E. Merck (I) Ltd vs C.I.T. B.C.Iii on 10 February, 2017

Author: M.S. Sanklecha

Bench: M.S. Sanklecha, A.K. Menon

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

INCOME TAX REFERENCE NO. 224 OF 1999

M/s. E. Merck (India) Ltd.
Shivsagar Estage,
Dr. A.B. Road, Worli

Bombay -18 .. Applicant

v/s.

Commissioner of Income Tax,

Bombay City-III, Bombay .. Respondent

Ms. Vissanji a/w Mr. S.J. Mehta for the applicant
None for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

RESERVED ON : 3rd FEBRUARY, 2017.

PRONOUNCED ON : 10th FEBRUARY, 2017

JUDGEMENT :

- (Per M.S. Sanklecha, J)

1. None appears for the respondent Revenue inspite of service. In fact, on 29th November, 2016 Mr. Charanjeet Chanderpal, a panel Counsel had appeared and sought time. However, he had not filed Vakalatnama on behalf of the Revenue. We had while granting time, made it clear that before the next date of hearing, the Advocate appearing for the Revenue should file his Vakalatnama. On 31 st Uday S. Jagtap 1 of 17 224-1999-ITR-Judgement=.doc January, 2017, when the Reference was taken up for hearing, Mr. Chanderpal, learned panel Counsel informed us that even after informing the Officers of the Revenue, no Vakalatnma in his favour has been executed. In the above view, it appears that the Revenue is not interested in opposing this Reference. Therefore, we proceed to hear the applicant in support of the present Reference.

2. This Reference under Section 256(1) of the Income Tax Act, 1961 (the Act) by the Income Tax Appellate Tribunal (the Tribunal) seeks our opinion on the following substantial questions of law :-

> (i) Whether on the facts and in the circumstances of the case, there was denial of the assessee's liability to interest under Section 215 of the I.T. Act, 1961, and thereby an appeal there against was maintainable to the CIT(A)?
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> (ii) If the answer to the aforesaid question is in affirmative, whether the assessee was liable to pay interest u/s 215 of the Act?

3. This Reference relates to the Assessment Year 1976-77. The previous year relevant to the subject Assessment Year is 1 st January, 1995 to 31st December, 1975.

4. The facts as set out in the statement of case reads as under :-

Uday S. Jagtap 2 of 17 224-1999-ITR-Judgement=.doc "2. The relevant facts are in the way following. An estimate of advance tax was filed at 'NIL' on 15.12.75. The assessment was, however, completed on a total income of Rs.28,88,820/-

and the tax thereon was worked out at Rs.18,19,956/-. Since there was no advance tax payment, the ITO levied an interest on Rs.7,33,346/- u/s 215 of the Income-Tax Act, 1961. In appeal, the levy of interest was challenged by the assessee on the ground that there was no liability to pay interest. On merits. It was submitted that the profits and gains of the business shown at Rs.30 lacs were subject to brought forward deficiency u/s 80J at Rs.60,28,000/- and, therefore, there was no positive income. It was also contended that it was only after the amendment was brought about by the Finance (No.2) Act, 1980, the provisions of Section 80J, the assessee's claim u/s 80J was denied

and, therefore, the assessee should not be penalised. The CIT(A) found that relief quantified for the assessment year 1975-76 was in accordance with the decision fo the Calcutta High Court in Century Enka which came to Rs.30,47,372/- besides the claim for the year under consideration at Rs.32,19,640/-, as against which the assessee's income before the adjustment u/s 80J was Rs.31,25,153/-. He held that since the assessee had determined the relief in accordance with the Calcutta High Court decision, the assessee could not be found fault with and, therefore, the estimate filed by it could not be considered to be an under-estimate. He also observed that as the assessee denied its liability to pay interest, the appeal was maintainable. On the whole, the assessee's appeal came to be allowed.

3. The Tribunal, after elaborate discussion on the issue, Uday S. Jagtap 3 of 17 224-1999-ITR-Judgement=.doc came to the conclusion that the case of the assessee could not be one of denial of its liability to the tax including levy of interest, and that it was liable under the Act. In any case, it was held, the reasonableness or otherwise of the circumstances is not a factor leading to the denial of the assessee's liability to levy of interest u/s 215. The Tribunal observed that in the instant case, the assessee had preferred an appeal to the CIT(A) on the ground that it was not liable to advance tax at all or that its income was outside the purview of advance tax. The principal ground of attack of the asessee, it was observed, was that it had reasonable cause for filing the estimate at 'nil' or that the assessment has resulted into income liable to advance tax because of a lower deduction u/s 80J. These facts, according to the Tribunal, could not be taken as denial of assessee's liability to interest u/s 215 of the Act. In view of the aforesaid, the Tribunal reversed the order of the first appellate authority and left it open to the assessee to apply to the departmental authorities for waiver or reduction of interest u/s 215 of the Act.

5. Regarding Question (i) :-

> (a) The issue of appealability on the question of interest under Section 215 of the Act in the context of Section 246(1)(c) of the Act as in force in the subject assessment year is no longer res integra. This is so as the issue stands concluded by the decision of the Apex Court in Central Provinces Manganese Ore Co. Ltd. vs. Commissioner of Uday S. Jagtap 4 of 17 224-1999-ITR-Judgement=.doc Income Tax, 160 ITR 961. In the above case, the Apex Court has held that an appeal under Section 246(1)(c) of the Act to the extent interest is charged under Section 215 of the Act is appealable, provided the assessee denies his liability to be assessed and / or to levy of tax and interest thereon.
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> (b) It would be appropriate to reproduce the relevant extract of the Apex Court decision in the case of Central Provinces Manganese Ore Co. Ltd.(supra) as under :-
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> "Now the question is whether orders levying interest under sub- s. (8) of S.139 and under S.215 are appealable under S.246 of the Income-tax Act. Cl. (c) of S.246 provides an appeal against an order where the assessee denies his liability to be assessed under the Act or 147 against any assessment order under sub-s. (3) of S.143 or S.144, where the assessee objects to the amount of income assessed or to the

amount of tax determined or to the amount of loss computed or to the status under which he is assessed. Inasmuch as the levy of interest is a part of the process of assessment, it is open to an assessee to dispute the levy in appeal provided he limits himself to the ground that he is not liable to the levy at all. In this connection we may usefully refer to the decision of the Karnataka High Court where in a judgment in National Products v. Commissioner of Income-tax, Mysore, [1977] 108 ITR 935. Govind Bhat, C.J., explained the position in regard to the levy of interest under S.139 and under S.215. After referring to the earlier cases on the point he observed:-

"All decided cases except one have uniformly taken the view that levy of interest under Section 18A(6) or section 18A(8) of the 1922 Act or levy of interest under Section 215 of the Act is not appealable but in the appeal against a regular assessment, it is open to the assessee to take every contention which, if accepted, must result in the Income-tax Officer holding that there was no liability to Uday S. Jagtap 5 of 17 224-1999-ITR-Judgement=.doc pay advance tax and, therefore, there was no liability to pay penal interest. In other words, it is open to an assessee to contend in the appeal against an order of assessment that he is not liable to pay any advance tax at all or the amount of advance tax determined as payable by the Income-tax Officer is not correct; but if the assessee does not dispute the amount of advance tax determined as payable by the Income-tax Officer, he merely cannot object to the levy of penal interest or question its quantum. .....

The levy of penal interest under Section 139 or Section 215 is made in the regular assessment order; the demand issued pursuant to the assessment order is for the total amount of liability imposed inclusive of tax and interest. While levy of penal interest under Section 18A of the 1922 Act up to 1st April 1952, was automatic as was noticed by Chagla, C.J. in Ramnath's case [1955] 27 ITR 192 (Bom.), under the Act such levy is not automatic; discretion is vested in the Income-tax Officer to waive or reduce penal interest in the cases and circumstances mentioned in rule 117A and rule 40 of the Income-tax Rules, 1962. If the case of the assessee falls within the scope of the 148 said Rules, the Income-tax Officer is bound in law to consider whether the assessee was entitled to waiver or reduction of interest. It is, therefore, clear that levy of penal interest under Sections 139 and 215 is part of assessment. When such penal interest is levied the assessee is "assessed", meaning thereby, he is subjected to the procedure for ascertaining and imposing liability on him. If the assessee denies his liability to be assessed under the Act, he has a right of appeal to the Appellate Assistant Commissioner against the order of assessment. Where penal interest is levied under Section 215 by the order or assessment, the assessee may altogether deny his liability to pay such interest on the ground that he was not liable to pay advance tax at all or that the amount of advance tax determined by the Income-tax Officer as payable ought to be reduced. In either case he denies his liability, wholly or partially, to be assessed. Similarly, where interest is levied under Section 139 of the Act, the assessee may deny his liability to pay such interest on the ground that the Uday S. Jagtap 6 of 17 224-1999-ITR-Judgement=.doc return was not belated or that

the penal provision was not attracted at all to his case. In such a case also he denies his liability to be assessed to interest."

(c) From the above observations, it is clear that an appeal would lie against the charging of interest under Section 215 of the Act only if the appellant assessee denies his liability to pay the advance tax at all or challenges the quantum of advance tax determined by the Assessing Officer. Therefore, an appeal simplicitor to reduce the interest or waive the interest without challenging the determination of the advance tax either in whole or in part, would not be maintainable.

Therefore, if the amount of advance tax is not disputed, the respondent cannot challenge only the levy of interest. This understanding of our is fortified by the decisions of this Court in Gammon India Vs. CIT 202 ITR 986 & Phaltan Sugar Vs. Commissioner of Income Tax, 208 ITR 989 wherein even the Advocates for the assessee conceded the position that no appeal would lie only against levy of interest under Section 215 of the Act. It is made clear that we have independently applied our mind to the decision of Central Provinces Manganese Ore Co. Ltd.

(supra) to reach to the conclusion that no appeal under Section 246(1)

(c) of the Act would lie only against levy of interest. As we are conscious that the above two decisions of this Court proceeded on concession of the Counsel for the assessee therein.

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(d) However, we note from the statement of case that

appeal which was filed by the applicant assessee to the CIT(A) was not restricted only to the interest levied under Section 215 of the Act but also to the quantification of the advance tax payable. This is evident as applicant's case before the CIT(A) was that no advance tax was payable in view of the decision of the Calcutta High Court in Century Enka Ltd.

Vs. ITO, 107 ITR 123, which held that Rule 19A of the Income Tax Rules, 1962, which provided for computation of capital employed for purposes of Section 80J of the Act, ultra vires. In fact, the CIT(A) deleted the demand on account of interest under Section 215 of the Act as a consequence of holding that in view of the Calcutta High Court decision in Century Enka (supra), no fault could be found with the applicant assessee in not paying advance tax or in estimating the advance tax payable

as Nil on 15th December, 1975.

(e) Therefore, the appeal which was filed before the CIT(A) by the applicant falls within the ratio of Central Provinces Manganese Ore Co. Ltd.(supra). Thus, this question is to be answered in favour of the applicant assessee.

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6. Regarding Question (ii) :-

(a) Ms. Vissanji, learned Counsel appearing in support of the applicant assessee contended that the applicant was not liable to pay any interest under Section 215 of the Act for non-payment of advance tax in December, 1975. According to the applicant, in December, 1976 when they estimated the advance tax to be paid and filed the estimate thereof, they proceeded to do so on the basis of the understanding of the law prevailing at that time. More particularly, the decision of the Calcutta High Court in Century Enka (supra) wherein it was held that Rule 19A of the Income Tax Rules was ultra vires the Act. Therefore, the computation of capital employed has to be worked out by including also borrowed capital for computing deduction under Section 80J of the Act. This the applicant had done in December, 1975 and on that basis estimated its advance tax. At that time, the estimate was arrived at on the basis of the law as was in force. According to Ms. Vissanji, the liability to pay the advance tax only arose on account of retrospective amendment made to Section 80J of the Act by Finance No.2 Act, 1980.

(b) It is submitted on behalf of the applicant that such retrospective amendment would not invite the liability to pay interest under Section 215 of the Act. In support, Ms. Vissanji relied upon the Uday S. Jagtap 9 of 17 224-1999-ITR-Judgement=.doc following decisions :-

i. Commissioner of Income Tax Vs. Revati Equipment Ltd. 298 ITR 67 (Madras).

ii. Enami Ltd. Vs. Commissioner of Income Tax, 337 ITR 470 (Calcutta).

iii. Commissioner of Income Tax Vs. JSW Energy Ltd., 379 ITR 36 (Bombay).

iv. Commissioner of Income Tax Vs. SAB Industries, Chandigarh (P&H).

v. Hindustan Construction Co. Ltd. Vs. Commissioner of Income Tax, 208 ITR 298 (Bombay).

vi. Commissioner of Income Tax Vs. Gurkartar Steels Pvt. Ltd. vs. 209 ITR 634(P&H).

vii. Prime Securities Ltd. Vs. Asstt.DCIT, 333 ITR 464 (Bombay). viii. Commissioner of Income Tax Vs. Rainbow Industries, 277 ITR 507 (Gujarat).

ix. ACIT Vs. EMMTICT Engineering Ltd. 316 ITR 153 (Gujrat)

(c) Before considering the above decisions, we must note that one additional feature in this case is that the amendment as also the decision of Calcutta High Court in Century Enka (supra) was subject of consideration by the Apex Court in Lohia Machines Ltd. Vs. Commissioner of Income Tax, 152 ITR 308. By the above decision, the Apex Court not only upheld the validity of amendment and overruled the decision in Century Enka (supra), but also held that the Uday S. Jagtap 10 of 17 224-1999-ITR-Judgement=.doc amendment was only clarificatory. Therefore, the law as it stood was always as declared by the amendment.

(d) All the decisions referred to above relate to the levy of interest under Section 234B of the Act and not in respect of Section 215 of the Act, with which we are concerned. Be that as it may, the decisions referred to at Sr. Nos. (i) to (iv), the liability to interest was deleted as the obligation to pay the amount of advance tax arose out of a retrospective amendment done to the Act by the Parliament. A common thread running in all the aforesaid decisions is that the liability to pay the tax on the income earned arose subsequent to the last date for payment of advance tax. In this case, we are not concerned with any amendment made by Finance No.2 Act, 1980 to Section 80J of the Act. As in the facts of this case, the liability to pay advance tax did not arise only on account of the retrospective amendment but the obligation was very much in existence when the obligation to pay advance tax on 15 th December, 1975 arose, on the basis of Section 80J of the Act as it stood even before the amendment.

This for the reason that the Apex Court in Lohia Machines (supra) while upholding the challenge to the amendment made in 1980 to Section 80J of the Act with retrospective effect from 1972 also observed that the amendment was merely clarificatory and Section 80J of the Act Uday S. Jagtap 11 of 17 224-1999-ITR-Judgement=.doc even dehors the amendment would have to be read in the same manner in which the amendment is understood. Thus, the aforesaid cases relied upon by the applicant assessee in view of the above distinguishing feature would have no application to the facts of the present case. It is axiomatic that a decision of the Supreme Court does not make the law but it only declares the law as always existing since its inception. This has been repeatedly held by the Apex Court [see in B.A. Linga Reddy Vs. Karnataka State Corporation, (2015) 4 SCC 515 (para 35)]. In Lohia Machines (supra), the Apex Court not only upheld the amendment of 1980 to Section 80J of the Act, incorporating the provisions of Rule 19A of the Rules, but it also held that the amendment was declaratory. Thus, holding that the reading of Section 80J of the Act prior to the amendment is no different from it reading post amendment. Further, the decision of the Calcutta High Court in Century Enka (supra) was also overruled. Thus, the basic reason for not paying the advance tax on the part of the applicant never existed.

(e) The decision at Sr. No.(v) in the case of Hindustan Construction Co. Ltd. (supra) of this Court relied upon by the applicant does not in our view assist the applicant. All that the decision did was to restore the issue to the Tribunal to decide the leviability of the Uday S. Jagtap 12 of 17 224-1999-ITR-Judgement=.doc interest under Section 215 of the Act taking into account the decision of the Apex Court in Central Provinces Manganese Ore Co. Ltd.(supra).

This was for the reason that the decision of the Tribunal was rendered prior to the decision of the Apex Court in the Central Provinces Manganese Ore Co. Ltd.(supra).

(f) The decision in Gurkartar Steels Pvt. Ltd. (supra) of Punjab & Haryana High Court at Sr. No. (vi) above has no application to the present facts for the reason that it was rendered on an application under Section 256(2) of the Act. The Court refused to direct the Tribunal to frame a question for its consideration as the Tribunal had decided the issue on facts arising before it and no question of law arose. Thus, the consideration therein would be entirely different from the consideration which would apply while deciding a substantial question of law in a Reference made by the Tribunal. Thus, this decision is in our view is also of no assistance to the applicant.

(g) The decision at Sr. No.(vii) of this Court in Prime Securities Ltd.

(supra) proceeded on the factual aspect that it is not possible for an assessee to anticipate future events to determine payment of advance tax. In the present facts, there was no occasion to anticipate any future events. A proper understanding of Section 80J of the Act at the time when the occasion to estimate and pay advance tax arose, would Uday S. Jagtap 13 of 17 224-1999-ITR-Judgement=.doc have resulted in a lower deduction available under Section 80J of the Act and payment of advance tax. In view of the Apex Court decision in Lohia Machines (supra) there has been no change in the law as were existing on 15th December, 1975 when the applicant filed an estimate of Nil advance tax and on 25th January, 1985 when it rendered its decision. In the present facts, it is not the applicant's case that there is any subsequent change in facts which could not be anticipated at the time of determining the advance tax. A subsequent decision of the Apex Court merely declaring the law cannot be categorized as an unanticipated fact. Therefore, the above decision also does not assist the applicant.

(h) The next decision at Sr. No.(viii) of Gujarat High Court in Rainbow Industries Pvt. Ltd. (supra), the demand for interest on short payment of advance tax was deleted by the Tribunal. In a Reference before Gujarat High Court at the instance of the Revenue, the Court held that the Tribunal as a matter of fact had found that the advance tax liability was determined by the assessee therein on the basis of its method of valuing closing stock which it had followed even for the earlier assessment years. Therefore, in the absence of the Revenue pointing out that the figures adopted for computing the income was incorrect, the levy of interest could not be sustained. Therefore, the Uday S. Jagtap 14 of 17 224-1999-ITR-Judgement=.doc High Court proceeded with the issue on finding of fact by the Tribunal to conclude that the assessee therein could not have anticipated when it filed its estimate and / or paid advance tax that the valuation of the closing stock would be enhanced leading to higher determination of tax. Similarly, the decision at Sr. No.(ix) of the Gujarat High Court in EMMTILI Engineering Ltd. (surpa) upheld the deletion of interest under Section 215 of the Act done by the Tribunal. It upheld the view of the Tribunal that no interest could be levied on account of the additions made in the assessment order as the same is highly debatable and could not have been foreseen at the time of filing the advance tax.

Therefore, both the above decisions were rendered in the context of finding of facts by the Tribunal.

(i) Moreover, both of the above decisions of Gujarat High Court completely ignore sub-section (4) of Section 215 of the Act, which provides for reduction or waiver of the interest payable by the assessee under Section 215 of the Act. Therefore, both the above decisions of the Gujarat High Court most

respectfully in our view were rendered sub-silentio. It is this sub-section (4) of Section 215 which inter alia takes into account the circumstances beyond the control of the assessee for having paid less advance tax than that finally determined to be payable. The argument of hardship, bona fide conduct etc. would be Uday S. Jagtap 15 of 17 224-1999-ITR-Judgement=.doc appropriately considered when applying sub-section (4) of Section 215 of the Act while considering waiver / reduction of interest payable under Section 215 of the Act. These arguments of hardship etc. cannot be subject of consideration while interpreting a fiscal legislation.

There is no place for any equity while interpreting a fiscal legislation.

The Apex Court in Sales Tax Commissioner Vs. Modi Sugar Mills, AIR (1961) 1047 (SC) has observed that "In interpreting a taxing statute, equitable consideration are entirely out of place." Therefore, the submission of the applicant assessee that non-payment of advance tax was on account of circumstances beyond the control of the assessee and for a reasonable cause, would not warrant deletion of interest payable on account of short payment / non-payment of the advance tax while considering the Sub-section (1) of Section 215 of the Act. The considerations may have been different if we were considering an application of waiver under Sub-section (4) of Section 215 of the Act.

(j) In the above view the applicant assessee is liable to pay the interest under Section 215 of the Act as held by the Tribunal.

7. In the above view, we answer the questions posed for our opinion as under :-

> (a) Question no.(i) in the affirmative i.e. in favour of the applicant Uday S. Jagtap 16 of 17 224-1999-ITR-Judgement=.doc assessee and against the Revenue.
>
> (b) Question (ii) in the affirmative i.e. in favour of the respondent Revenue and against the applicant assessee.

8. In view of the above, the Reference is disposed of in the above terms.

(A.K. MENON, J.) (M.S. SANKLECHA, J.)

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