

ITEM NO.63 COURT NO.3 SECTION IIIA

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Petition(s) for Special Leave to Appeal (Civil) No(s).14013/2013

(From the judgement and order dated 19/07/2012 in ITA No.2193/2009
of The HIGH COURT OF BOMBAY)

COMMISSIONER OF INCOME TAX-I Petitioner(s)

VERSUS

M/S. RELIANCE ENERGY LTD. Respondent(s)

(With prayer for interim relief and office report)

Date: 30/09/2013 This Petition was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE R.M. LODHA
HON'BLE MR. JUSTICE SHIVA KIRTI SINGH

For Petitioner(s) Mr. Arijit Prasad, Adv.
Mr. D.L. Chidananda, Adv.
Mr. Sahil Tagotra, Adv.
Mrs Anil Katiyar, Adv.

For Respondent(s) Mr. G.C. Srivastava, Adv.
Ms. Preeti Bhardwaj, Adv.
Mr. Aditya Parda, Adv.
Mr. Shiv Kumar Suri, Adv.

UPON hearing counsel the Court made the following

O R D E R

Heard learned counsel for the parties.

Learned counsel for the Revenue submits that the question involved in the present special leave petition is in respect of retrospectivity of Section 234D of the Income Tax Act, 1961 (for short, 'Act') and, therefore, the decision of the Bombay High Court in Director of Income Tax (International Taxation)-I Vs. M/s Delta Air Lines Inc. has no

application and the High Court erred in dismissing the appeal preferred by the Revenue while keeping the question of retrospectivity of Section 234D open.

Learned counsel for the assessee places reliance on Explanation (2) inserted in Section 234D of the Act by the Finance Act, 2012 with effect from 01.06.2003.

Explanation (2) which has been inserted in Section 234D of the Act reads as under:-

"Explanation 2. - For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date."

The High Court was concerned with the appeal relating to the assessment year 1998-99. It is admitted case that the assessment of that year was completed prior to 01.06.2003.

Having regard to the legal position which has been clarified by the Parliament by insertion of Explanation (2) in Section 234D of the Act, in the present case, retrospectivity of Section 234D does not arise.

Having regard to above position, the view of the High Court in relying upon the decision of the Bombay High Court in M/s Delta Air Lines Inc. (supra) cannot be said to be erroneous.

Special Leave Petition is dismissed.

(Rajesh Dham)
Court Master

(Renu Diwan)
Court Master

This Order is modified/corrected by Speaking to Minutes Order

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 2193 OF 2009

The Commissioner of Income Tax-1 ..Appellant
versus
M/s. Reliance Energy Ltd. ..Respondent

Mr. Suresh Kumar for the Appellant.
Mr. Percy Pardiwalla, Sr. Counsel alongwith Mr. Atul
K. Jasani for the Respondent.

.....
**CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.**

DATE : 19 July 2012.

P.C. :

It is not disputed that the matter is covered
against the appellant by the Judgment of this court in
The Director of Income Tax (International Taxation)-I
v/s. M/s. Delta Air Lines Inc. in a group of appeals
the first appeal bearing Income Tax Appeal No.
1318/11.

The appeal is accordingly disposed of.

(M.S. SANKLECHA, J.)

(S.J.VAZIFDAR J.)

Snc

1/1

ITAX 2193/09

sas

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.1318 OF 2011
WITH
INCOME TAX APPEAL (LOD) NO.790 OF 2011
WITH
INCOME TAX APPEAL (LOD) NO.791 OF 2011
WITH
INCOME TAX APPEAL (LOD) NO.792 OF 2011
WITH
INCOME TAX APPEAL (LOD) NO.793 OF 2011
WITH
INCOME TAX APPEAL (LOD) NO.794 OF 2011
WITH
INCOME TAX APPEAL (LOD) NO.795 OF 2011

The Director of Income Tax (International Taxation)-I
Scindia House, Ballard Estate,
N.M. Road, Mumbai – 400 038

..Appellant.

V/s.

M/s. Delta Air Lines Inc.
GSA : Inter Globe Air Transport,
Bajaj Bhavan, 12th Floor,
Nariman Point, Mumbai – 400 021

..Respondent.

Mr. Suresh Kumar for the appellant.
Mr. Atul K. Jasani for the respondent.

CORAM : J.P. DEVADHAR AND
K.K. TATED, JJ.

DATED : 5TH SEPTEMBER, 2011

JUDGMENT :- (Per J.P. Devadhar, J.)

1. All these appeals relating to assessment years 1992-93 to 1998-99 are admitted on the following question of law :-

“ Whether on the facts and circumstances of the case and in law, the Tribunal was justified in holding that interest u/s.234D of the I.T. Act has no retrospective application without appreciating that the provisions of Section 234D are procedural and compensatory in nature and as such can be applied to proceedings of earlier assessment years pending as on 01-06-2003 ? “

2. By consent, all the appeals are taken up for final hearing.
3. In all these cases, in the assessment orders passed under Section 143(3) r/w 147 of the Income Tax Act, 1961 ('the Act' for short), the assessing officer disallowed the benefit of Article 8 of the Double Taxation Avoidance Agreement (DTAA) between India and USA to the assessee. The appeals filed by the assessee were allowed by the CIT(A) by holding that the assessee is entitled to the benefit of Article 8 of DTAA. Challenging the aforesaid order, the revenue filed appeals before the ITAT and the Tribunal set aside the order of CIT(A) and restored the orders passed by the assessing officer.
4. While giving effect to the order of the ITAT, the assessing officer apart from levying interest under Section 234A and under Section 234B of the Act has also levied interest under Section 234D of the Act.

5. Challenging the levy of interest under Section 234D of the Act, the assessee filed appeals before the CIT(A). By his order dated 22/9/2009, the CIT(A) held that the interest under Section 234D is chargeable where the refund has been granted to the assessee on processing the return of income under Section 143(1) of the Act and thereafter such refund is found to be excessive under the regular assessment. In the present case, since no refund was granted under Section 143(1), the CIT(A) was of the opinion that in the facts of the present case Section 234D was not attracted. Alternatively, the CIT(A) following the Special Bench decision of the ITAT in the case of ITO V/s. Ekta Promoters (P) Ltd. reported in [(2008) 305 ITR (AT)1] held that since Section 234D was introduced with effect from 1st June, 2003 the said provision would not apply to the facts of the present case where the assessments are for the period prior to 1st June 2003. Challenging the aforesaid order, the revenue filed appeals before the ITAT and by the impugned order dated 28/7/2010, the Tribunal has dismissed the appeals filed by the revenue by following the Special Bench decision in the case of Ekta Promoters (P) Ltd. (supra). Challenging the aforesaid order, the revenue has filed the present appeals.

6. Mr. Suresh Kumar, learned counsel appearing on behalf of the revenue submits that as per the explanation to Section 234D, the assessment made for the first time under Section 147 shall be regarded as a regular assessment. In the present case, the assessments are

made under Section 147 read with Section 143(3) of the Act and, therefore, Section 234D would be applicable to the facts of the present case.

7. Section 234D of the Act (to the extent relevant), reads thus:-

Interest on excess refund.

234D. (1) Subject to the other provisions of this Act, where any refund is granted to the assessee under sub-section (1) of section 143, and -

- (a) no refund is due on regular assessment; or
- (b) the amount refunded under sub-section (1) of section 143 exceeds the amount refundable on regular assessment,

the assessee shall be liable to pay simple interest at the rate of [one-half] per cent on the whole or the excess amount so refunded, for every month or part of a month comprised in the period from the date of grant of refund to the date of such regular assessment.

(2) -----

Explanation - Where, in relation to an assessment year, an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment for the purposes of this section”.

8. Thus, Section 234D is attracted only when the refunds

granted to the assessee under Section 143(1) of the Act becomes refundable to the Revenue on regular assessment.

9. In the present case, admittedly refund was not granted to the assessee under Section 143(1) of the Act. In fact, the refund was not granted even under the assessment order passed under Section 143(3) read with Section 147 of the Act, but the same was granted pursuant to the orders passed by the CIT (A). Therefore, the decision of the ITAT in holding that in the facts of the present case, Section 234D is not applicable cannot be faulted.

10. The argument of the Revenue that as per the Explanation to Section 234D, assessments made under Section 147 shall be regarded as regular assessment does not carry the matter any further, because, the provisions of Section 234D would apply only in those cases where refunds were granted under Section 143(1) of the Act and on regular assessment whether made under Section 143(3) or under Section 143(3) read with Section 147, no refund becomes due or the amount refunded under Section 143(1) exceeds the amount refundable on regular assessment. In the present case, since refunds were not granted under Section 143(1) of the Act, the Tribunal was justified in holding that Section 234D is not attracted in the facts of the present case.

11. We make it clear that we have upheld the order of the ITAT not on the ground that Section 234D has no retrospective operation, but on the ground that Section 234D has no application to the facts of the present case, because, in none of these cases, refunds were granted under Section 143(1) of the Act. The question as to whether Section 234D applies retrospectively is kept open. All the appeals are disposed off accordingly with no order as to costs.

(K.K. TATED, J.)

(J.P. DEVADHAR, J.)

Bombay High