

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Income Tax Appeal No.26 of 2009

Director of Income Tax
International Taxation, Delhi-II,
Delhi & another ... Appellants

Versus

M/s Maersk Co. Ltd. as agent of
Mr. Henning Skov,
C/o A. S. Ferguson & Co.,
Maker Towers 'E' Wing,
Cuffe Parade, Mumbai ... Respondent

with

Income Tax Appeal No. 27 of 2009

Director of Income Tax & another. Appellants

Versus

M/s Maersk Co. Ltd. Respondent.

with

Income Tax Appeal No. 28 of 2009

Director of Income Tax & another. Appellants

Versus

M/s Maersk Co. Ltd. Respondent.

with

Income Tax Appeal No. 29 of 2009

Director of Income Tax & another. Appellants

Versus

M/s Maersk Co. Ltd. Respondent.

Dated:- 07th April, 2011

Coram: **Hon. Tarun Agarwala, J.**
Hon. Prafulla C. Pant, J.
Hon. V. K. Bist, J.

Per :- Hon'ble Tarun Agarwala, J.

1. A Division Bench of this court finding itself unable to agree with the decision of another Division Bench of this Court felt that the matter should be referred to a Larger Bench. Hon'ble the Chief Justice, accordingly, constituted a Full Bench to decide the case. Since the entire matter has been referred to this Bench, we are accordingly deciding the appeal itself.

2. In the **Commissioner of Income Tax, Meerut & another Vs. M/s Tide Water Marine International Inc. (2009) 309 I.T.R. 85**, the question of law involved in the said appeal was whether the Income Tax Appellate Tribunal had erred in law in holding that the interest was not payable by the assessee under Section 234B of the Income Tax Act (hereinafter referred to as 'Act'), even though, the income of the assessee was subject to tax deduction at source. The facts of that case was that the assessee M/s Tide Water Marine International Inc. was a non-resident foreign company and was engaged by another non-resident company M/s Hundai Heavy Industries Co. Ltd. in the business of exploration and production of mineral oils. The employer, M/s Hundai Heavy Industries Co. Ltd. did not deduct the tax at source from the income of the assessee. The assessing officer, while assessing the tax of the assessee on the income shown in its return, directed that interest would be charged under Section 234B of the Act, since advance tax was not paid. The assessee, being aggrieved, filed an appeal which was dismissed and thereafter filed a second appeal before the Income Tax Appellate Tribunal, who allowed the appeal holding that the interest was not payable by the assessee under Section 234B of the Act as the assessee himself was not liable to deduct the tax at source in order to pay advance tax under Section 208 of the Act. The Income Tax Department, being aggrieved by the order of the Tribunal, filed an appeal under Section 260A of the Income Tax Act before the High Court. The High Court dismissed the appeal and affirmed the order of the Tribunal holding that the assessee was not liable to pay interest under Section 234B of the Act for the default committed by the employer, who was liable to deduct the tax at source. The Division Bench, while arriving at the aforesaid conclusion relied upon a decision of another Division Bench of this Court in the **Commissioner of Income Tax &**

**another Vs. Sedco Forex International Drilling Co. Ltd.
(2003) 264 I.T.R. 320.**

3. While hearing the present appeal, the Division Bench in its order dated 09th December, 2010 held that the decision of the Division Bench in the case of Sedco Forex (supra) was distinguishable and was not directly applicable to the case in hand and did not agree with the decision of the Division Bench in M/s Tide Water Marine (supra). The Division Bench held that if the assessee was liable to be taxed in India, then, it was his obligation to pay advance tax and, if he failed to pay the advance tax, he was liable to pay interest under Section 234B of the Act. For reference, the order of the Division Bench dated 09.12.2010 passed in this appeal is quoted hereunder :-

“All these Appeals raise the same question of law. We, accordingly, decided, with consent of the parties, to take up these Appeals together.

*2. The Tribunal has rendered the Judgment, appealed against, following the decision of this Court rendered in the case of **Commissioner of Income Tax & another Vs. Sedco Forex International Drilling Inc. Ltd.** In that case, as it appears, this Court took notice of Section 209 (1)(a) of the Act, which authorised the assessee to make an estimate of his current income. This Court also took notice of the fact that in view of different decisions rendered by Tribunal, there was a bona fide dispute whether an assessee was liable to pay tax for the off-period and the said dispute was put to rest by a clarification inserted by the Legislature in 1999. This Court, therefore, in those circumstances, interfered with imposition of interest under Section 234B of the Act. In the instant case, however, there is no scope of any confusion by reason of any conflicting views expressed by the Tribunal. Therefore, the said judgment of this*

Court may not be directly applicable to the case in hand.

3. *The learned counsel for the appellants, however, has brought to our notice another decision of this Court rendered in the case of **Commissioner of Income Tax & another Vs. M/s Tide Water Marine Intl. Inc.** reported in **2008(2) U.D. 84**, where it has been held that for failure on the part of the employer to deduct tax, interest liability under Section 234B does not accrue. According to us, if the assessee is liable to be taxed in India, then it is his obligation to pay advance tax and, if he fails to pay advance tax, he is liable to pay interest thereon under Section 234B of the Act.*

4. *Our such view, being contrary to what has been expressed by this Court in the Commissioner of Income Tax & another Vs. M/s Tide Water Marine Intl. Inc. (supra), we feel that the matters should be referred to a larger Bench and, accordingly, we move the Hon'ble Chief Justice for constitution thereof. "*

4. In the light of the aforesaid decision, the matter has now come up before this Full Bench.

5. All the aforesaid appeals raise the same question of law. For facility and in order to appreciate the controversy involved in these appeals, the facts of Income Tax Appeal No.26/2009 Director of Income Tax & another Vs. Maersk Co. Ltd. is being taken into consideration.

6. M/s Maersk Co. Ltd. (*for short 'MCL'*) is a non-resident company and had a contract for supply of technicians to the Oil and Natural Gas Corporation (*for short 'ONGC'*) in respect of which hire charges had been received by it. Under the terms of the contract, MCL was required to provide the technicians to the

ONGC. The MCL supplied the technicians to ONGC. The Income Tax Department treated MCL as an agent of the employees and issued a notice under Section 148 of the Income Tax Act. The assessing officer, after considering MCL as an agent of M/s Henning Skov, assessed the income of the assessee under Section 143 (3) / 147 and 163 of the Act and held that since the income of the assessee under the head "Salaries" had not been subjected to tax deduction at source (T.D.S.), the agent company was liable to pay interest under Section 234A and 234B of the Act. The assessee, being aggrieved, filed an appeal. The appellate authority partly allowed the appeal and remitted the matter to the assessing officer to reconsider the levy of interest under Section 234B of the Act on the basis of the contention raised by the appellant relying upon a decision of the Division Bench of this Court in the matter of Sedco Forex (supra). The Income Tax Department, being aggrieved by the appellate order, filed an appeal before the Income Tax Tribunal, who by its order dated 28th November, 2008 dismissed the appeal being devoid of any merit. The department, being aggrieved by the aforesaid orders, filed the present appeal under Section 260A of the Act, which was admitted on the following substantial question of law:-

"Whether the Income Tax Appellate Tribunal has erred in law in holding that interest under Section 234B of the Income Tax Act, 1961 was not chargeable as the payments were subject to deductions of tax under Section 195 of the Act?"

7. We have heard Mr. Arvind Vashisht and Mr. Hari Mohan Bhatia, the learned counsels for the Income Tax Department and Mr. Porus Kaka, the learned senior counsel assisted by Mr. Naresh Pant, Ms. Monika Tripathi and Mr. Manish Kanth, Advocates for the assessee.

8. Mr. Arvind Vashisht, the learned counsel for the Income Tax Department contended that in the facts and circumstances of the present case, Section 234B of the Act was applicable and that the assessee was liable to pay interest for non-payment of the advance tax. The learned counsel submitted that Section 234B of the Act was applicable to income falling under the head "Salaries". The learned counsel submitted that under Section 191 of the Act, in case of a failure to deduct tax at source by the employer, the tax had to be paid by the assessee and, in case of a short fall in the payment of advance tax by the assessee, interest was liable to be paid under Section 234B of the Act. The learned counsel submitted that even where the employer did not deduct the tax at source under Section 192 of the Act, the assessee still incurred the liability to pay interest under Section 234B of the Act. The learned counsel further submitted that there was no bar in imposing interest simultaneously on the employer under Section 201(1A) or on the assessee under Section 234B and that the department had an option to recover interest either from the employer or from the assessee. The learned counsel further submitted that the provisions of Section 234B are mandatory and, therefore, interest under all circumstances was liable to be paid by the assessee.

9. On the other hand, Mr. Porus Kaka, the learned senior counsel for the assessee contended that the advance tax is required to be paid in accordance with the provisions of Chapter XVII C of the Act. Under Section 191 of the Act, income tax is payable by the assessee at the stage of self-assessment and not by way of advance tax and that the tax is payable during the assessment proceedings. Under section 192(1) of the Act, the employer is obliged to deduct the tax at source on the income under the head "Salaries" at the rates in force on the estimated

income. The learned senior counsel for the assessee submitted that the assessee, who is a salaried employee, is not required to pay advance tax on his salaried income in as much as the obligation is upon the employer under Section 192 (1) of the Act to deduct the tax at source and if there was a short deduction of the tax at source then, in such a case, the department had a right to move against the employer under Section 201 of the Act for the recovery of the balance tax with interest as provided under Section 201(1A) of the Act. The learned senior counsel vehemently submitted that where any income was liable to tax deducted at source, Section 234B of the Act was not applicable. The learned senior counsel submitted that Section 191 of the Act only created a liability upon the assessee to pay the tax deductible at source, but the said provision does not include the liability for payment of interest chargeable under Section 234B on the assessee for failure on the part of his employer to deduct the tax at source.

10. At the outset, we would like to make it clear that the present controversy is confined on the question as to whether interest under Section 234B of the Act could be imposed by the department on the return of the income of the employee under the head "Salaries" on account of non deposit of advance tax by the employer under Section 192 (1) of the Act.

11. In order to appreciate the rival submissions of the learned counsel for the parties, it would be essential to deal with certain provisions of the Act on the subject in question.

12. Part A of Chapter XVII of the Act deals with the general provision for the collection and recovery of tax. Section 190(1) of the Act provides that notwithstanding the fact that the regular

assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction at source or by advance payment in accordance with the provisions of this Chapter. Section 191 of the Act provides that in the case of income in respect of which a provision is not made under this Chapter for deducting income tax at the time of payment and, in any case, where income tax has not been deducted in accordance with the provisions of this Chapter, income tax shall be payable by the assessee directly.

13. The provisions relating to deduction of tax at source are contained in Part B of Chapter XVII from Section 192 to 206B of the Act, whereas the provisions regarding advance payment of tax is contained in Part C of Chapter XVII from Section 207 to 219 of the Act. Section 2(1) of the Act defines advance tax as advance tax payable in accordance with the provisions of Chapter XVII C.

14. Section 192(1) of the Act provides that any person responsible for paying any income chargeable under the head “Salaries” shall at the time of payment, deduct income tax on the amount payable at the average rate of income tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year.

15. From the aforesaid, it is clear that tax in such a case would be deductible at source at the time when payment is being made to the payee and not thereafter at any subsequent stage. When tax is deducted at source, it would be treated as income received by the assessee as provided under Section 198 of the Act. Under Section 200 of the Act, the person who deducts the tax is

required to pay the same to the Central Government within the prescribed period and a certificate for the tax deducted is required to be issued under Section 203 to the person from whom the tax has been deducted.

16. Section 201 of the Act provides the consequences of failure to deduct the tax at source or failure to pay the tax deducted to the Government. If the person responsible to deduct the tax at source fails to deduct the whole or any part of the tax or after deducting fails to pay the tax as required under the Act, the person responsible would be treated as an assessee in default in respect of the tax. Section 201(1A) of the Act provides that without prejudice to the provision of sub-section (1), if such person does not deduct the tax or having deducted, failed to pay the tax, he or it shall be liable to pay simple interest @ 15 % per annum on the amount of such tax from the date on which it was deductible to the date on which it was actually paid. Under Section 204 of the Act, the expression “the person responsible for paying” in the case of payment of income chargeable under the head “Salaries” means, the employer.

17. Thus, from a combined reading of Section 190, 191, 192, 198, 200, 201, 203 and 204 of the Act, it is clear that as soon as tax is deducted at source by the person responsible to make the payment, the liability of the assessee to pay the tax gets discharged. If the tax is not deducted, it remains payable by the assessee direct as provided under Section 191 of the Act. Further, the liability to pay interest under Section 201(1A) is on the person who fails to deduct the tax at source is absolute and is upon the person responsible for deducting tax at source till the date it was actually paid.

18. When the tax is not deducted, the assessee is required to pay the tax directly which would be at the stage of self assessment and not by way of advance tax. The liability to pay the interest will however remain upon the person responsible to deduct the tax at source. The statute has taken care of the liability for the assessee under Section 191 of the Act to pay the tax deductible at source directly if it has not been deducted by the person responsible for making such deduction. The loss of interest on the amount of tax suffered by the revenue would be compensated by the person responsible for making such deduction, namely, in the present case, by the employer as provided under Section 201(1A) of the Act.

19. The provisions relating to advance payment of tax are contained in Part C of Chapter XVII of the Act. Under Section 207 of the Act, the tax shall be payable in advance during a financial year in accordance with the provisions of Section 208 to 219 of the Act, in respect of the total income of the assessee which would be chargeable to tax. Under Section 208 of the Act, advance tax is payable during the financial year where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter is Rs.5000/- or more. The amount of advance tax payable by an assessee in the financial year shall be computed in accordance with the method provided under Section 209 of the Act. While computing the advance tax payable under Section 209, the income tax calculated under clause (a), or clause (b) or clause (c) of Section 209 (1) is required to be reduced by the amount of income tax which would be deductible during the said financial year in accordance with the provisions of the Act, namely, under Section 192 to 194, 194A, 194C, 194D and 195.

20. Let us now consider the most important provision of Section 234B of the Act, which is required to be interpreted in the light of the provisions as stated aforesaid with regard to the deduction of tax at source and payment of advance tax by the assessee. For facility, the relevant portion of Section 234B of the Act reads as follows:-

“234B. (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 per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of [one and [one-fourth]] 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.]”

21. A perusal of the aforesaid provision indicates that the liability to pay interest is on the person who fails to pay advance tax under Section 208 of the Act and / or under Section 210 of the Act.

22. The question now is, whether the assessee who became liable to pay the tax as it was not deducted at source also became liable to pay interest under Section 234B of the Act?

23. The payment of tax and interest have been separately dealt with under the Income Tax Act. When a regular assessment is made and the assessee is found liable to pay more tax than the advance tax paid by him including the tax deducted at source, his liability to pay interest would arise under Section 220 (2) of the Act only after an issuance of a notice under Section 156 of the Act. The liability to pay the interest under Section 234B of the Act arises only if the assessee who is liable to pay advance tax under Section 208 of the Act has failed to pay such tax or where the advance tax paid by the assessee under the provisions of Section 210 is less than 90% of the assessed tax. Advance tax on the salary of an employee is not payable under Section 208 of the Act by the said assessee in as much as the obligation to deduct the tax at source is upon the employer under Section 192 of the Act. A statutory duty is imposed upon the employer to deduct the tax at source for paying any income chargeable under the head "Salaries" under Section 192 of the Act. The assessee cannot foresee that the tax deductible under a statutory duty imposed upon the employer would not be so deducted. The employee assessee proceeds on an assumption that the deduction of tax at source has statutorily been made or would be made and a certificate to that effect would be issued to him. Consequently, the liability to pay interest in respect of such deductible amount

is therefore clearly excluded to that extent. The statute has taken care of the liability to pay tax by the assessee under Section 191 of the Act directly if the tax has not been deducted at source. The liability to pay interest under Section 234B of the Act is different and distinct in as much as the interest could only be imposed on the person who had defaulted which in the present case is the employer for not making deduction of tax at source as required under Section 192 of the Act.

24. In the light of the aforesaid, we are of the view that the assessee was not liable to pay advance tax under Section 208 of the Act in as much as the tax at source was required to be deducted by the person responsible for paying any income chargeable under the head "Salaries" at the time of payment under Section 192 of the Act. The assessee only became liable to pay the tax directly under Section 191 of the Act since it was not deducted at source. The stage for making payment of tax could only arise at the stage of self assessment which is to be made in a later assessment year as is clear from Section 190 of the Act, whereas advance tax is liable to be paid in a financial year only and not thereafter. We are consequently of the view that if the employer fails to deduct the tax at source while paying any income chargeable under the head "Salaries", would be responsible for payment of interest under Section 201(1A) of the Act. The assessee would not be liable to pay interest under Section 234B of the Act since he was not liable to pay advance tax under Section 208 of the Act.

25. In the *Sedco International* (supra), a Division Bench of this Court held that interest was not payable by the assessee under Section 234B of the Act on account of non-deduction of tax at source by the employer. The reasoning laid down in the said

judgment and the principles enunciated therein are squarely applicable to the present facts and circumstances of the case and the said judgment applies on all force. We accordingly agree with the said decision.

26. Similarly, in **Commissioner of Income Tax & another Vs. Halliburton Offshore Services Inc. 2004 (271) I.T.R. 395** (Uttarakhand High Court) and another Division Bench of this Court relying upon the decision in **Sedco Forex (supra)** reiterated and held that the Income Tax Appellate Tribunal was justified in holding that interest under Section 234B of the Act could not be charged since the entire income of the assessee was subject to T.D.S. whereas interest was chargeable on the assessed tax as defined by Explanation (1) under Section 234B of the Act.

27. In **Commissioner of Income Tax, Tamil Nadu-I, Madras Vs. Madras Fertilizers Ltd. 1984 (149) I.T.R. 703**, a Division Bench of the Madras High Court held that whenever there was a possibility of deduction of tax at source, the person who had failed to deduct the tax at source was liable to pay interest and not the assessee as otherwise there would be charging of interest twice on payment of tax in relation to the same income.

28. In **Commissioner of Income Tax Vs. Ranoli Investment P. Ltd & others 1999 (235) I.T.R. 433**, a Division Bench of the Gujarat High Court also came to the same conclusion, namely, that the liability to pay interest is on the payer for non-deduction of tax under Section 215 of the Act and that the assessee was not liable to pay interest.

29. The learned counsel for the appellant placed reliance on the decisions in **Commissioner of Income Tax Vs. Anjum M. H. Ghaswala & others 2001 (252) I.T.R. 1 (S.C.)**, **Commissioner of Income Tax Vs. Hindustan Bulk Carriers 2003 (259) I.T.R. 449 (S.C.)** and the **Commissioner of Income Tax Vs. Kotak Mahindra Finance Ltd. 2004 (265) I.T.R. 119 (Bombay)**, in which it was held that the provision of Section 234B of the Act is mandatory. There is no quarrel with the principles enunciated in the aforesaid decisions. The provision of Section 234B of the Act is mandatory and absolute and runs throughout the period from the date when the tax was deductible till the date it was actually paid.

30. Looking into the scheme of Chapter XVII of the Act, it is clear that the provisions relating to payment of tax and payment of interest operate in two different areas. If the tax has not been deducted at source, the liability is upon the assessee to pay directly as per Section 191 of the Act and upon failure to deduct the tax at source, the liability is upon the employer to pay interest under Section 201 (1A) of the Act. An assessee whose income is liable to be deducted at source is not liable to pay advance tax under Section 208 of the Act and consequently is not liable to pay interest under Section 234B of the Act. The contention of the appellant that it is open to the department to proceed against the employer or against the employee for the recovery of interest is patently misconceived and, in any case, would not make the assessee jointly and severally liable to pay interest on the amount of tax which was not deducted at source on the income by the employer.

31. In the light of the aforesaid, we concur with the decision of the Division Bench of this Court in **Tide Water Marine International (supra)** and disagree with the order of the Division Bench dated 09.12.2010.

32. In the light of the aforesaid, we answer the reference that where the assessee's income is chargeable under the head "Salaries", the person responsible for paying any income chargeable under the head "Salaries" shall at the time of paying, deduct income tax at source and failure on his part entails an obligation to pay interest under Section 234B of the Act in order to compensate the loss incurred to the revenue and that upon failure on the part of the employer to deduct tax at source, the assessee only becomes liable to pay the tax directly under Section 191 of the Act and does not become liable to pay interest under Section 234B of the Act.

33. Since the question of charging of interest under Section 234B of the Act was remitted to the assessing officer by the appellate authority, we dismiss the appeals with the direction to the assessing officer to pass consequential orders on the issue pending before it on the basis of the decision given by this Bench.

(V. K. Bist, J.) (Prafulla C. Pant, J.) (Tarun Agarwala, J.)

Dated 07th April, 2011

LSR

