

**IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income-Tax)
(Original Side)**

Present:

The Hon'ble Mr. Justice Bhaskar Bhattacharya

And

The Hon'ble Mr. Justice Sambuddha Chakrabarti

I.T.A. No.199 of 2006

Emami Limited

Versus

Commissioner of Income-Tax, Central-I, Kolkata.

For the Appellant:

Mr. R. N. Bajoria,
Mr. J. P. Khaitan,
Mr. Sanjay Bhowmik,
Mr. Siddharth Das,
Mr. C. S. Das.

For the Respondent:

Md. Nizamuddin.

Heard on: 07.06.2011

Judgment on: 17th June, 2011.

Bhaskar Bhattacharya, J.:

This appeal under Section 260A of the Income-tax Act, 1961 is at the instance of an assessee and is directed against an order dated December 16, 2005 passed by the Income-tax Appellate Tribunal, "D" Bench, Kolkata, in Income-tax Appeal being ITA No.108/Kol/2005 for the Assessment Year 2001-02 and thereby allowing the appeal preferred by the Revenue and setting aside the order passed by the CIT (A).

Being dissatisfied, the assessee has come up with the present appeal.

The facts giving rise to filing of this appeal may be summed up thus:

- a) The assessee carries on business, *inter alia*, of manufacturing toiletries and medicines.
- b) As the assessee did not have any taxable income according to the normal computation provisions of the Income-tax Act for the Assessment Year 2001-02, the assessee had no liability under Section 115JB of the Act as the assessee was entitled to deduct a total amount of Rs.26.51 crore withdrawn from the revaluation reserve and credited to the profit and loss account in computing the book profit. After such deduction, the assessee was left with a book loss of Rs.5.87 crore and in such circumstances, the assessee had no liability to pay any advance tax under Section 208 of the Act for the Assessment Year 2001-02.
- c) The Chartered Accountants of the assessee in their report in form No.29B computing the book profit under Section 115JB for the Assessment Year 2001-02 stated that the assessee was not liable to tax under Section 115JB and such report along with its return for the Assessment Year 2001-02 was filed on October 31, 2001. According to the said return, the assessee did not have any taxable income either

according to the normal computation provisions or under Section 115JB.

- d) By the Finance Act, 2001, Section 115JB was amended with retrospective effect from April 01, 2001. In view of the aforesaid retrospective amendment, the assessee was not in a position to deduct the sum of Rs.26.51 crore withdrawn from the revaluation reserve. In such circumstances, the assessee recomputed the book profit under Section 115JB for the Assessment Year 2001-02 on the basis that the said sum of Rs.26.51 crore credited to the profit and loss account was not deductible. On such basis, the assessee worked out the amount of tax payable at Rs.1,55,62,511/- and paid the same on August 31, 2002.
- e) Subsequently, the assessee was advised that as the amendment had been made with retrospective effect, the only alternative available to the assessee was to challenge the legality and/or validity of the same by filing a writ-application. The assessee was advised that the income-tax authority could not adjudicate upon the legality and/or validity of the retrospective amendment and as such, the assessee was advised to file a revised return for the Assessment Year 2001-02 on the basis of the retrospectively amended Section 115JB without prejudice to its rights to challenge the legality and/or validity thereof.

- f) Accordingly, the assessee obtained from its Chartered Accountants a revised report in form No.29B on the basis of the amended section in supersession of the previous report and filed a revised return on March 31, 2003 on the basis that the sum of Rs.26.51 crore credited to the profit and loss account was not deductible in computing the book profit. According to the said revised return, the book profit amounted to Rs.20,63,65,711/- entailed a tax liability of Rs.1,74,89,494/-.
- g) After taking into consideration the tax deducted at source of Rs.19,26,983/- and the sum of Rs.1,55,62,511/- paid on August 31, 2002, the assessee was not required to make any further payment.
- h) On March 31, 2004, the Assessing Officer passed an order under Section 143(3)/115JB for the Assessment Year 2001-02. The Assessing Officer computed the tax liability under Section 115JB at the same figure as shown in the assessee's revised return. However, the Assessing Officer charged interest under Section 234B of Rs.44,00,937/- and interest under Section 234C of Rs.11,78,960/- since the assessee did not pay any advance tax with reference to the liability for tax under the retrospective amended Section 115JB.
- i) Being dissatisfied, the assessee preferred an appeal before the Commissioner of Income-tax who by an order dated October 11, 2004 allowed the same. The Commissioner of Income-tax (Appeals) held that

since the amended provision did not exist in the statute during the relevant previous year, namely, the Financial Year 2000-01, the assessee's contention that it had no liability under Section 208 to pay advance tax was well-founded. The CIT (A) held that since the interest under Sections 234B and 234C was chargeable only where the assessee was liable to pay advance tax, the assessee could not be said to have been in default.

- j) Being dissatisfied, the Assessing Officer preferred an appeal before the Income-tax Appellate Tribunal and by the order impugned herein, the said Tribunal allowed the appeal holding that the appellant was liable to pay interest under Sections 234B and 234C.
- k) Hence this appeal under Section 260A of the Act.

A Division Bench of this Court at the time of admission of this appeal formulated the following substantial questions of law for determination:

- “(a) Whether on a true and proper interpretation of the relevant provisions of Income-tax Act, 1961, the provisions relating to payment of advance tax are applicable in a case where the book profit is deemed to be the total income under Section 115JB.
- “(b) Whether and in any event, on a true and proper interpretation of the relevant provisions of the Income-tax Act, 1961, the

provisions of Sections 234B and 234C are attracted in a case where there was no liability to pay any advance tax under Section 208 on any of the due dates for payment of the advance tax installments and there is retrospective amendment of the law long after the close of the financial year imposing liability for tax.

“(c) Whether the Tribunal was justified in law in upholding the levy of interest of Rs.44,00,937/- under Section 234B and Rs.11,78,960/- under section 234C even though the appellant became liable to pay tax under Section 115JB by virtue of a retrospective amendment made long after the due dates for payment of the advance tax installments.”

Mr. Bajoria, the learned Senior Advocate appearing on behalf of the appellant, has, at the very outset, fairly conceded that in view of the decision of the Supreme Court in the case of Joint Commissioner of Income-tax Vs. Rolta India Ltd., reported in [2011] 330 ITR 470 (SC), the point No. (a) mentioned above should be answered in the affirmative and against his client.

Mr. Bajoria, however, contends that so far question No. (b) formulated above, the same should be answered in the negative and against the Revenue and consequently, the last question should also be answered in the negative and in favour of his client.

In view of the aforesaid stance taken by Mr. Bajoria, the principal question that arises for determination in this appeal is in view of the fact that the provision contained in Section 115JB of the Act was amended with retrospective operation with effect from April 1, 2001 by the Finance Act, 2002, whether the assessee was under any obligation to pay advance tax under Section 208 of the Act on the due dates mentioned in the Act for payment of advance tax so as to attract the provision contained in Section 234B and Section 234C of the Act.

In order to appreciate the question, it would be profitable to refer to the provision contained in Section 234B and Section 234C which are quoted below:

“234-B. 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 per cent of the assessed tax, the assessee shall be liable to pay simple interest at the rate of [one] 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 [or Section 153-A], the assessment so made shall be regarded as a regular assessment for the purposes of this section.

Explanation 3.—In Explanation 1 and 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 140-A 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 140-A 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.

(3) Where, as a result of an order of reassessment or recomputation under Section 147 [or Section 153-A], the amount on which interest was payable under sub-section (1) is increased, the assessee shall be liable to pay simple interest at the rate of [one] per cent for every month or part of a month comprised in the period commencing on the day following the date of determination of total income under sub-section (1) of Section 143 [and where a regular assessment is made as is referred to in sub-section (1) following the date of such regular

assessment] and ending on the date of the reassessment or recomputation under Section 147 [or Section 153-A], on the amount by which the tax on the total income determined on the basis of the reassessment or recomputation exceeds the tax on the total income determined under sub-section (1) of Section 143 or on the basis of the regular assessment aforesaid.

(4) Where, as a result of an order under Section 154 or Section 155 or Section 250 or Section 254 or Section 260 or Section 262 or Section 263 or Section 264 or an order of the Settlement Commission under sub-section (4) of Section 245-D, the amount on which interest was payable under sub-section (1) or sub-section (3) has been increased or reduced, as the case may be, the interest shall be increased or reduced accordingly, and—

(i) in a case where the interest is increased, the Assessing Officer shall serve on the assessee a notice of demand in the prescribed form specifying the sum payable and such notice of demand shall be deemed to be a notice under Section 156 and the provisions of this Act shall apply accordingly;

(ii) in a case where the interest is reduced, the excess interest paid, if any, shall be refunded.

(5) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.

“234-C. Interest for deferment of advance tax.—[(1) Where in any financial year,—

(a) **the company which is liable to pay advance tax under Section 208 has failed to pay such tax or—**

(i) **the advance tax paid by the company on its current income on or before the 15th day of June is less than fifteen**

per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of September is less than forty-five per cent of the tax due on the returned income or the amount of such advance tax paid on or before the 15th day of December is less than seventy-five per cent of the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of [one] per cent per month for a period of three months on the amount of the shortfall from fifteen per cent or forty-five per cent or seventy-five per cent, as the case may be, of the tax due on the returned income;

(ii) *the advance tax paid by the company on its current income on or before the 15th day of March is less than the tax due on the returned income, then, the company shall be liable to pay simple interest at the rate of [one] per cent on the amount of the shortfall from the tax due on the returned income:*

Provided *that if the advance tax paid by the company on its current income on or before the 15th day of June or the 15th day of September, is not less than twelve per cent or, as the case may be, thirty-six per cent of the tax due on the returned income, then, it shall not be liable to pay any interest on the amount of the shortfall on those dates;*

(b) *the assessee, other than a company, who is liable to pay advance tax under Section 208 has failed to pay such tax or,—*

(i) *the advance tax paid by the assessee on his current income on or before the 15th day of September is less than thirty per cent of the tax due on the returned income or the amount of such advance tax paid in or before the 15th day of December is less than sixty per cent of the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of 13[one] per cent per month for a period of three months on the amount of the shortfall from thirty*

per cent or, as the case may be, sixty per cent of the tax due on the returned income;

(ii) the advance tax paid by the assessee on his current income on or before the 15th day of March is less than the tax due on the returned income, then, the assessee shall be liable to pay simple interest at the rate of [one] per cent, on the amount of the shortfall from the tax due on the returned income:]

Provided *that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of underestimate or failure to estimate—*

(a) the amount of capital gains; or

(b) income of the nature referred to in sub-clause (ix) of clause (24) of Section 2,

and the assessee has paid the whole of the amount of tax payable in respect of income referred to in clause (a) or clause (b), as the case may be, had such income been a part of the total income, as part of the 15[remaining instalments of advance tax which are due or where no such instalments are due], by the 31st day of March of the financial year:

[Provided further *that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge under Section 2 of the Finance Act, 2000, as amended by the Taxation Laws (Amendment) Act, 2000 (10 of 2000), and the assessee has paid the amount of shortfall, on or before the 15th day of March, 2001 in respect of the instalment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000 and the 15th day of December, 2000:]*

[Provided also that nothing contained in this sub-section shall apply to any shortfall in the payment of the tax due on the returned income where such shortfall is on account of increase in the rate of surcharge under Section 2 of the Finance Act, 2000 as amended by the Taxation Laws (Amendment) Act, 2001 and the assessee has paid the amount of shortfall on or before the 15th day of March, 2001 in respect of the instalment of advance tax due on the 15th day of June, 2000, the 15th day of September, 2000 and 15th day of December, 2000.]

Explanation.—In this section, “tax due on the returned income” means 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 tax deductible or collectible 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.

(2) The provisions of this section shall apply in respect of assessments for the assessment year commencing on the 1st day of April, 1989 and subsequent assessment years.”

(Emphasis supplied by us).

A plain reading of the aforesaid provisions makes it abundantly clear that those provisions are mandatory in nature and there is no scope of waiving of the said provisions.

However, in order to attract the provisions contained in Sections 234B and 234C of the Act, it must be established that the assessee had the liability to

pay advance tax as provided in Sections 207 and 208 of the Act within the time prescribed under Section 211 of the Act. Those provisions are quoted below:

“207. Liability for payment of advance tax.—Tax shall be payable in advance during any financial year, in accordance with the provisions of Sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as “current income”.

“208. Conditions of liability to pay advance tax.—Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is [five thousand rupees] or more.

“211. Instalments of advance tax and due dates.—¹[(1) Advance tax on the current income calculated in the manner laid down in Section 209 shall be payable by—

(a) all the companies, who are liable to pay the same, in four instalments during each financial year and the due date of each instalment and the amount of such instalment shall be as specified in Table I below:

TABLE I

<i>Due date of instalment</i>	<i>Amount payable</i>
<i>On or before the 15th June</i>	<i>Not less than fifteen per cent of such advance tax.</i>
<i>On or before the 15th September</i>	<i>Not less than forty-five per cent</i>

	<i>of such advance tax, as reduced by the amount, if any, paid in the earlier instalment.</i>
<i>On or before the 15th December</i>	<i>Not less than seventy-five per cent of such advance tax, as reduced by the amount or amounts, if any, paid in the earlier instalment or instalments.</i>
<i>On or before the 15th March</i>	<i>The whole amount of such advance tax as reduced by the amount or amounts, if any, paid in the earlier instalment or instalments.</i>

(b) all the assessees (other than companies), who are liable to pay the same, in three instalments during each financial year and the due date of each instalment and the amount of such instalment shall be as specified in Table II below:

TABLE II

<i>Due date of instalment</i>	<i>Amount payable</i>
<i>On or before the 15th September</i>	<i>Not less than thirty per cent of such advance tax.</i>
<i>On or before the 15th December</i>	<i>Not less than sixty per cent of such advance tax, as reduced by the amount, if any, paid in the earlier instalment.</i>
<i>On or before the 15th March</i>	<i>The whole amount of such advance tax as reduced by the amount or amounts, if any, paid in the earlier instalment or instalments:</i>

Provided *that any amount paid by way of advance tax on or before the 31st day of March shall also be treated as advance tax paid*

during the financial year ending on that day for all the purposes of this Act.]

(2) If the notice of demand issued under Section 156 in pursuance of an order of the Assessing Officer under sub-section (3) or sub-section (4) of Section 210 is served after any of the due dates specified in sub-section (1), the appropriate part or, as the case may be, the whole of the amount of the advance tax specified in such notice shall be payable on or before each of such of those dates as fall after the date of service of the notice of demand.”

(Emphasis supplied by us).

A mere reading of those provisions leaves no doubt that the advance tax is an amount payable in advance during any Financial Year in accordance with the provisions of the Act in respect of the total income of the assessee which would be chargeable to tax for the Assessment Year immediately following that Financial Year. Thus, in order to hold an assessee liable for payment of advance tax, the liability to pay such tax must exist on the last date of payment of advance tax as provided under the Act or at least on the last date of the Financial Year preceding the Assessment Year in question. If such liability arises subsequently when the last date of payment of advance tax or even the last date of the Financial Year preceding the assessment year is over, it is inappropriate suggest that still the assessee had the liability to pay “advance tax” within the meaning of the Act.

In the case before us, the last date of the relevant Financial Year was March 31, 2001 and on that day, admittedly, the appellant had no liability to pay any amount of advance tax in accordance with the then law prevailing in the country. Consequently, the appellant paid no advance tax and submitted its regular return on October 31, 2001 within the time fixed by law wherein it declared its total income and the book profit both as nil. However, consequent to the amendment of the provisions contained in Section 115JB of the Act by virtue of Finance Act, 2002 which was published in the official gazette on May 11, 2002 giving retrospective effect to the amendment from April 1, 2001, the appellant first voluntarily paid a sum of Rs.1,55,62,511/- on account of the tax payable on book profit as provided in amended provision of Section 115 JB and then filed its revised return of March 31, 2003 declaring its business income as nil but the book profit under Section 115JB as Rs.20,63,65,711/-. The Assessing Officer accepted such return of income but imposed interest under Section 234B and 234C of the Act amounting to Rs.44,00,937/- and Rs.11,78,960/- respectively.

In our opinion, the amended provision of Section 115JB having come into force with effect from April 1, 2001, the appellant cannot be held defaulter of payment of advance tax. As pointed out earlier, on the last date of the Financial Year preceding the relevant Assessment Year, as the book profit of the appellant in accordance with the then provision of law was nil, we cannot conceive of any “advance tax” which in essence is payable within the last day of the financial year preceding the relevant Assessment Year as provided in Sections 207 and 208 or

within the dates indicated in Section 211 of the Act which inevitably falls within the last date of Financial Year preceding the relevant Assessment Year. Consequently, the assessee cannot be branded as a defaulter in payment of advance tax as mentioned above.

At this stage, we may profitably rely upon the observations of the Supreme Court in the case of *Star India P. Ltd Vs. Commissioner of Central Excise*, reported in (2006) 280 ITR 321, strongly relied upon by Mr. Bajoria, where the Apex Court in the context of imposition of Service Tax by the Finance Act, 2002 with retrospective effect held that that the liability to pay interest would arise only on default and is really in the nature of quasi-punishment and thus, although the liability to pay tax arose due to retrospective effect of law, same should not entail the punishment of payment of interest.

Although Mr. Nizamuddin, the learned Counsel appearing on behalf of the Revenue, in this connection, strongly relied upon the decision of the Supreme Court in the case of *Joint Commissioner of Income Tax vs. Rolta India Ltd.*, reported in (2011) 330 ITR 470, we find that in that case the question was whether interest under Section 234B of the Act could be charged on the tax calculated on the book profit under Section 115JA and in other words, whether advance tax was at all payable on book profits under Section 115JA of the Act. The Supreme Court answered the said question in the affirmative and further held that the provisions of interest on default as provided in Sections 234B and

234C would also apply. We have already pointed out that Mr. Bajoria, at the very outset, conceded that the said decision should be applied for answering the first question formulated in this appeal against his client. In our opinion, the said decision is not relevant for considering the second and the third questions as to whether an assessee can be said to be a defaulter in payment of advance tax if he had no liability to make payment of such tax on the last date of a Financial Year preceding the relevant Assessment Year as such question did not arise in the said case before the Supreme Court.

It appears that the learned Tribunal has not at all considered the aforesaid aspect as to the liability of the assessee to make payment of the advance tax on the last day of the Financial Year i.e. March 31, 2001 when its book profit was nil according to the then law of the land. The various decisions of the other High Courts and the Tribunals relied upon by the Tribunal did not effectively consider the question whether even in a case like the present one where on the last date of the Financial Year preceding the relevant Assessment Year, the assessee had no liability to pay advance tax, he would be nevertheless asked to pay interest in terms of Section 234B and Section 234C of the Act for default in making payment of tax in advance which was physically impossible.

We, therefore, partly allow the appeal by answering the first question in the affirmative and against the assessee and the second and the third questions in the negative and against the Revenue.

The order passed by the Tribunal is, thus, set aside to the extent indicated above.

In the facts and circumstances, there will be, however, no order as to costs.

(Bhaskar Bhattacharya, J.)

I agree.

(Sambuddha Chakrabarti, J.)