of the goods auctioned, because the statutory liability for the payment of that sales tax was that of the assessee. However, the assessee on the other hand did not also deposit the amount of sales tax realized by it in the state exchequer, for the reason that as per the assessee the statutory provision creating that liability upon it was not valid. Thus it was in the backdrop of the said factual background, wherein the assessee auctioneer as a matter of fact collected the sales tax from the purchasers, but thereafter neither did part with the same in the favor of the sellers, nor deposited the same with the state exchequer, that the Hon'ble Apex Court not going by the nomenclature adopted by the assessee as regards the said 'receipt', therein concluded that it was the nature and quality of receipt as would prove decisive, and held that the amount of 'Sales tax' so collected by the assessee would form part of its trading or business receipt, though subject to a rider that the assessee would stand entitled to claim deduction of the amount, as and when the same is deposited with the State exchequer. Thus unlike the facts involved in the case before the Hon'ble Supreme Court, now when in the case of the present assessee company before us, neither any part of the aforesaid amount so reduced by the customers from the amount of fees/royalty which otherwise would had been payable to the assessee

company, had at any point of time accrued as income to the assessee company, nor was the same ever received by the latter, therefore the said amount cannot be held to be 'Income' in the hands of the assessee company. Now adverting to the order of the **Hon'ble ITAT Delhi 'I' Bench**, so passed in the case of : **DDIT(Intl). Vs. Technichip Offshore Contracting Br. (Appeal No. ITA 4613/D/07; dated. 16/01/2009)**, relied upon by the Ld. D.R.as well as the authorities below, after perusing the facts involved in the said case, it stands gathered that unlike the facts involved in the case of the present assessee company, in the aforesaid case relied upon by the Ld. D.R, the issue before the Tribunal was that whether service tax collected by the assessee from its customers was liable to be included in the receipts in terms of Sec. 44BB of the 'Act', or not. Thus we are of the considered view that as the facts involved in the aforesaid order of the coordinate bench of the Tribunal are distinguishable as against the facts of the case before us, therefore the reliance placed on the same by the Ld. D.R is found to be misconceived.

4.3. We though find ourselves to be in agreement with the claim of the Ld. A.R that as the amount of Rs. 1,71,13,377/-(supra) reduced by the customers on account of service tax liability from the amount of fees/royalty, which otherwise but for the said reduction would had been payable to the assessee company, had been accepted as such in full and final discharge of the liability of the customers as regards the fees/royalty payable to the assessee company, and the assessee company had not retained with itself any right as regards recovery of any such amounts deducted by the customers qua the liability towards service tax as was so cast upon them, therefore the aforesaid amount of Rs. 1,71,13,337/-(supra) cannot be treated to be the

income of the assessee company, but as we are persuaded to arrive at such a finding in light of the claim raised by the Ld. A.R for the assessee company on the basis of the aforesaid letter dated 25/07/2016(supra) placed before us, we therefore restore the issue to the file of the A.O for verifying the aforesaid claim of the assessee company, and on finding the same in order, delete the addition of Rs. 1,71,13,337/-(supra) made in the hands of the assessee company. In this regard it is further directed that the A.O in the course of verifying the aforesaid claim of the assessee company shall in all fairness afford an opportunity of being heard to the assessee company. Thus the 'Ground of appeal No. 1'so raised by the assessee company is allowed in light of our aforesaid observations and directions.

4.4. That the assessee company had vide 'Ground of appeal No. 2' challenged the order of the CIT(A) upholding the interest levied by the A.O u/s 234B of the 'Açt', on the ground that as the entire income of the assessee company was subject to deduction of tax at source (for short 'TDS'), therefore the latter was not liable to pay any advance tax, and thus no liability towards interest u/s 234B of the 'Act' could be fastened upon it. That before the CIT(A) the assessee company in support of its aforesaid contention placed reliance on the following judicial pronouncements:-

(i). Motorola Inc. Vs. DCIT

[96 ITD 269(Del)(SB)]

(ii). Sedco Forex International Drilling Inc. Vs. DCIT

[72 ITD 415 (Del)]

(iii). CIT & Anr. Vs. Sedco Forex International Drilling Co. Ltd. & Ors

[264 ITR 320(Uttaranchal)]

(iv). CIT Vs. Madras Fertilizers Ltd.

[149 ITR 703](Mad)

(v). CIT Vs. Ranoli Investments Pvt. Ltd.

[235 ITR 433](Guj)

The Ld. CIT(A) however being of the view that unlike as per the facts involved in the case laws relied upon before him, the assessee company had not offered its income for taxation following any recognized method of accounting, and rather as a matter of fact had understated its taxable income and claimed refund of TDS, therefore upheld the interest levied by the A.O u/s 234B of the 'Act'.

4.5. The Ld. A.R submitted before us that as the entire income of the assessee company was subject to deduction of tax at source, therefore the latter was not liable to pay any advance tax, as a result whereof the authorities below have erred in levying interest u/s 234B of the 'Act'. The Ld. D.R on the other hand relied on the order of the CIT(A) and submitted that levy of interest u/s 234B, pursuant to framing of assessment in the hands of the assessee company, was automatic, mandatory and consequential, and therefore no infirmity could be pointed out in the order of the lower authorities. The Ld. D.R in support of his contention relied upon the judgment of the Hon'ble Supreme Court in the case of : CIT Vs. Anjum M.H Ghaswala & Ors. (2001) 252 ITR 1 (SC).

4.6. We have considered the rival submissions of either side and perused the orders of the authorities below and are of the considered opinion that the contention of the Ld. A.R that as the income of the assessee company

was subject to deduction of tax at source, therefore for the purpose of computing the advance tax liability, the amount of income tax computed therein was liable to be reduced by the amount of the tax which was deductible at source during the financial year, irrespective of the fact as to whether the payer had deducted the same, or not, is found to be in accord with the provisions of Sec. 209(1)(d) of the 'Act', as was available on the statute during the year under consideration, and thus merits acceptance to the extent the said contention is to be considered in context of computation of the advance tax liability of the assessee company under section 209 of the 'Act' is concerned. The aforesaid view so arrived at by us stands fortified by the case laws relied upon by the Ld. A.R, wherein the Hon'ble Courts and Tribunals have held that where the income received by an assessee was liable for deduction of tax at source, but either the payer had failed to deduct tax at source or had carried out short deduction, then the assessee in light of the clear provisions of Sec. 209(1)(d) cannot be held to be in default as regards payment of advance tax, and therein be saddled with levy of interest u/s 234B as regards such amount of short/non-deduction of TDS by the payer. That going by the aforesaid judicial pronouncements, we herein reiterate that we are in agreement with the contention of the Ld. A.R that where there is short/non-deduction of tax at source by the payers, as regards certain income which had been taken into account in computing the total income of an assessee, the assessee cannot be held to be in default, and for the sake of clarity rely on the observations of the Hon'ble Madras High Court in the case of : Madras Fertilizers Ltd. (supra), wherein it was held by the Hon'ble Court, as under: -

> *"Hence, where the statute provides for deduction of tax at source in respect of a particular income, the concerned assessee need not pay*

any advance tax in relation to the said income.

4.7. That still further a perusal of Sec. 234B reveals that once an assessee falls within the scope and ken of Sec. 208 of the 'Act' and is found liable to pay advance tax, but had either failed to pay the same or the amount so paid by him is less than ninety percent of the assessed tax, he therein stands liable to be fastened with interest u/s 234B of the 'Act'. In context of the issue under consideration before us, it would be relevant and pertinent to point out that unlike Sec. 209(1)(d) of the 'Act', wherein in the process of computing the advance tax liability of an assessee, cognizance is taken of the income tax which would be deductible at source during the financial year under any provision of the 'Act', from any income which has been taken into account in computing the total income, i.e irrespective of the fact as to whether the payer had deducted the tax at source, or not, however while quantifying the liability of an assessee towards interest under Sec. 234B, the tax on the total income determined in the hands of the assessee is to be reduced only by the amount of the tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction and which is taken into account in computing such total income of the assessee.

4.8. We are of the considered view that the issue that where an assessee is found to be in default as regards the statutory obligation cast upon him with respect to payment of advance tax, the levy of interest u/s 234B of the 'Act' will be automatic, mandatory and consequential, is no more *res integra* after the judgment of the **Hon'ble Supreme Court** in the case of : **Anjum M.H. Ghaswala (supra)**. Thus in light of the aforesaid settled position of law, we

are of the view that though the levy of interest u/s 234B of the 'Act' would be automatic, mandatory and consequential to the framing of regular assessment in the hands of the assessee company, but the process of fastening the levy of interest u/s 234B must be preceded by surfacing of the fact that the assessee company is found to be in default as regards the statutory obligation as stood cast upon it with respect to payment of advance tax. Thus now when the issue pertaining to substantive addition had been restored by us to the file of the A.O for making necessary verifications and giving effect to the same as per our directions, we therefore also restore the present issue as regards the liability of the assessee company towards interest u/s 234B of the 'Act' to the file of the A.O, with the direction that the same be adjudicated in light of our aforesaid observations. Thus the 'Ground of appeal' No. 2 is allowed for statistical purpose, in terms of our aforesaid directions.

4.9. That as the facts and circumstances in the other appeal of the assessee company for A.Y. 2009-10, marked as ITA No. 6605/Mum/2012, is *pari materia* to those in A.Y. 2008-09, our decision therein shall apply *mutatis mutandis* in the said appeal also.

4.10. In the result, both the appeals of the assessee company are partly allowed.

Order pronounced in the open court on 26/08/2016

Sd/-	Sd/-
(G.S.PANNU)	(RAVISH SOOD)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Mumbai, Dated 26/08/2016

Copy of the Order forwarded to :

1. The Appellant ,
2. The Respondent.
3. The CIT(A) concerned
4. The CIT concerned
5. The DR, "L" Bench, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai