

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

DIRECTORATE OF INCOME TAX, NEW DELHI.....APPELLANT

VERSUS

M/S MITSUBISHI CORPORATION.....RESPONDENT

FACTS OF THE CASE

1. Assessee is a non-resident company incorporated in Japan with operations in India.
2. Assessee was engaged in carrying out trading activities of carbon crude oil, LPG, ferrous products, industrial machinery, mineral, non-ferrous metal and products, textiles, automobiles etc.
3. Notice was issued to respondent assessee u/s 143(2).
4. Assessment order was passed for assessment years 1998-99 to 2004-05.
5. In spite of assessee's resistance, it was held by department that portion of assessee's income was attributable to its activities in India and therefore liable to be taxed in India under Article 4,5 and 6 of DTAA between India and Japan read with other provisions of the act.
6. The Respondent assessee files appeal against assessment order before CIT (Appeals) only for levy of interest u/s 234B of the Income Tax Act.

FURTHER DETAILS OF THE CASE

- CIT (Appeals) dismissed the appeals by a common order.
- Aggreived by the order, respondent assessee files appeal before ITAT
- ITAT allowed the appeal and held that respondent was not liable for payment of interest u/s 234B, when TDS was liable to be deducted at source.
- This judgement of ITAT was challenged by Appellant before High Court.
- High Court dismissed the appeals and upheld the judgement of ITAT.
- Dissatisfied with the judgements of ITAT and High Court, appellant preferred appeal with Supreme Court.

OTHER FACTS AND LAW POINTS

- Appeal was disposed off by ITAT by remanding the appeals from A.Y. 1998-99 to 2004-05 to be decided on merits.
- On remand of appeals, CIT framed two questions for consideration:
 - a. Whether appellant is liable to pay interest u/s 234B of the Act , in case tax which was deductible but not deducted at source.
 - b. Whether in facts and circumstances of the case there was any tax deductible at source from the receipts of the appellant so as to apply the ratio of ITAT decision in appellant's own case for A.Y. 2005-06.

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- CIT took note of the order passed by ITAT for AY 2005-06 in case of respondent.
 - ITAT while passing order, had followed an earlier order passed in

Motorola Incorporation vs. Deputy CIT

In this case, assessee was not liable to pay advance tax and in consequence interest u/s 234B since entire income received by assessee was liable to tax deductible at source.

-CIT ignoring ITAT decision, came to conclusion that respondent is liable to pay advance tax u/s 191 of the Act, in case of no deduction of TDS by the payer.

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- Consequently interest u/s 234B also becomes payable.
 - On this basis, respondent's appeals for AY 1998-99 to 2004-05 was dismissed.
- ITAT also held that same issue was already covered in ITAT's decision dated 08.08.2008 in the case of respondent for AY. 2005-06 based on decision of:
- Motorola Incorporation for decisions of Uttarakhand High Court and Bombay High Court.
 - Reliance was also placed on judgement of Uttarakhand High Court in
- Reliance was also placed on judgement of CIT vs Tide Water Marine International Inc,
- Whereby it was decided that an individual cannot be held liable to pay interest u/s 234B for default of the company who had engaged or employed.

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- In Director of Income Tax vs NGC Network Asia LLC, it was held that on failure to deduct TDS, no interest can be imposed on payee-assesses u/s 234B.
 - ITAT observed that in all 7 years, TDS was deductible from payments made to respondent assessee and respondent was not liable to pay interest u/s 234B. The respondent's appeal was allowed.

QUESTION OF LAW

The question of law framed by High Court- whether intt u/s 234B is leviable for short deduction of TDS?

The High Court referred to judgement of

- -Uttarakhand High Court in case of **CIT and Anr vs Sedko Forex International; Drilling co ltd**, judgement of **Bombay high court in NGC Network Asia LLC** and judgement of **Madras Court in CIT, Tamil Nadu -I, Madras vs Madras Fertilizers ltd** to uphold the submission of respondent assessee that TDS should be excluded from consideration while the estimate of income for advance tax is submitted.
- Court held that intt u/s 234B cannot be imposed when section 201 provides for consequence of failure to deduct tax at source.

REVENUE DEPARTMENT ARGUMENTS

- Revenue department argued that obligation of assessee to pay advance tax is independent of obligation to deduct tds by deductor. Obligation of assessee to pay advance tax continues u/s 190 and 191 of the Act even in case of non-deduction of tax at source. Interest u/s 234B is compensatory to revenue due to loss in tax recovery. Department's choice of recovery whether from assessee or payer should not be restricted. Payment of advance tax is liability of assessee and any default or shortfall continues to be the liability of assessee.

ARGUMENTS OF REVENUE COUNSEL

- As per revenue counsel- words “deductible or collectible” used in section 209(1)(d) have been mistaken by court. These words should be read as “deducted or collected”.
- Revenue may proceed with collection of unpaid tax & refund to payer or payee, most likely to payee once it is successful in recovering dues.
- Choice of revenue regarding mode of recovery should not be restricted.

RESPONDENT COUNSEL ARGUMENTS

Respondent counsel argued that section 234B should not be read in isolation. This section should be read with section 209.

He relied on the judgement of court in case of

Ian Peter Morris vs ACIT

- He submitted that provisions of payment of advance tax and levy of interest for default in payment of advance tax would not come into play once it is determined that TDS was deductible.

He also sought support of judgements:

- -Uttarakhand High Court in Sedco Forex Case
- -Bombay High Court in NGC Network Asia LLc
- -Madras High Court in Madras Fertilizers

RESPONDENT COUNSEL ARGUMENTS

- According to counsel, tds and advance tax are 2 different components of recovery.
- Assessee can not be penalized for default of payer.
- Payer should be penalized

RESPONDENT COUNSEL ARGUMENTS

Quoting relevant provisions of section 209, 234, 200

Assessee's Counsel argued that

- As per section 209(1) clause (a) and (d), assessee shall make estimate of current income and tax for payment of advance tax on the basis of rates in force in the financial year. The advance tax so calculated has to be reduced by tax deductible or collectible at source. In case of failure to pay advance tax or where advance tax paid is lesser than 90% of assessed tax, assessee shall be liable to pay interest on the amount of shortfall from the assessed tax u/s 234B.

REVENUE'S SUBMISSIONS:

Revenue's contention was:

The main emphasis was on phrase “ deductible or collectible at source”. That any person who has received any payment without payer deducting any tax cannot be escaped, liability in payment of advance tax and consequent interest for such non payment u/s 191 and 234B of the Act. As the assessee was fully aware of the payments being received without deduction of tax at source, they should not be allowed to rely on section 201 of the act to reduce advance tax liability.

- “deductible or collectible” would not include “ deducted or collected” amounts.

MEMORANDUM EXPLAINING FINANCE BILL 2012 (LIABILITY TO PAY ADVANCE TAX IN CASE OF NON DEDUCTION OF TAX AT SOURCE)

- Under the existing provisions of section 209 of the Income-tax Act, the amount of advance tax payable is computed by reducing the amount of income-tax which would be deductible or collectible during the financial year from income-tax on estimated income. Therefore, in cases where the assessee receives or pays any amount (on which the tax was deductible or collectible) without deduction or collection of tax, it has been held by Courts that he is not liable to pay advance tax to the extent the tax is deductible or collectible from such amount.
- In order to make an assessee liable for payment of advance tax in respect of income which has been received or paid without deduction or collection of tax, it is proposed to amend the aforesaid section to provide that where a person has received any income without deduction or collection of tax, he shall be liable to pay advance tax in respect of such income.
- This amendment will take effect from the 1st April, 2012 and would, accordingly, apply in relation to advance tax payable for the financial year 2012-13 and subsequent financial years.

FURTHER EXPLANATIONS BY ASSESEE COUNSEL

- As per the provisions of section 209, assessee shall estimate his current income and income tax for payment of advance tax. The calculation of advance tax to be reduced by tax deductible or collectible at source.
- In case of failure to pay advance tax u/s 208 or where advance tax paid by assessee as per the provisions of section 210 is less than 90% of assessed tax, the assessee shall be liable to pay interest on the shortfall u/s 234B.

FURTHER EXPLANATIONS BY ASSESEE COUNSEL

- There is no reason that section 234B should be read in isolation without referring to other provisions of chapter XVII. Liability for payment of interest as provided in section 234B is for default in payment of advance tax. Interest has to be calculated on short payment of tax after taking into account the assessed tax. Therefore section 209 related to computation of advance tax payable by assessee can not be ignored while construing the contents of section 234B.
- Prior to 2012, there was a provision in law to deduct tax deductible or collectible at the time of calculating advance tax liability.

CASE LAW IN SUPPORT OF ASSESEE

As held in judgement of Delhi High Court as well as Madras High Court, in

Madras Fertilizers case that,

- Revenue is not remediless and there are provisions in the Act enabling the revenue to proceed against the payer who has default in deducting tax at source.
- The provisions have changed with effect from 2012 and assessee can not reduce tax deductible or collectible while calculating advance tax liability after 2012.
- Th proviso introduced in Finance Act 2012 is an exception to section 209(1)(d).