***** **THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on 06.02.2009

+ **ITA 402/2005**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

M/S JINDAL EXPORTS LIMITED **...** Respondent

WITH

+ **ITA 1474/2006**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

M/S NESTLE INDIA LIMITED **...** Respondent

AND

+ **ITA 708/2007**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

BRIJBASI ART PRESS LIMITED **...** Respondent

WITH

+ **ITA 719/2007**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

BIOSEED RESEARCH (INDIA) PVT LTD ... Respondent

AND

+ ITA 791/2007

COMMISSIONER OF INCOME TAX … Appellant

- versus –

ALLIED STRIPS LIMITED ... Respondent

AND

+ ITA 829/2007

COMMISSIONER OF INCOME TAX … Appellant

- versus –

CONTINENTAL PACKAGING PVT. LIMITED ... Respondent

AND

+ ITA 907/2007

THE COMMISSIONER OF INCOME TAX-V … Appellant

- versus –

NIS SPARTA LIMITED ... Respondent

AND

+ ITA 914/2007

THE COMMISSIONER OF INCOME TAX-V … Appellant

- versus –

NOKIA INDIA LIMITED ... Respondent

AND

+ **ITA 969/2007**

COMMISSIONER OF INCOME TAX-II … Appellant

- versus –

MITSUBISHI CORPORATION INDIA (P) LTD ... Respondent

AND

+ **ITA 986/2007**

THE COMMISSIONER OF INCOME TAX-V … Appellant

- versus –

NEGOLICE INDIA PRIVATE LIMITED ... Respondent

AND

+ **ITA 992/2007**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

CADENCE DESIGN SYSTEMS (I) PVT LTD ... Respondent

AND

+ **ITA 1063/2007**

THE COMMISSIONER OF INCOME TAX-V … Appellant

- versus –

OCL INDIA LIMITED ... Respondent

AND

+ **ITA 1350/2007**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

E I DUPONT INDIA LIMITED ... Respondent

AND

\+ **ITA 271/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

M/S INSILCO LIMITED ... Respondent

AND

\+ **ITA 272/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

INTERNATIONAL PRINT-O-PACK LTD ... Respondent

AND

\+ **ITA 295/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

INTERNATIONAL PRINT-O-PACK LIMITED ... Respondent

AND

\+ **ITA 344/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

INDRAPRASTHA MEDICAL CORPORATION LIMITED ... Respondent

AND

+ **ITA 407/2008**

COMMISSIONER OF INCOME TAX-II … Appellant

- versus –

LEROY SOMER & CONTROLS (I) PVT LTD ... Respondent

AND

+ **ITA 453/2008**

COMMISSIONER OF INCOME TAX-I … Appellant

- versus –

C.J. INTERNATIONAL HOTELS LIMITED ... Respondent

AND

+ **ITA 456/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

ANANT RAJ INDUSTRIES PVT LIMITED ... Respondent

AND

+ **ITA 462/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

ANANT RAJ INDUSTRIES PVT LIMITED ... Respondent

AND

+ **ITA 476/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

AJANTA OFFSET & PACKAGING LIMITED ... Respondent

AND

+ **ITA 477/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

IMI NORGREN HERION PVT. LIMITED ... Respondent

AND

+ **ITA 546/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

NEHRU PLACE HOTELS LIMITED ... Respondent

AND

+ **ITA 701/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

SAMTEL COLOUR LIMITED ... Respondent

AND

+ **ITA 801/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

COSMO FILMS LIMITED ... Respondent

AND

+ **ITA 802/2008**

THE COMMISSIONER OF INCOME TAX … Appellant

- versus –

M/S SURYA ROSHNI LIMITED ... Respondent

AND

+ **ITA 893/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

SAGE METALS LIMITED ... Respondent

AND

+ **ITA 989/2008**

COMMISSIONER OF INCOME TAX … Appellant

- versus –

INDIAN SUGAR EXIM CORPORATION LTD ... Respondent

Advocates who appeared in this case:

For the Appellants : Mr R D Jolly with Ms. Rani Kiyala[in ITA Nos. 596/2005, 969/2007, 407/2008, 546/2008]
Ms Prem Lata Bansal, Mr Mohan Prasad Gupta and Ms Anshul Sharma [in ITA Nos. 402/2005, 708/2007, 719/2007, 829/2007, 992/2007, 1350/2007, 271/2008, 272/2008, 295/2008, 344/2008, 453/2008, 456/2008, 462/2008, 476/2008, 477/2008, 701/2008, 893/2008, 989/2008]
Mr Sanjeev Sabharwal [in ITA Nos. 1474/2006, 802/2008]

For the Respondents : Mr Ajay Vohra with Ms Kavita Jha and Mr Sriram Krishna [in ITA Nos. 907/2007, 344/2008, 701/2008]
Mr R. M. Mehta [in ITA No. 1063/2007]
Dr. Rakesh Gupta, Ms Aarti Saini, Ms Poonam Ahuja [in ITA No. 986/2007, 989/2008]
Mr M.S. Syali, Sr. Advocate with Mr Satyen Sethi, Mr Aseem Mawar and Ms Mahua C. Kalra [in ITA Nos. 1474/2006, 453/2008]
Mr V.P. Gupta and Mr Basant Kumar[in ITA NoS.719/2007, 791/2007, 829/2007, 271/2008, 476/2008, 546/2008, 893/2008]

Mr C.S. Aggarwal, Sr. Advocate with Mr Prakash Kumar and Mr Ravi Pratap Mall[in ITA Nos. 402/2005, 802/2008 and 989/2008
Mr Satyen Sethi and Mr Johnson Bara [in ITA Nos. 708/2007, 1350/2007, 801/2008]
Mr Karan Khanna in [ITA Nos. 456/2008 and 462/2008]
Mr S. Nanda Kumar and Mr Achin Goel [in ITA No. 992/07]
Mr R.M. Mehta [in ITA No. 1063/2007]
Mr Rajesh Mahna and Mr Ramanand Roy in ITA No.791/07

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? YES

2. To be referred to the Reporter or not ? YES

3. Whether the judgment should be reported in Digest ? YES

BADAR DURREZ AHMED, J

The Questions:

1. In these appeals two sets of substantial questions of law have been formulated. They are:-

Question A:

Whether the Income Tax Appellate Tribunal was correct in law in holding that rectification could not be made by the Assessing Officer under Section 154 of the Income Tax Act, 1961 as the issue regarding charging of interest under Section 234-B of the Act without giving set off of MAT credit available to the Assessee was highly debatable ?

Question B:
Whether the Income Tax Appellate Tribunal was correct in law in holding that credit of tax paid under Section 115-JAA can be given before computing interest under Section 234C of the Income Tax Act, 1961 ?

2. Question A has been formulated in ITA Nos. **402/2005**, 407/2007, 907/2007, 914/2007, 969/2007, 989/2007, 1350/2007, 546/2008, 701/2008, and 893/2008. Question B has been framed in ITA Nos. **1474/2006**, 708/2007, 719/2007, 791/2007, 829/2007, 986/2007, 992/2007, 1063/2007, 271/2008, 272/2008, 295/2008, 344/2008, 453/2008, 456/2008, 462/2008, 476/2008, 477/2008, 801/2008 and 802/2008. Essentially, these questions raise the common issue as to whether interest under sections 234B and 234C is to be charged before the tax credit (commonly referred to as MAT credit) available under section 115JAA is set off against tax payable on total income or after it is so set off? The additional issue is whether this question was debateable and therefore the provisions of section 154 could not have been invoked ? The latter issue arises only in the first set of appeals.

Rival Contentions – Summary:

3. All the appeals are in respect of assessment years prior to the amendments to *Explanation 1* after section 234B(1) and to the *Explanation* after section 234C(1) of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") by virtue of the Finance Act, 2006, w.e.f. 01.04.2007. According to the learned counsel for the appellant/revenue, after the said amendments, there is no dispute that credit of tax paid under section 115JAA read with section 115JA would have to be set off before interest is computed under sections 234B and 234C. It was further contended that the said amendments were substantive and prospective in nature. Consequently, it was submitted, prior to 01.04.2007, there was no statutory prescription for first setting off the tax credit and then computing the interest under sections 234B and 234C of the said Act. Therefore, the revenue contended, the Tribunal erred in holding that interest under sections 234B and 234C

was to be computed only after giving effect to the set off. With regard to the rectification proceedings under section 154, it was contended that the language of the provisions of section 234B and section 234C was clear and unambiguous and, as such, there was no scope for any debate. Thus, it was submitted, that rectification proceedings were in order.

4. The learned counsel who appeared for the assessees / respondents submitted that the provisions of sections 234B and 234C were compensatory in nature. On the basis of this premise they contended that since the tax credit (MAT credit) was available with the revenue, no loss was caused to the revenue and, therefore, the question of compensation itself would not arise. It was also contended that the amendments to the said *Explanation 1* after section 234B(1) and the *Explanation* after section 234C(1) were merely curative and clarificatory of the legal position that applied even before 01.04.2007. As regards the cases which involved the issue of section 154, it was submitted, without prejudice to the aforesaid, that in any event the position was not clear-cut and was highly debateable and therefore could not be sought to be corrected by way of rectification proceedings under section 154 of the said Act.

Rival contentions – in detail:-

Contentions on behalf of the Revenue

5. Broadly speaking, these were the submissions of the learned counsel on both sides. However, before we embark upon a discussion of the issues at hand we feel that it would be appropriate if the contentions of the learned counsel are set out in somewhat greater detail. It was submitted on behalf of the appellant/revenue that section 234B provides for charging of interest for defaults in payment of advance tax. Where an assessee, who is liable to pay advance tax under

section 208, fails to pay such tax or where the advance tax paid by the assessee under section 210 is less than 90% of the "assessed tax" then such assessee shall be liable to pay interest at the prescribed rate on the "assessed tax" or on the difference between the "assessed tax" and the advance tax paid, as the case may be. It was submitted that *Explanation 1* after section 234(1) defines the term "assessed tax" to mean the tax determined under section 143(1) or upon a regular assessment as reduced by the Tax Deducted at Source (TDS). The said *Explanation 1*, prior to its amendment with effect from 01.04.2007, did not have any reference to MAT credit. Thus, in order to arrive at the figure of "assessed tax", the only permissible deduction from the tax computed on total income, as determined under section 143(1) or upon a regular assessment, was the amount of TDS.

6. Similarly, it was contended, in respect of section 234C that it stipulated charging of interest for deferment of payment of advance tax. It was submitted that the interest payable under this provision is to be computed with reference to "tax due on returned income", which expression is defined in the *Explanation* after section 234C(1) to mean 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 TDS on any income which is subject to such deduction or collection and which is taken into account in computing such total income. Here, too, according to the revenue, the only reduction permissible is in respect of TDS.

7. It was further contended that this was the position in law prior to 01.04.2007. Since this was causing hardship, various

representations were received by the Central Board of Direct Taxes to treat the tax credit under section 115JAA (MAT credit) as advance tax. Subsequently, the amendment to *Explanation 1* after section 234B(1) was brought about so as to specifically provide for reduction of the tax determined under section 143(1) or upon a regular assessment by, inter alia, the available tax credit under section 115JAA in addition to the existing reduction of TDS so as to arrive at the figure of "assessed tax" which formed the basis of the charge of interest. A similar amendment was brought about in the *Explanation* after 234C(1).

8. In this context, the learned counsel for the revenue drew our attention to Circular No.14/2006 which contains the "Explanatory Notes on provisions relating to Direct Taxes" under the Finance Act, 2006. The relevant portions of the said circular are as under:-

> **"38. Credit for payment of Minimum Alternate Tax (MAT) and tax paid in a country or specified territory outside India for the purposes of charge of interest under sections 234A, 234B and 234C**
>
> **38.1** Under the existing provisions of sections 234A and 234B an assessee is held liable to pay simple interest at the rate of one per cent for every month or part of a month for default in furnishing the return of income and for default in payment of advance tax respectively. Similarly under the existing provisions of section 234C in respect of deferment of advance tax, the assessee is held liable to pay simple interest at the rate of one per cent per month and if there is shortfall of tax paid before the 15th March, one per cent on the amount of the shortfall. While computing interest, credit for advance tax paid and tax deducted or collected at source is allowed. MAT credit under section 115JAA, relief of tax under section 90 and deduction from income-tax payable under section 91 are not taken into account while charging interest under the aforesaid sections. Under section 140A also, interest is required to be paid for any delay in furnishing the return or for any default or delay in payment of advance tax.

> **38.2** It has been represented from several quarters that the tax credit allowed under section 115JAA is no different from the tax paid in advance and credit for having paid the minimum alternate tax should be allowed against the tax liability determined on assessment. On a similar analogy, credit for taxes paid in a country outside India has also been recommended to be allowed so that interest is not charged on an amount that equals to the taxes paid outside India. Accordingly, for calculating interest under sections 234A, 234B and 234C, the Finance Act, 2006 has provided for
>
> (*a*) reduction of tax credit allowed to be set off under section 115JAA from the tax on the total income; and
> (*b*) reduction of the amount of relief of tax allowed under section 90 and 90A and deduction from the Indian Income-tax before furnishing the return of income.
>
> **38.3** The credit for the above shall also be allowed under section 140A for calculating tax and interest before furnishing the return of income.
>
> **38.4** The above amendments will take effect from 1-4-2007 and will, accordingly, apply in relation to the assessment year 2007-08 and subsequent years."

9. On the strength of this Circular, it was contended that reduction of MAT credit prior to computation of interest under sections 234B and 234C is permissible only after 01.04.2007, that is, for assessment year 2007-2008 onwards. Since all these appeals relate to prior assessment years, MAT credit cannot be set off prior to the computation of interest under sections 234B and 234C.

10. Referring to the provisions of chapter XVII-C relating to advance tax, it was submitted by the learned counsel for the revenue that section 207 imposes the liability for payment of advance tax and that section 208 stipulates that the advance tax must be paid in the

financial year itself. Section 209 prescribes the mode of computation of advance tax and, as per sub-clause (d) of sub-section (1) thereof, only the amount of TDS is to be reduced for arriving at the figure of advance tax. A reference was then made to section 140A which lays down the procedure for payment and computation of self-assessment tax. This, too, according to the learned counsel for the revenue, speaks of reduction of only the TDS amount from the tax payable. It was submitted that whether it is the computation of advance tax or self-assessment tax, the only reduction permissible is of the TDS amount and there is no mention of MAT credit.

11. The learned counsel for the revenue referred to the Supreme Court decision in ***Commissioner of Income-tax v. Xpro India Ltd: 300 ITR 337*** wherein, while setting aside the order passed by the Calcutta High Court that no substantial question of law arose, it held that the question of interpretation of section 234B in the context of short payment of interest on advance tax arose for determination before the High Court which warranted interpretation of section 115JAA read with sections 234B and 234C. Reference was then made to the decision in ***Commissioner of Income-tax v. Anjum M.H. Ghaswala: 252 ITR 1*** wherein the Supreme Court held that the provisions of sections 234A, 234B and 234C were mandatory in nature and that the Income Tax Settlement Commission, in exercise of its power under section 245D(4) and (6), did not have the power to reduce or waive interest statutorily payable under sections 234A, 234B and 234C except to the extent of granting relief under the circulars issued by the Board under section 119 of the Act.

12. Reliance was also placed by the learned counsel for the revenue on the Bombay High Court decision in ***CIT v. Kotak***

Mahindra Finance Ltd: ***265 ITR 119 (Bom)*** for explaining the scope of sections 234B and 234C. The Bombay High Court observed that:

> "Section 234B and section 234C fall under Chapter XVII of the Income-tax Act which deals with collection and recovery. Chapter XVII-F deals with interest chargeable in certain cases. Section 234B along with section 234A and section 234C were inserted by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989. It is well settled that interest under section 234B is compensatory in character. It is not penal in nature. So also, interest under section 234C is compensatory in character. It is for this reason that section 234B does not envisage grant of hearing in so far as levy of interest is concerned. The levy is automatic on it being proved that the assessee has committed a default as governed by section 234B. This reasoning also applies to levy of interest under section 234C. Therefore, the question of equity, rules of natural justice and justification for not making payment do not arise for determination in cases where interest is leviable under section 234B and section 234C."

13. It must be pointed out that this decision was in the context of section 115J, the question being –

> "Whether interest under section 234B and section 234C is chargeable even in a case where tax liability arises only by applicability of section 115J ? "

The question was answered in the affirmative in favour of the revenue and against the assessee. Of course, the questions in the present appeals are entirely different.

14. With regard to the issue of rectification proceedings, it was submitted that the provisions are clear. There is no scope for debate. Moreover, the provisions being mandatory and automatic, there is no question of waiver. That being the position, it was submitted, if

interest under section 234B or 234C is not originally charged, the same can be corrected in proceedings under section 154 of the said Act. Reliance was placed by the learned counsel for the revenue on ***CIT v. Malayala Manorama Co. Ltd:*** ***253 ITR 791 (Ker)*** and ***Nicco Corporation Ltd v. CIT:*** ***272 ITR 58 (Cal)***.

15. Lastly, it was argued that hardship or inequity is no ground for not charging interest under sections 234B and 234C before allowing MAT credit. It was contended that it is a well established principle that equity has no place in tax laws. It was therefore urged that the questions be answered in favour of the revenue and the appeals be allowed.

Contentions on behalf of the Respondents/Assessees

16. Mr C.S. Aggarwal, the learned senior counsel who appeared for the respondent/assessee in ITA 402/2005, submitted that for an assessee to be liable to pay interest under section 234B, the assessee must first be liable to pay advance tax. The liability to pay advance tax, in turn, arises under section 208 if the advance tax payable by the assessee is Rs 5000/- or more. It was further contended that the "advance tax payable" is to be computed in accordance with section 209(1)(a) whereunder the assessee is required to estimate its income and calculate the tax payable thereon and thereafter to reduce from it the TDS amount. It was further contended that by virtue of section 115JAA(4) the assessee is entitled to set off MAT credit at the stage at which the tax has become payable. Consequently, it was submitted, that the assessee is entitled to take into account the tax credit (MAT credit) available to it under section 115JAA when it computes the tax payable under section 209 of the said Act. It was submitted that the tax payable by a company under section 209 is the tax payable on the current

income less the Tax credit available for set off. It was therefore contended that the liability to pay interest under section 234B can only be computed after the liability to pay advance tax is calculated, which, in turn, depends on the tax payable on the current income. Such tax payable has to be computed after setting of the Tax Credit available under section 115JAA. Thus, interest under section 234B can only be computed after the tax credit under section 115JAA is set off against the tax payable on the current income.

17. Reliance was placed on paragraph 45 of Circular No. 763 (230 ITR 54 [St], 81) which contained the Explanatory Notes on provisions relating to Direct Taxes in the Finance Act, 1997. The relevant portions of the said paragraph 45 are as under:-

> "Minimum alternative tax on companies
>
> 45.1 The minimum alternative tax (MAT) on companies was introduced by the Finance (No.2) Act, 1996, with effect from the 1st April, 1997. This was necessary due to a rise in the number of zero-tax companies in view of tax preferences granted in the form of exemptions, deductions and high rates of depreciation. The rate of minimum tax was kept at a modest figure deeming 30 per cent of book profits as total income. This modest amount is likely to go down further with the downward revision of corporate tax rate to 35 per cent and abolition of surcharge.
>
> xxxx xxxx xxxx xxxx
>
> 45.4 The Act also inserts a new section 115JAA to provide for a tax credit scheme by which the MAT paid can be carried forward for set-off against regular tax payable during the subsequent five-year period subject to certain conditions:--
>
> (1) When a company pays tax under MAT, the tax credit earned by it shall be an amount which is the difference between the amount payable under MAT and the regular tax. The regular tax in this

case means the tax payable on the basis of normal computation of total income of the company.

(2) MAT credit will be allowed carry forward facility for a period of five assessment years immediately succeeding the assessment year in which MAT is paid. Unabsorbed MAT credit will be allowed to be accumulated subject to the five-year carry-forward limit.

(3) In the assessment year when regular tax becomes payable, the difference between the regular tax and the tax computed under MAT for that year will be set off against the MAT credit available.

(4) The credit allowed will not bear any interest.

45.5 The rationale for allowing credit in respect of taxes paid under MAT in the aforesaid manner is that a company should always pay a minimum tax. The above method will ensure that the company will always pay a minimum tax even while offsetting the MAT credit against the regular tax.

45.6 The amendment will take effect from the 1st April, 1997, and will accordingly, apply in relation to the assessment year 1997-98 and subsequent years."

18. Mr Aggarwal then referred to section 234B(2) which provides for situations where, before the date of determination of total income under sub-section(1) of section 143 or completion of a regular assessment, tax is paid by the assessee under section 140A or otherwise. Mr Aggarwal placed emphasis on the expression "*or otherwise*" appearing in the phrase "*tax is paid by the assessee under section 140A or otherwise.*" Referring to ***CIT v. Atlas Cycle Industries: 180 ITR 319***, which considered a similar provision appearing in section 215(2), the learned senior counsel submitted that the expression "*or otherwise*" in sub-section (2) of section 234B signifies that in whatever manner tax is paid, it shall be taken note of in

calculating the interest. He submitted further that the expression "or otherwise" was wide enough to take within its sweep the available MAT credit and since the MAT credit was available at the beginning of the year, there would be no question of computing any interest on it.

19. It was further contended by Mr Aggarwal that the provision of interest under section section 234B is not penal and is only by way of compensation in respect of the tax withheld. It was submitted that since MAT credit was available at the beginning of the year and had to set off against the tax payable, no loss has been caused to the revenue and, therefore, there is no question of charging any interest thereon by way of compensation. Reliance was placed upon the decision of this court in ***Dr. Prannoy Roy v. Commissioner of Income-tax: 254 ITR 755 (Del)***. In that case the provisions of section 234A were in issue. The question before the court was whether interest could be charged under section 234A when, though the return had not been filed in time, the tax had been paid. The argument raised on behalf of the revenue that such payment of tax did not strictly comply with the meaning of advance tax and would therefore have to be disregarded for the purposes of charging interest under section 234A, was rejected. The court also held that interest under section 234A was compensatory in nature and unless any loss was caused to the revenue, the same could not be charged from the assessee. Inter alia, referring to the definition of "advance tax" in section 2(1) of the said Act, the court also observed as under:-

> "The interpretation clause, as is well known, is not a positive enactment. The interpretation clause also begins with the word "unless the context otherwise requires". Advance tax has been defined to mean the advance tax payable in accordance with the provisions of Chapter XVII-C. Such a definition is not an exhaustive one. If the word "advance tax" is given a literal meaning, the same

apart from being used only for the purpose of Chapter XVII-C may be held to be tax paid in advance before its due date, i.e., tax paid before its due date. The matter might have been otherwise, had there been an exhaustive definition of the said provision. The scheme of payment of the advance tax is that it will have to be paid having regard to the anticipated income on September 15, December 15 and March 15. A person, who does not pay the entire tax by way of advance tax, may deposit the balance amount of tax along his return.

In the instant case, tax has been paid although no return has been filed. The Revenue, therefore, has not suffered any monetary loss.

We, therefore, are of the opinion that in this case if the doctrine of purposive construction is not taken recourse to, the same would betray the purport and object of the Act.
If the aforementioned construction is not resorted to, we will have to read a penal provision in section 234A, which was not and could not have been the object of the law for the reasons stated hereinbefore.

It is further well known that in case of doubt or dispute, taxation statute must be liberally construed.

We, therefore, are not in a position to assign stringent meaning to the words "advance tax" …."

20. Placing reliance on ***CIT v. J.H. Gotla: 156 ITR 323***; ***CIT v. Hindustan Bulk Carriers: 259 ITR 449***; ***K.P. Varghese v. ITO: 131 ITR 597 (SC)***, Mr Aggarwal contended that where the plain and literal interpretation produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may interpret the language used in the statute in a manner so as to achieve the obvious intention of the legislature which results in a rational construction. According to Mr Aggarwal, if the provisions of section 234B are read in the manner suggested by the revenue, it would produce a manifestly absurd and unjust result. Interest under section

234B is by way of compensation. If the revenue's interpretation is accepted, charging of interest under section 234B would be permissible even when the revenue has suffered no loss and the occasion for compensation itself does not arise.

21. It was then contended by Mr Aggarwal that amendment in *Explanation 1* after section 234B brought about by the Finance Act, 2006 with effect from 01.04.2007 is merely declaratory. He placed reliance on the said Circular No. 14/2006 dated 28.12.2006 and upon ***Allied Motors v. CIT: 224 ITR 677 (SC)*** and ***Suresh N. Gupta v. CIT: 297 ITR 322 (SC)***. Consequently, what was introduced by way of amendment was merely to clarify and declare in explicit terms what was always the position in law.

22. Lastly, it was submitted by Mr Aggarwal, in the context of applicability of section 154, that, in any event the issue was highly debatable. This was so because, according to him, the Tribunal in several cases had concluded that MAT credit has to be given prior to computation of advance tax liability. Reference was made to 92ITD 441 (Chandigarh) and 83 TTJ 427 (Chennai). These demonstrate that the issue was debateable and could not have the subject matter of section 154 proceedings.

23. Mr Syali, senior advocate, appeared for the respondent/assessee in ITA 1474/2006 in which the issue was with regard to section 234C. In addition to the arguments of Mr C S Aggarwal in respect of section 234B, which, according to Mr Syali, would also be relevant in respect of section 234C, he (Mr Syali) submitted that the revenue's contention, that interest under section 234C has to be computed before the MAT credit is set off, is untenable.

He submitted that the absurdity of such a contention was obvious: the department expects an assessee to first pay advance tax to the extent of MAT credit already available and then claim refund of the same amount.

24. He submitted further that the nature of interest under sections 234A, 234B and 234C was compensatory. Reliance was placed by him on the decision of this court in ***Dr Prannoy Roy*** *(supra)* wherein it had been held that interest under section 234A was compensatory in nature. He submitted that the ratio of the decision is fully applicable to sections 234B and 234C of the said Act. He laid emphasis on the sentence at p.766 of the said report which reads as follows – "*Interest is payable when a sum is due not otherwise.*" Mr Syali also pointed out that the Supreme Court has confirmed the view taken by this court inasmuch as the appeal preferred therefrom by the revenue has been dismissed on merits. He drew our attention to the Supreme Court judgment in ***CIT v. Prannoy Roy [Civil Appeal No.448/2003]*** decided on 17.09.2008. The Supreme Court noted that "*[t]he High Court, while accepting the writ petition and setting aside the interest charged under section 234A of the Act, has come to the conclusion that interest is not a penalty and that the interest is levied by way of compensation to compensate the revenue in order to avoid it from being deprived of the payment of tax on the due date.*" The Supreme Court held:-

> "Having heard counsel on both sides, we entirely agree with the finding recorded by the High Court as also the interpretation of Section 234A of the Act as it stood at the relevant time.
>
> Since the tax due had already been paid which was not less than the tax payable on the returned income which was accepted, the question of levy of interest does not arise.."

In this background, Mr Syali submitted that as the tax due stood paid because of the available tax credit, there was no question of charging interest under sections 234B or 234C of the said Act.

25. Mr Syali then submitted that the expression used in sub-sections (4) and (5) of section 115JAA is "*set off*" and not "deduction". Tax credit is to be set off against tax payable. Consequently, the tax payable in any year is only the amount after the tax credit under section 115JAA is set off.

26. It was also contended that the available tax credit has to be set off mandatorily against the tax payable. The department has no option in this regard. This is clear from the language employed in sub-section (4) of section 115JAA which uses the expression "*the tax credit shall be allowed set-off..*". Mr Syali submitted that as tax credit is to be mandatorily set-off against tax payable, therefore, for computing interest under sections 234B and 234C also, the tax credit is to be set-off first and only thereafter the deductions of the TDS amount and the advance tax paid are to be made.

27. In similar vein to what Mr Aggarwal had submitted, Mr Syali also contended that it is a settled principle of law that literal construction may be the general rule in construing taxing enactments, but that does not mean that it should be adopted even if it leads to a discriminatory or incongruous result. When a literal interpretation leads to an absurd or unintended result, the language of the statute can be modified to accord with the intention of the legislature and to avoid absurdity. Reliance was placed on ***CWS (India) Ltd v. CIT: 208 ITR 649 (SC)*** and ***CIT v. J.H. Gotla: 156 ITR 323 (SC)***. It was also submitted that where two views are reasonably possible, the view in

favour of the assessee should be preferred. For this proposition, reliance was placed on ***UOI v. Onkar S. Kanwar:*** ***258 ITR 761 (SC)*** and ***CIT v. Kulu Valley Transport Co. P. Ltd:*** ***77 ITR 518***.

28. Mr Syali, lastly, submitted that the amendments to Explanation 1 after section 234B(1) and the Explanation after section 234C(1) were introduced to mitigate the hardship caused and were in that sense curative and clarificatory. Reliance was placed on ***Allied Motors*** *(supra)*; ***CIT v. Podar Cement Pvt Ltd: 226 ITR 625 (SC)*** and ***CIT v. Gold Coin Health Food P Ltd:*** ***304 ITR 308 (SC)***.

29. Mr Ajay Vohra, the learned counsel appearing for the respondents in some of the appeals, adopted the arguments of Mr Aggarwal and Mr Syali and made additional submissions.

30. Mr Vohra's first submission is that MAT credit is equivalent to payment of tax in advance. According to him, MAT credit available under section 115JAA is essentially credit for the tax paid by the assessee in earlier years. Such credit is withheld by the government to be set-off against tax payable in future years subject to fulfilment of specified conditions. Consequently, it was submitted, the amount of MAT credit is akin to tax paid in advance, lying with the government for and on behalf of the assessee and available to the assessee, as a matter of right, to be set off against the tax payable in future years. It was contended that in the context of payment of advance tax, the courts have held that tax paid within the previous year, though beyond the stipulated date for payment of advance tax, has to be treated as payment of advance tax for the purpose of calculation of interest and penalty under the various sections of the said act. It was, therefore, submitted that the case of MAT credit is on a much better footing inasmuch as the

sum representing MAT credit is available with the government even prior to the commencement of the relevant previous year. Consequently, MAT credit cannot be treated as anything but tax paid in advance and is, therefore, to be set off against the tax payable before computing interest under sections 234A, 234B and 234C of the said act.

31. Mr Vohra's second proposition is that interest is compensatory in character. He submitted that interest is levied by the government for tax legitimately belonging to the government which has not been paid by the assessee in time. Conversely, interest is paid by the government where the refund of taxes legitimately due to an assesse are withheld by the government. Referring to the Supreme Court decision in ***Sandvik Asia Ltd v. CIT: 280 ITR 643***, Mr Vohra contended the Supreme Court held that the interest levied/granted under the provisions of the said act being compensatory in nature, had to be paid by the government even on refund of interest paid by the assessee under the provisions of the act. In other words, the Supreme Court directed grant of interest on interest on the principle that interest being compensatory in character had to be paid to the assessee to compensate for deprivation of the use of money, for the period such monies were illegally detained by the government. He submitted that the Supreme Court held that even outside the provisions of the said act, interest had to be granted by the government, in a situation where the government had withheld refund of taxes and interest was determined to be due to the assessee. Based on the said decision, it was submitted that MAT credit available to an assessee for being set-off against the tax payable under the statutory enactment cannot be ignored while determining shortfall of tax payable for the purposes of calculation of interest under sections 234A, 234B and 234C of the said Act. To the

extent of the availability of MAT credit, monies are held by the government and the assessee cannot be charged interest on the shortfall of the tax, excluding the amount of MAT credit, when, in fact, such credit is set off against the tax payable for the relevant previous year. He submitted that two different criteria cannot be adopted, one, for calculating the tax payable and the other for computing the amount of interest payable by an assessee on the alleged shortfall of taxes.

32. The third submission of Mr Vohra was that the provisions called for an equitable construction. He referred to the proviso to section 115 JAA(2) of the said act which stipulated that the no interest shall be payable on the tax credit allowed under subsection (1) of section 115JAA. In the context of this provision, he submitted that no interest is payable to the assessee on the amount of MAT credit. He contended that if the construction advanced by the revenue was to be accepted it would result in double "jeopardy" to the assessee inasmuch as while no interest was payable by the government, in law, on the amount of MAT credit, on the one hand, interest would be charged from the assessee on the alleged short payment of tax, without taking into account of MAT credit, on the other. This, according to Mr Vohra, would result in iniquity and injustice. He submitted that the Supreme Court in ***CIT v. J.H. Gotla*** *(supra)* held that where the strict literal construction leads to injustice, then, the equitable construction should be preferred over the strict literal construction. In particular, he placed reliance on the following portion of the said decision: --

> "Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the Legislature, the court might modify the language used by the Legislature so as to achieve the intention of the Legislature and produce a rational construction. The task of interpretation of a statutory

provision is an attempt to discover the intention of the Legislature from the language used. It is necessary to remember that language is at best an imperfect instrument for the expression of human intention. It is well to remember the warning administered by judge Learned Hand that one should not make a fortress out of the dictionary but remember that statutes always have some purpose or object to accomplish and sympathetic and imaginative discovery is the surest guide to their meaning.

We have noted the object of s. 16(3) of the Act which has to be read in conjunction with s. 24(2) in this case for the present purpose. If the purpose of a particular provision is easily discernible from the whole scheme of the Act, which in this case is to counteract the effect of the transfer of assets so far as computation of income of the assessee is concerned, then bearing that purpose in mind, we should find out the intention from the language used by the Legislature and if strict literal construction leads to an absurd result, i.e., a result not intended to be subserved by the object of the legislation found in the manner indicated before, then if another construction is possible apart from strict literal construction, then that construction should be preferred to the strict literal construction. Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction…"

(underlining added)

33. The fourth and final submission of Mr Vohra was that the amendments made in sections 234A, 234B and 234C of the said Act were curative and, therefore, had retrospective operation. The amendments had been brought in to remove the unintended anomaly and were clarificatory in nature. Reliance was placed on ***Allied Motors*** *(supra)*; ***CIT v. Raman Lal Hathi: 217 CTR 105*** and ***CIT v. Suresh N. Gupta*** *(supra).*

34. Supplementing the arguments of the other learned counsel who appeared for the respondents/assessees in other appeals, Dr Rakesh Gupta, submitted that "tax" as defined in section 2(43) of the said Act refers to income tax chargeable under the provisions of the said Act which includes section 115JA and 115JAA. Hence, MAT credit has to be set-off against the tax payable before computing the liability to advance tax. He submitted that if the set-off is not allowed in this manner, it would lead to absurd results. The assessee would be required to pay tax twice. The first time, when the assessee qualifies for the tax credit under section 115JAA and the second time when he is required to pay the advance tax. After paying tax twice in this manner, the assessee would then have to claim refund of the excess tax paid. This was an unintended result and it is for this reason that the curative and clarificatory amendments were brought in by the Finance Act, 2006. It was submitted that the Circular No.14/2006 itself recognizes the curative nature of the amendments. Consequently, it was submitted, the legislative intention was always that MAT credit be set-off first and then interest be computed under sections 234A, 234B and 234C of the said Act.

35. The counsel for the respondents in all the other appeals adopted the arguments of the various learned counsel for the respondents/assesses mentioned above. In ITA 829/2007 the comparative tax computation for the assessment year 2003-04 as per the department and as per the assessee was placed before us. We are reproducing the same below as it would greatly clarify the scope of the issues at hand:-

Particulars	As per the Department (Rs)	As per the Company/Assessee (Rs)
Taxable income as per intimation u/s 143(1) dated 02.03.2004	77,44,490	77,44,490
Tax on above @ 36.75%	28,46,100	28,46,100
Less: MAT credit	--	**5,48,075**
	28,46,100	22,98,025
Less: TDS	4,26,357	4,26,357
Less Advance Tax	--	--
	24,19,743	18,71,668
Add: Interest u/s 234B	2,31,376	1,64,666
Add: Interest u/s 234C	1,52,748	1,18,149
Tax + interest payable	28,03,867	21,54,483
Less: MAT credit	**5,48,075**	--
Total Tax + interest liability	22,55,792	21,54,483
Difference		**1,01,309**

36. The above table clearly illustrates the difference in the stands adopted by the parties. While the MAT credit is the same, the point at which it is set off makes all the difference. As per the department the MAT credit is to be set off after interest under sections 234B and 234C are computed. On the other hand, as per the assessee, the MAT credit has to be set off against the tax payable, prior to the computation of interest.

Rejoinder on behalf of the Revenue

37. In rejoinder, the learned counsel for the revenue/appellant submitted that the case of ***Dr Prannoy Roy*** *(supra)* was not applicable as the tax had been paid in the year in question. It was also contended that availability of MAT credit could not be equated to advance tax actually paid. The case of refunds was referred to. The learned counsel submitted that each year is treated as an independent year and it cannot be assumed that if there is refund for an earlier year, advance tax to that extent for a later year stands paid. The respondents' answer to this,

with which we agree, is that while refunds cannot be set off in a subsequent year as there is no provision for it, MAT credit has to be set off as a matter of right in view of the provisions of section 115JAA itself.

Analysis and discussion:

Sections 234B, 208, 143(1), 140A et al

38. Having set out the contours of the controversy at hand, it is time for us to examine the provisions. Section 234B of the said Act as it stood prior to the amendments introduced by the Finance Act, 2006, to the extent relevant, is as follows:-

> **"234B. Interest for defaults in payment of advance tax.**--(1) Subject to the other provisions of this section, where, in any financial year, an assessee who is liable to pay advance tax under section 208 has failed to pay such tax or, where the advance tax paid by such assessee under the provisions of section 210 is less than ninety percent of the **assessed tax**, the assessee shall be liable to pay simple interest at the rate of one and one-half per cent for every month or part of a month comprised in the period from the 1st day of April next following such financial year to the date of determination of total income under sub-section (1) of section 143 and where a regular assessment is made, to the date of such regular assessment on an amount equal to the **assessed tax** or, as the case may be, on the amount by which the advance tax paid as aforesaid falls short of the **assessed tax**.
>
> ***Explanation 1.—In this section, "assessed tax" means the tax on the total income determined under sub-section (1) of section 143 or on regular assessment as reduced by the amount of tax deducted or collected 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.***

Explanation 2.--Where in relation to an assessment year, an assessment is made for the first time under section 147, the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3--In Explanation 1 and in sub-section (3), "tax on the total income determined under sub-section (1) of section 143" shall not include the additional income-tax, if any, payable under section 143.

(2) Where, before the date of determination of total income under sub-section (1) of section 143 or completion of a regular assessment, tax is paid by the assessee under section 140A or otherwise,--

(i) interest shall be calculated in accordance with the foregoing provisions of this section up to the date on which the tax is so paid, and reduced by the interest, if any, paid under section 140A towards the interest chargeable under this section;

(ii) thereafter, interest shall be calculated at the rate aforesaid on the amount by which the tax so paid together with the advance tax paid falls short of the assessed tax.

xxxx xxxx xxxx xxxx"

(emphasis supplied)

39. Under sub-section (1), liability to pay interest for defaults in payment of advance tax can arise in two situations. Both situations, of course, are predicated on the liability of the assessee to pay advance tax under section 208 of the said Act. The first situation arises where an assessee who is liable to pay advance tax under section 208, fails to pay such tax. The liability to pay interest is fixed at the prescribed rate on the "assessed tax". The second situation arises where an assessee who is liable to pay advance tax under section 208, pays advance tax but to an extent less than 90% of the "assessed tax". In this situation, the

liability to pay interest for this default is fixed at the prescribed rate on the difference between the tax paid and the "assessed tax". The expression "assessed tax" is defined in *Explanation 1* after section 234B(1) [as it stood prior to the amendment introduced by the Finance Act,2006] to mean the "tax on the total income" determined under sub-section (1) of section 143 or on regular assessment as reduced by the amount of tax deducted or collected 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.

40. Sub-section (2) indicates as to how the interest is to be computed where, before the date of determination of total income under section 143(1) or completion of regular assessment, tax is paid by the assessee under section 140A or otherwise. Section 140A provides for self-assessment. Sub-section (1) of section 140A as it stood prior to the amendment by Finance Act, 2006 was as under:-

> **"140A. Self-assessment.**--(1) Where any tax is payable on the basis of any return required to be furnished under section 139 or section 142 or section 148 or, as the case may be, section 158BC, after taking into account the amount of tax, if any, already paid under any provision of this Act, the assessee shall be liable to pay such tax, together with interest payable under any provision of this Act for any delay in furnishing the return or any default or delay in payment of advance tax, before furnishing the return and the return shall be accompanied by proof of payment of such tax and interest."

41. It is clear that prior to the filing of the return, the assessee is to make a self-assessment of the tax payable on the basis of the return which is to be furnished and has to pay the amount of such tax "*after*

taking into account the amount of tax, if any, already paid under any provision of this Act". Such tax is to be paid together with interest payable for any delay in furnishing the return (section 234A) or any default or delay in payment of advance tax (Sections 234B and 234C). The expression "such tax" referred to in section 140A(1) means the tax payable on the basis of the return minus the amount of tax, if any, already paid under any provision of the Act. The MAT credit under section 115JAA is nothing but credit for tax paid under section 115JA of the said Act. Both the sections are part of the said act. MAT credit is granted for tax already paid under section 115JA. Thus, the sum represented by the available MAT credit would fall within the expression "*tax….already paid under any provision of this Act*". This means that the expression "such tax" referred to in section 140A(1) would mean the tax payable on the basis of the return minus, inter alia, the available MAT credit which represents the tax already paid under a provision (section 115JA) of the said Act. The adjustment or the set off in respect of the available MAT credit is implicit in the meaning of "such tax". However, after the amendment introduced by the Finance Act, 2006, this has been made explicit. This would be immediately clear by reading the section 140A(1) as it stands today, that is, after the said amendment:-

> **"140A. Self-assessment.**--(1) Where any tax is payable on the basis of any return required to be furnished under section 139 or section 142 or section 148 or section 153A or, as the case may be, section 158BC, after taking into account,—
>
> (i) the amount of tax, if any, already paid under any provision of this Act ;
> (ii) any tax deducted or collected at source ;
> (iii) any relief of tax or deduction of tax claimed under section 90 or section 91 on account of tax paid in a country outside India ;
> (iv) any relief of tax claimed under section 90A on account of tax paid in any specified

territory outside India referred to in that section ; and

(v) ***any tax credit claimed to be set off in accordance with the provisions of section 115JAA***,

the assessee shall be liable to pay such tax, together with interest payable under any provision of this Act for any delay in furnishing the return or any default or delay in payment of advance tax, before furnishing the return and the return shall be accompanied by proof of payment of such tax and interest."

42. So, the amendment merely clarifies and makes explicit what was already implicit. Even if the amendment had not been introduced, the expression "such tax" as appearing in section 140A would have reference to the tax payable on the basis of the return minus, inter alia, the MAT credit claimed to be set off in accordance with the provisions of section 115JAA of the said Act.

43. The "such tax" mentioned in section 140A(1), if paid prior to the filing of the return, is what is referred to in section 234B(2) as the tax paid by the assessee under section 140A. Going back to section 234B(2), we find that there is reference to tax paid under section 140A as well as tax paid "otherwise". It is obvious that tax paid otherwise would take in within its sweep any tax paid under the provisions of the said Act. It cannot be denied that an assessee who makes a payment of tax under section 115JA makes such payment as per the provisions of the said Act. However, not all of it is to be accounted in the year it is paid. Part of it is accounted in the same year and the remainder is to be carried forward as MAT credit under section 115JAA. To make it clear, MAT credit under section 115JAA is not given in respect of the entire tax (viz., Minimum Alternate Tax) paid under section 115JA in a year. MAT credit is given only in respect of the amount of MAT which

is in excess of the tax payable for that year by the assessee under the normal provisions (i.e., other than the special provisions of section 115JA). It represents the amount of tax paid by the assessee in excess of what it would be required to make under the normal provisions only because of the special provisions requiring company assessees to pay a minimum tax each year. It is for this reason that credit is given to the assessee for such payment and the assessee can, as a matter of right, subject to certain conditions, carry forward and set off the tax credit against the tax payable in a subsequent year. There can be no doubt that the entire amount of MAT paid under section 115JA would be towards tax. Part of it may be towards tax for that year and part of it, for which credit is given, is towards tax for a subsequent year. Thus the tax credit which has been carried forward and is available for set off under the provisions of section 115JAA in a subsequent year would qualify as tax paid "otherwise". Since, it is available at the beginning of the subsequent year, it is obvious that such tax credit would be tax paid by the assessee before the date of determination of total income under section 143(1) or completion of regular assessment.

44. This means that whether we take the route of "section 140A" or "otherwise", the available tax credit under section 115JAA would fall within the meaning of tax paid prior to the date of determination of total income under section 143(1) or completion of regular assessment. And, significantly, this conclusion is not dependent upon the amendment brought about by the Finance Act, 2006 which makes the position explicit and beyond doubt. It is also noteworthy that the said Circular No.14/2006 itself recognizes the fact that the amendment was introduced because it had been represented from several quarters that the tax credit allowed under section 115JAA was no different from the tax paid in advance and credit for having paid the minimum alternate

tax ought to be allowed against the tax liability determined on assessment. This circumstance is another indicator that the amendments were clarificatory in nature.

45. The next step is to proceed to compute interest in terms of section 234B(2). The said provision stipulates that where tax is so paid, interest shall be calculated upto the date on which the tax is paid. Since, we are dealing with tax credit which has been carried forward from a prior year, it is obvious that the tax would be deemed to have been paid on the very first day of the year in question, even prior to the due dates of payment of advance tax. The implication of this is that no interest would be chargeable on such amount. From this it follows that interest under sections 234B is to be charged after the carried forward tax credit (MAT credit) available under section 115JAA is set off. The same logic would apply to the computation of interest for delayed payments of advance tax under section 234C.

Sections 115JA and 115JAA

46. The relevant portions of sections 115JA and 115JAA are as follows:-

> "**115JA. Deemed income relating to certain companies.**--(1) Notwithstanding anything contained in any other provisions of this Act, where in the case of an assessee, being a company, the total income, as computed under this Act in respect of any previous year relevant to the assessment year commencing on or after the 1st day of April, 1997 (hereafter in this section referred to as the relevant previous year) is less than thirty per cent. of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to thirty per cent. of such book profit.
>
> xxxx xxxx xxxx xxxx"

"**115JAA. Tax credit in respect of tax paid on deemed income relating to certain companies.**--(1) Where any amount of tax is paid under sub-section (1) of section 115JA by an assessee being a company for any assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the provisions of this section.

(2) The tax credit to be allowed under sub-section (1) shall be the difference of the tax paid for any assessment year under sub-section (1) of section 115JA and the amount of tax payable by the assessee on his total income computed in accordance with the other provisions of this Act:
Provided that no interest shall be payable on the tax credit allowed under sub-section (1).

(3) The amount of tax credit determined under sub-section (2) shall be carried forward and set off in accordance with the provisions of sub-section (4) and sub-section (5) but such carry forward shall not be allowed beyond the fifth assessment year immediately succeeding the assessment year in which tax credit becomes allowable under sub-section (1).

(4) The tax credit shall be allowed set-off in a year when tax becomes payable on the total income computed in accordance with the provisions of this Act other than section 115JA.

(5) Set off in respect of brought forward tax credit shall be allowed for any assessment year to the extent of the difference between the tax on his total income and the tax which would have been payable under the provisions of sub-section (1) of section 115JA for that assessment year.

(6) Where as a result of an order under sub-section (1) or sub-section (3) of section 143, section 144, section 147, section 154, section 155, sub-section (4) of section 245D, section 250, section 254, section 260, section 262, section 263 or section 264, the amount of tax payable under this Act is reduced or increased, as the case may be, the amount of tax

credit allowed under this section shall also be increased or reduced accordingly."

47. Both these sections fall under Chapter XII-B which contains special provisions relating to certain companies. Sub-section (1) of section 115JA begins with a non-obstante clause and stipulates that where the total income, as computed under the Act, of a company assessee is less than 30% of its book profit, the total income of such assessee chargeable to tax for the relevant previous year shall be deemed to be an amount equal to 30% of such book profit. To clarify, let us assume the following:-

Total income of a company assessee (as computed under the Act) in year 0 = X_0

30% of its Book Profit in year 0 = Y_0

If X_0 is less than Y_0, implying that the total income as computed under the normal provisions of the Act is less than 30% of the book profit, then, because of section 115JA(1), Y_0 (i.e., 30% of the book profit) shall be deemed to be the total income of the company assessee which would be chargeable to tax. If the rate of tax in year 0 is t_0%, the tax payable (TJA_0) on this deemed total income by the company assessee in respect of year 0 would be $t_0/100 \times Y_0$. So, we see that the factum of the total income computed under the normal provisions of the Act being less than 30% of the book profit triggers the deeming provision of sub-section(1) of section 115JA and then, the total income is deemed to be 30% of the book profit. This implies that the floor income (total income) which would be subject to tax would be 30% of book profit. By employing this deeming fiction the Minimum Alternate Tax (TJA_0) is computed on the deemed total income.

48. But, the tax payable (T_0) on the total income (X_0) under the normal provisions would have been equal to $t_0/100 \times X_0$. Since the actual total income (X_0) is less than the deemed total income (Y_0), the tax payable (T_0) on actual total income would also be less than the tax payable (TJA_0) on the deemed total income. This brings in the provisions of section 115JAA which stipulate that credit shall be allowed to the company assessee to the extent of the excess of tax paid (TJA_0) under section 115JA and the tax payable (T_0) under the normal provisions of the said Act ie., Tax Credit in respect of year 0 (TC_0) = $TJA_0 - T_0$. Though such tax credit (TC_0) is allowed in respect of year 0, no interest is payable thereon by the revenue. Such tax credit is to be carried forward for no more than five years and is permitted to be set off in a year when the total income of the company assessee as computed under the normal provisions of the Act exceeds 30% of its book profits or, to put it simply, where the actual total income exceeds the deemed total income under section 115JA. Furthermore, by virtue of sub-section (5) of section 115JAA, the set off in respect of brought forward tax credit shall be allowed for any assessment year to the extent of the difference between the tax on total income and the tax which would have been payable under the provisions of sub-section (1) of section 115JA for that assessment year.

49. The interplay of sections 115JA and 115JAA for computing the tax credit and its set off in a subsequent year is explained in a simple two year example below using the same symbology adopted above.

Assume that: Total income in year 1 = X_1
30% of book profit in year 1 = Y_1
$X_1 > Y_1$ [therefore, set off is permissible]

Then:

$T_1 = t_1/100 \times X_1$;
$TJA_1 = t_1/100 \times Y_1$
$T_1 > TJA_1$ [since, $X_1 > Y_1$]
Set off permissible in year 1 = $T_1 - TJA_1$

But, actual set off would depend on whether ($T_1 - TJA_1$) is greater than or less than or equal to TC_0. There are these possibilities :-

(i) Set off (S_1) = ($T_1 - TJA_1$) – TC_0 [where, $T_1 - TJA_1 > TC_0$]

(ii) Set off (S_1) = $T_1 - TJA_1$ [where, $T_1 - TJA_1 < TC_0$]
[the balance credit (TC_0 – [T_1 – TJA_1]) shall be permitted to be carried forward subject to the five year limit in section 115JAA(5)]

(iii) Set off (S_1) = TC_0 [where, $T_1 - TJA_1 = TC_0$]
[i.e., the entire tax credit is set off]

50. It is apparent that because of the manner in which the two provisions work, it is ensured that a company assessee always pays its minimum alternate tax computed on the basis of 30% of its book profit. Even the tax credit which is allowed to the assessee can only be set off against the tax payable in excess of the minimum alternate tax. It is also apparent that the tax credit obtained in a particular year is a part of the minimum alternate tax of that year. It represents tax paid by the assessee to the government of India. In the year in which such tax credit is set off in terms of section 115JAA, it is clear that such tax credit was available on the first day of that year. So, in such a year, the tax credit, to the extent it can be set off, represents tax already paid and available as credit at the beginning of the year. Consequently, the assessee cannot be charged interest on something which it had already paid.

Interest under sections 234A, 234B and 234C is Compensatory or penal?

51. We have already noted above that the learned counsel for the respondents had submitted in unison that the provisions of sections 234A, 234B and 234C are compensatory in nature. We agree with this submission. In fact, even in ***CIT v. Kotak Mahindra Finance Ltd:*** *(supra)*, a decision strongly relied upon by the learned counsel for the revenue, the Bombay High Court held that:-

> "It is well settled that interest under section 234B is compensatory in character. It is not penal in nature. So also, interest under section 234C is compensatory in character. It is for this reason that section 234B does not envisage grant of hearing in so far as levy of interest is concerned. The levy is automatic on it being proved that the assessee has committed a default as governed by section 234B. This reasoning also applies to levy of interest under section 234C."

52. We are also of the view that sections 234A, 234B and 234C are of the same genre. On going through these provisions it is clear that interest is sought to be charged because the government is denied of its revenues at the due dates. Under section 234A interest is charged where tax which is payable upon self assessment at the time of filing of a return is not paid at that point of time. Section 234B provides for charging of interest for default in payment of advance tax and under section 234C interest is charged for deferment in the payment of advance tax from the appointed dates of payment. Under the Act, Income tax is payable at different stages and through different modes. Where specific dates by which parts of the tax are to be paid are clearly stipulated, if such a schedule is not adhered to it can be said that the government is deprived of its revenue as on those dates. To compensate for such deprivation, interest is chargeable under

provisions of the Act such as sections 234A, 234B and 234C. The scheme of the Act and the nature of these provisions reveal that they are compensatory and not penal. Under these provisions interest is chargeable by way of compensation and not by way of penalty. This is also clear from the fact that none of the safe-guards such as stipulation of opportunity of hearing and the like as are necessary accompaniments of penal provisions are to be found in these sections. In any event, this issue is now beyond the pale of controversy in view of the Supreme Court decision in ***Dr Prannoy Roy*** *(supra)*, wherein it accepted this Court's conclusion that *interest charged under section 234A of the Act is not a penalty and that the interest is levied by way of compensation to compensate the revenue in order to avoid it from being deprived of the payment of tax on the due date.* This, in our view, would apply with equal vigour to sections 234B and 234C. In the said decision the Supreme Court also observed that "*[s]ince the tax due had already been paid which was not less than the tax payable on the returned income which was accepted, the question of levy of interest does not arise.*" The learned counsel for the revenue referred to this sentence and submitted that in Dr Prannoy Roy (supra) the tax had been paid but the return was not filed and therefore that case stood on a different footing. We are not impressed by this line of thought. What the Supreme Court decided was that the provisions of section 234A were compensatory in nature and since the tax stood paid there was no question of levy of interest even though the return had not been filed when the tax was paid.

53. In the present appeals, the tax due to the extent of available MAT credit, stood paid. If that be the case, how would the question of levy of interest arise ? The revenue had the amount representing the MAT credit at the very beginning of the year. The revenue was not put

to any loss. There is no case made out for compensation. Unless it can be shown that the interest sought to be charged was by way of compensation of loss suffered by the revenue, such "interest" cannot be regarded as interest under sections 234B or 234C.

Purposive meaning to be ascribed to "advance tax"

54. We feel that it would be fruitful to remember what was said by Sinha CJ (as his lordship then was), while speaking for a Division Bench of this court in ***Dr. Prannoy Roy v. Commissioner of Income-tax:*** ***254 ITR 755 (Del),*** with regard to the interpretation to be placed on the term "advance tax" as defined in section 2(1) of the said Act. It was observed that an interpretation clause, as is well known, is not a positive enactment. It was specifically noticed that section 2 of the said Act began with the word "unless the context otherwise requires". The Division Bench held that though "advance tax" has been defined to mean the advance tax payable in accordance with the provisions of Chapter XVII-C, such a definition is not an exhaustive one and that "advance tax", apart from being used only for the purpose of Chapter XVII-C, may be held to be tax paid in advance before its due date. In other words, the term "advance tax" is not restricted to mean the advance tax payable in accordance with the provisions of Chapter XVII-C. If the context requires, "advance tax" may extend beyond the territory of Chapter XVII-C and could very well refer to any tax paid in advance before its due date. MAT credit represents that portion of MAT which was not actually payable by the company assessee but, has all the same, been collected by the government. It represents the tax paid before it is due. In our view, the MAT credit which is available for set off in a year falls within the meaning of "advance tax" because the context requires us to give such a purposive meaning.

Conclusions:

55. This discussion leads us to the conclusion that interest under sections 234B and 234C is to be charged after the tax credit (MAT credit) available under section 115JAA is set off against tax payable on the total income of the year in question. This being the position and rival stands taken by the revenue and the respondents as well as the decisions of benches of the Tribunal [92ITD 441 (Chandigarh) and 83 TTJ 427 (Chennai)] do indicate that the Tribunal was correct in law in holding that rectification could not be made by the Assessing Officer under Section 154 of the Income Tax Act, 1961 as the issue regarding charging of interest under Section 234-B of the Act without giving set off of MAT credit available to the Assessee was highly debatable. Consequently, we answer both the questions against the revenue and in favour of the respondents / assessees. The appeals are dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

February 06, 2009
HJ