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

INCOME TAX APPEAL NO. 1037 OF 2008

The Director of Income Tax
(International Taxation),
107 Scindia House, N.M.Road,
Ballard Pier, Mumbai 400 038.

... Appellant

v/s

M/s.NGC Network Asia LLC,
C/o S.R.Batliboi & Co.,
18th floor, Express Towers,
Nariman Point, Mumbai 400 021.

... Respondent

Mr.Parag Vyas with Mr.P.S.Sahadevan for the appellant.

Mr.Paras Kaka with Mr.A.K.Jasani for the respondent.

CORAM: F.I.REBELLO AND
R.S.MOHITE, JJ.

DATED: 14TH JANUARY, 2009

P.C.:

1. The Revenue has come in appeal on the following question -

"Whether on the facts and in the circumstances of the case the Tribunal was right in law in upholding the assessee's contention that when the assessee is not liable to pay advance tax, there is no question of charging interest



under Section 234B of the Act by relying upon the decision in the case of Motorola Inc. rendered by Hon'ble Special Bench of ITAT, "A" Bench, Delhi, reported in (2005) 95 ITD 269."

2. Our attention is invited to the following findings recorded by the Tribunal in its order dated 12th December, 2007:

"Thus, in the given case, though assessee is assessable in respect of the income (though of course and it would not be if its quantum appeal is successful), it is not liable to pay advance tax, since tax is deductible by the payer M/s.NTIL, though not actually deducted by it."

3. The submission on behalf of the revenue is that, on failure of the payer to deduct the advance tax, it is the liability of the assessee to pay the advance tax even on the amount which had not been deducted under Section 195 of the Income Tax Act.

4. Our attention also has been invited to the observations of the Full Bench of this Court under the Indian Income Tax Act, 1922 in the case of **Commissioner**



of Income Tax, Bombay City-I v/s Daimler Benz A.G. reported in (1977) 108 ITR 961). One of the issues considered was the consequence of failure to pay advance tax by the assessee. The Full Bench held that the assessee was of the opinion that it was under no obligation to pay advance tax under Section 18A inasmuch as being a non-resident company its income fell under Section 18 of the Act, that is to say an income in respect of which the tax payable was liable to be deducted at source at the time of payment. The learned Full Bench of this Court took the view considering the discussion that the assessee would not be liable to pay the interest on the advance tax not so deducted.

5. Under the provisions of the present Act, the issue had come for consideration in the case of **Commissioner of Income Tax & anr. v/s Sedco Forex International Drilling Co. Ltd.**, reported in (2003) 264 ITR 320. One of the questions was, as to whether interest could be levied on the assessee under Section 234B of the Act in respect of tax which was not liable to be deducted at source. A learned Bench of the Uttaranchal High Court, after considering the provisions, held as under :

"Secondly, although section 191 of the Act is not overridden by sections 192, 208 and

209(1)(a)(d) of the Act, the scheme of sections 208 and 209 of the Act indicates that in order to compute advance tax the assessee has to, inter alia, estimate his current income and calculate the tax on such income by applying the rates in force. That under section 209(1)(d) the income-tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which the assessee cannot be faulted."

6. Relying on the judgment in **Sedco Forex International Drilling Co. Ltd.** (supra), a learned Bench of this Court was pleased to pass an order dated 16.7.2008 in Income Tax Appeal (L) No.1796 of 2007 in the case of the **Director of Income Tax (International Taxation) v/s M/s.Morgan Guarantee International Finance Corporation**, by applying the ratio of that judgment.

7. Our attention is also invited to the judgment of the Madras High Court, in the case of **Commissioner of Income-Tax, Tamil Nadu-I, Madras v/s Madras Fertilisers Ltd., reported in (1984) 149 ITR 703**, where the Madras



High Court took the view that the amount of tax deductible at source is to be taken into consideration to determine the liability to pay the interest under Section 215. In that case, the assessee had not paid advance tax on interest income. The payer of interest had not deducted the tax. The learned Bench of the Madras High Court was of the view that levy of interest under Section 215 on assessee was not justified.

8. We are in respectful agreement with the view taken in the case of **Commissioner of Income-Tax & anr. v/s Sedco Forex International Drilling Co. Ltd.**, by the Uttaranchal High Court. We are clearly of the opinion that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee-assessee.

9. Considering the submissions of both parties and the provisions of law, consequently the appeal is dismissed.

(R.S.MOHITE, J.)

(F.I.REBELLO, J.)