

**Court No.32**

**Income Tax Appeal No.81 of 2002**

Commissioner of Income-Tax-II, Kanpur Vs. M/s Deep  
Awadh Hotels (P.) Ltd., Kanpur

**Income Tax Appeal No.82 of 2002**

Commissioner of Income Tax-II, Kanpur Vs. M/s Deep  
Awadh Hotels (P.) Ltd., Kanpur

**Hon. Sunil Ambwani, J.**

**Hon. Pankaj Mithal, J.**

We have heard Shri A.N. Mahajan, learned counsel for the department. Shri Ashish Bansal appears for the assessee.

In both the income tax appeal Nos.81 and 82 of 2002 the department has raised following substantial questions of law to be considered by the Court:-

*"1. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in holding that the assessee was an Industrial Undertaking for the purpose of business of manufacture or production of any article or thing and consequently entitled to investment allowance under section 32A (1) of the Income Tax Act, 1961?*

*2. Whether on the facts and in the circumstances of the case, the order of the Commissioner of Income Tax (Appeals) is liable to be set aside when in fact machinery installed in Hotel is not entitled to Investment Allowance?*

*3. Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was correct in law in deleting interest under section 234B of the Income Tax Act, 1961 particularly when charging of interest under that section is mandatory for default in payment of advance tax?"*

So far as the first question is concerned, we find that the Tribunal has set aside the order of the CIT (A) and A.O. and has remanded the matter to be decided in accordance with law. The appeal against the remand order unless it decides any question or raise any substantial question of law is not ordinarily maintainable. The submission that the assessing

authority is bound by the judgment in Anand Theater's case as there is a direction that the issue may be decided afresh in view of the decision of the Supreme Court in Anand Theater, does not appear to have any substance in as much as the Tribunal has clearly stated that the A.O. will decide the matter in view of the case of the Anand Theater, as per law. If there is any other view taken by the Supreme Court or any larger bench decision covers the issue, the A.O. should not ignore it.

Shri A.N. Mahajan submits that in Hotel and Allied Traders Pvt. Ltd. Vs. Commissioner of Income Tax, 2000 (245) ITR 538 the Supreme Court has decided the question regarding investment allowance under Section 32A of the Income Tax Act. We are of the opinion that the A.O. is required to consider all the cases, which are cited before him.

On the third question it is submitted by Shri A.N. Mahajan that in para 16 of the order of the Tribunal the plea that the interest under Section 234 (B) cannot be charged unless it is included in the assessment order or in the extra sheet or additional sheet attached with the assessment order in relation to computation and charging of interest. Shri Mahajan submits that the Tribunal has wrongly relied upon Ranchi Club Ltd. Vs. Commissioner of Income Tax & Ors. is not correct. He submits that the charging of interest under Section 243A, 243B and 243C is mandatory. He has relied upon the judgments in CIT Vs. Anjum M.H. Ghaswala & Ors., 2001 (252) ITR 1, which has been followed by the Kerala High Court in Dr. R.P. Patel Vs. Commissioner of Income Tax, Kottayam, (2009) 182 Taxman 305 (Ker.) and in M/s Nilgiri Sleepers (Pvt.) Ltd. Vs. the Commissioner of Income Tax I, Patna, 2010 Tax LR 105 (Pat.). A perusal of the judgments cited by Shri Mahajan leads to the conclusion that the charging of interest after the amendment of the statute by

Direct Tax Laws (Amendment Act), 1987 w.e.f. 1.4.1989 payable under Section 234A, 243B, and 243C is mandatory and no discretion is vested in the assessing officer in this regard. The provisions prior to the amendment gave discretion in regard to waiver of interest. Once interest is mandatory the liability falls automatically on the assessee on default. The rest is only working out the amount.

In *Kalyan Kumar Ray Vs. CIT*, (1996) 191 ITR 654 it was held that calculation part of tax payable need not be done in the assessment order itself. It can be done separately in Form No.ITNS 150, subject to the condition that the said form is signed or initiated by the Income Tax Officer.

In the case of *Commissioner of Income Tax Vs. Anjum M.H. Ghaswala & Ors.* (Supra) the question of waiver of interest by the Settlement Commissioner was involved. The Supreme Court held that once charging interest is mandatory, even the Settlement Commissioner cannot allow waiver.

In *Commissioner of Income-Tax Vs. Insilco Ltd.*, 2005 (278) ITR 1 (SC) the Supreme Court remanded the matter to decide whether the law laid down in *Ranchi Club* has been changed by the decision of the case in *Anjum M.H. Ghaswala*.

In *CIT Vs. Ranchi Club Ltd.*, (2001) 247 ITR 209 decided by the three judges of the Supreme Court, the SLP was dismissed on merits. The facts stated in the note published in ITR demonstrate that the High Court had held that the order of the assessing authority in the assessment order to charge interest is to be specific and clear and the assessee must be made to know that the assessing officer after applying its mind has ordered charging of interest. We do not find that the judgment in *Ranchi Club Ltd.* has either been expressly overruled or any different view has been taken in *Anjum M.H. Ghaswala's* case. We also do not find force in the argument advanced by Shri Mahajan that even if assessment order or

computation sheets do not provide for interest, since interest is mandatory, it can be charged in the demand notice, which according to Shri Mahajan is signed by the Assessing Officer.

Even if any provision of law is mandatory and provides for charging of tax or interest, the view taken in Ranchi Club Ltd. is that such charge by the assessing officer should be specific and clear and assessee must be made to know that the assessing officer has applied its mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things.

In the present case although it is stated by Shri Mahajan that in the demand notice there was charging of interest, there is no such pleading or ground taken, nor do we find that any such point was raised in the Tribunal.

The third question is thus decided against the department and in favour of the assessee.

Both the income tax appeals are **dismissed**.

**Dt.03.08.2011**

SP/

**Reserved/Court No. - 32****Case :-** INCOME TAX APPEAL No. - 48 of 2003**Petitioner :-** The Commissioner, Of Income Tax -11 & Another**Respondent :-** M/S. Sarin Chemical Laboratory Chilli Int Road Agra**Petitioner Counsel :-** A.N. Mahajan,A.N.Mahajan,Ashok Kumar,Bharatji Agarwal,D. Awasthihi,G.Krishnana,R.K. Upadhyaya,S.Chopra**Hon'ble Ashok Bhushan,J.****Hon'ble Prakash Krishna,J.****(Delivered by Prakash Krishna,J)**

Raising a short dispute with regard to compulsory levy of interest under section 234-B of the Income Tax Act, the revenue has filed the present appeal against the order dated 29.8.2002 passed by the Income Tax Appellate Tribunal, Agra Bench, Agra in ITA No.1506/Del/95 for the assessment year 1991-92.

The assessee is a partnership firm and is engaged in manufacturing of tooth powder and its sale. During the course of the assessment proceeding, the Assessing Officer made certain additions in the income of the assessee on account of unexplained investment in the raw material and sale outside the books, vide order dated 14.5.1990. The matter was carried in appeal before CIT(A), Agra Bench, Agra who allowed the appeal in part by the order dated 18.1.1995. Before him, one of the grounds raised was with regard to charge of interest under sections 234-A, 234-B and 234-C. The assessee contended that the interest could not be charged under the aforesaid sections in the absence of any order to this effect in the assessment order. The CIT(A) took the view that no appeal is provided against charge of interest but the Assessing Officer may levy the interest while giving effect to the appellate order. The assessee carried the matter further in appeal before the Tribunal. The Tribunal accepted the contention of the assessee that the Assessing Officer has failed to mention in the assessment order for charging of any interest and therefore, interest could not be charged from the assessee. The Revenue has challenged the aforesaid finding of the Tribunal and raised the following substantial question of law for consideration

***"Whether on the facts and circumstances of the case the Tribunal is justified in law in directing the A.O not to charge interest under section 234-A, 234-B and 234-C of the Income Tax Act, 1961 in the absence of the any direction by the AO in the assessment order?"***

Heard Shri R.K.Upadhyaya, learned standing counsel for the Department and Shri Suyash Agrawal, learned counsel for the assessee-respondent.

Shri Upadhyaya, learned standing counsel submits that in view of authoritative pronouncement of the Apex Court in the case of *CIT Versus Anjum M.H Ghaswala (2001) 252 ITR 1 (SC)*, charging of interest under sections 234-A, 234-B and 234-C is mandatory. Even Settlement Commission could not waive the charging of interest.

In reply, the learned counsel for the assessee submits that the aforesaid judgment of the Apex Court has been considered by this Court in the case of Income Tax Appeal Nos. 81 of 2002 & 82 of 2002 *CIT-II Kanpur versus M/s Deep Awadh Hotels (P) Ltd., Kanpur* decided on 3.8.2011 and it has been held that the earlier decision given by the Apex Court in the case of *CIT versus Ranchi Club Ltd. (2001) 247 ITR 209 (SC)* still holds the field and unless in the order of Assessing Authority, it is ordered that interest be charged, a notice of demand charging interest cannot be issued.

Considered the respective submissions of the learned counsel for the parties and perused the record.

In the case of *CIT Versus Anjum M.H Ghaswala (2001) 252 ITR 1 (SC)*, a constitution Bench of the Apex Court while interpreting the power of the Settlement Commission to waive charging income of interest under section 234-A, 234-B and 234-C etc. has held that the expression "shall" used in the aforesaid sections cannot be construed as "may". They have noticed that prior to the Finance Act 1987, the corresponding sections pertaining to imposition of interest used the expression "may". The change thus brought about by the Finance Act 1987 is indicative of the intention of the Legislature to make the collection of interest mandatory. The said expression "shall" has been used deliberately.

The relevant portion is extracted below:

***"The expression "shall" used in sections 234-A, 234-B, 234-C cannot by any stretch of imagination be construed as "may". There are sufficient indications in the scheme of the Act to show that the expression "shall" used in Sections 234-A, 234-B and 234-C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as "may". This is clear from the fact that prior to the Amendment brought about by the Finance Act, 1987, the Legislature in the corresponding section pertaining to imposition of interest used the expression "may" thereby giving a discretion to the authorities concerned to either reduce or waive the interest. The change brought about by the Amending Act (Finance Act, 1987) is a clear indication of the fact that the intention of the Legislature was to make the collection of statutory***

***interest mandatory. "***

At this juncture, the learned counsel for the assessee refers a latest judgment of Division Bench of our Court, in the case of ***CIT-II Kanpur versus M/s Deep Awadh Hotels P Ltd., Kanpur*** (Supra) wherein the following has been held:

***On the third question it is submitted by Shri A.N. Mahajan that in para 16 of the order of the Tribunal the plea that the interest under Section 234 (B) cannot be charged unless it is included in the assessment order or in the extra sheet or additional sheet attached with the assessment order in relation to computation and charging of interest. Shri Mahajan submits that the Tribunal has wrongly relied upon Ranchi Club Ltd. Vs. Commissioner of Income Tax & Ors. is not correct. He submits that the charging of interest under Section 243A, 243B and 243C is mandatory. He has relied upon the judgments in CIT Vs. Anjum M.H. Ghaswala & Ors., 2001 (252) ITR 1, which has been followed by the Kerala High Court in Dr. R.P. Patel Vs. Commissioner of Income Tax, Kottayam, (2009) 182 Taxman 305 (Ker.) and in M/s Nilgiri Sleepers (Pvt.) Ltd. Vs. the Commissioner of Income Tax I, Patna, 2010 Tax LR 105 (Pat.). A perusal of the judgments cited by Shri Mahajan leads to the conclusion that the charging of interest after the amendment of the statute by Direct Tax Laws (Amendment Act), 1987 w.e.f. 1.4.1989 payable under Section 234A, 243B, and 243C is mandatory and no discretion is vested in the assessing officer in this regard. The provisions prior to the amendment gave discretion in regard to waiver of interest. Once interest is mandatory the liability false automatically on the assessee on default. The rest is only working out the amount.***

Further reliance has been placed upon another unreported judgment of Uttrakhand High Court delivered in Income Tax Appeal No.15 of 2006 dated 14.10.2011 in ***Commissioner of Income Tax, Dehradun Versus M/s Dehradun Club Ltd.*** wherein also reliance has been placed on ***Ranchi Club Ltd. versus Commissioner of Income Tax & others 217 I.T.R 72*** and other decisions such as of Punjab & Haryana High Court in ***Vinod Khurana versus Commissioner of Income Tax & another 253 I.T.R 578*** and of Delhi High court in ***Commissioner of Income Tax versus Kishan Lal (HUF) 258 I.T.R 359***, etc.

The Uttrakhand High Court in paragraph 16 of the judgment has said that there is no quarrel with the proposition laid down by the Supreme Court in the case of ***CIT Versus Anjum M.H Ghaswala (2001) 252 ITR 1 (SC)*** but at the same time if the assessment order contained the imposition of interest, only then, a notice of demand of interest could be issued under section 156 of the Act.

Be that as it may, in view of the Division Bench judgment of this Court in the case of

*CIT-II Kanpur versus M/s Deep Awadh Hotels P Ltd., Kanpur (Supra)*, holding that in the absence of any mention of charging of interest in the assessment order, interest cannot be charged by issuing a notice of demand, the contrary argument of the learned standing counsel for the Revenue cannot be accepted. So far as this Court is concerned, we are bound by the Division Bench's pronouncement of this Court, which is based on consideration of two judgments of the Apex Court in the case of *Ranchi Club Ltd. versus Commissioner of Income Tax & others (Supra)* and *CIT Versus Anjum M.H Ghaswala (Supra)*.

The question raised in the appeal is therefore, decided accordingly by holding that the Tribunal committed no illegality in deleting the charge of interest on the facts and circumstances of the case.

The appeal is dismissed. No order as to costs.

(Prakash Krishna,J)

(Ashok Bhushan,J)

**Order Date :-18.5.2012**

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**HIGH COURT OF UTTARAKHAND, AT NAINITAL**

**Income Tax Appeal No.15 of 2006**  
Commissioner of Income Tax, Dehradun ... Appellant  
**Versus**

M/s Dehradun Club Ltd.  
Survey Road, Dehradun ... Respondent

**Dated:- 14<sup>th</sup> October, 2011**

**Coram: Hon. Tarun Agarwala, A.C.J.**  
**Hon. U. C. Dhyani, J.**

**Hon 'ble Acting Chief Justice (Oral)**

1. Heard Mr. Arvind Vashisht, the learned counsel for the appellant and Mr. S. K. Posti, the learned counsel for the respondent assessee.

2. This is an appeal under Section 260-A of the Income Tax Act, 1961 (hereinafter referred to as 'Act') filed by the Revenue. For the assessment year 1998-1999, an assessment order was passed by the Assessing Officer under Section 143(3) / 148 of the Act vide order dated 24<sup>th</sup> November, 2000. The operative portion of the order of the assessing officer is extracted hereunder :-

*“8. Initiate penalty proceedings under section 271(1)(c) for not offering the above income of taxation. Penalty proceedings under section 271B are also initiated as the assessee's business turnover exceeds Rs.40 lakhs and accounts are not audited as per section 44AB issue demand notice and challan.”*

3. From the aforesaid, it is clear that while completing the assessment, the assessing officer had not issued any direction in respect of charging interest under Section 243-B of the Act.

4. Pursuant to the assessment order, a notice of demand was issued under Section 156 of the Act demanding interest under Section 243-B of the Act amounting to Rs.1,27,545/- on the

ground that the assessee had failed to pay advance tax within the stipulated period as specified under Section 209 of the Act.

5. The assessee, being aggrieved by the charging of the interest, filed an application under Section 154 of the Act for rectification of the order on the ground that there was a mistake apparent from the record. The assessee contended that the interest under Section 234-B of the Act could not be charged since there was no order to that effect in the assessment order. The application of the assessee was rejected by the assessing officer. The assessee, being aggrieved by the rejection of his application, filed an appeal before the Commissioner of Income Tax (Appeals), who by an order dated 05.09.2002 allowed the appeal and quashed the order demanding interest under Section 234-B of the Act. The appellate authority held that there has to be a specific order for charging interest in the assessment order and since the assessing officer did not levy any interest in the assessment order, no interest could be charged in the notice of demand issued under Section 156 of the Act.

6. The Revenue, being aggrieved by the order of the appellate authority, preferred an appeal before the Income Tax Appellate Tribunal, who by its order dated 06<sup>th</sup> June, 2005 rejected the appeal and affirmed the order of the appellate authority. The Revenue, being aggrieved by the aforesaid orders, has filed the present appeal under Section 260-A of the Act.

7. The question of law, which is to be considered in the present appeal is

“whether interest under Section 234-B of the Act could be charged in the notice of demand issued under Section 156 of the Act in the

absence of any specific order demanding interest in the assessment order.

8. In order to answer the question of law, it would be appropriate to examine a few provisions of the Act.

9. Section 143 (3) of the Act as it existed for the relevant year in question is extracted hereunder:-

*“143(3) On the day specified in the notice issued sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make as assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment.*

10. Section 156 of the Act is extracted hereunder:-

“Notice of demand.

156. When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable.

11. A perusal of the aforesaid provision clearly indicates that the tax, interest, penalty, or fine is payable in consequence of an order passed under the Act, namely, the assessment order. There has to be a specific order passed by the assessing officer charging interest and, only thereafter, a notice of demand levying interest could be issued.

12. The language of the aforesaid provision mandates that the Income Tax Officer shall by an order in writing make an assessment of the total income or loss of the assessee and determine the same payable by the assessee on the basis of such assessment. The Supreme Court in **Kalyankumar Ray Vs. Commissioner of Income Tax 191 I.T.R. 634** while considering the provisions of Section 143(3) of the Act held that the Income Tax Officer has to determine, by an order in writing, not only the total income, but also the net sum which would be payable by the assessee for the assessment year in question and that the demand notice under Section 156 of the Act has to be issued in consequence of such an order.

13. In **Ranchi Club Ltd. Vs. Commissioner of Income Tax & others 217 I.T.R. 72**, the assessment order did not mention about the levy of interest and a notice of demand was issued under Section 156 of the Act to the effect that the interest was payable on the tax due. The Patna High Court held that the levy of interest was not justified. The said decision was affirmed by the Supreme Court in **Commissioner of Income Tax & others Vs. Ranchi Club Ltd. 247 I.T.R. 209**.

14. In **Vinod Khurana Vs. Commissioner of Income Tax & another 253 I.T.R. 578**, the Punjab & Haryana High Court held that the notice of demand under Section 156 of the Act cannot go beyond the assessment order and that the assessee cannot be served with any such notice demanding interest where the assessment order does not specify charging of any interest. Similarly in **Commissioner of Income Tax Vs. Kishan Lal (HUF) 258 I.T.R. 359**, the Delhi High Court held that since no direction was issued in the assessment order for charging of interest, the notice of demand could not be issued levying

interest under Section 234A, 234B and 234C of the Act. Similar view was reiterated by the Delhi High Court in **Commissioner of Income Tax Vs. INSILCO Ltd. 261 I.T.R. 220.**

15. In **Uday Mistanna Bhandar & Complex 222 I.T.R. 44** (Patna), while analyzing the provisions of Sections 234A, 234B and 234C vis-à-vis Section 156 of the Act, the Patna High Court held that notice of demand claiming interest can be issued only when there is a direction in the assessment order for levying interest. In **Smt. Tej Kumari & others Vs. Commissioner of Income Tax & others 247 I.T.R. 210**, the Full Bench of the Patna High Court (Ranchi Bench) held that in the absence of any specific order, interest could not be charged or recovered from the assessee.

16. The learned counsel for the appellant submitted that the provision of charging interest under Section 234A, 234B & 234C of the Act is mandatory as held by the Supreme Court in **Commissioner of Income Tax Vs. Anjum M. H. Ghaswala & others 252 I.T.R. 1**. There is no quarrel with the aforesaid proposition laid down by the Supreme Court, but, at the same time, the assessment order must contain the imposition of interest and, only thereafter, a notice of demand could be issued under Section 156 of the Act. To elucidate the matter, a notice of demand is somewhat like a decree in a civil suit, which must follow the order. When the judgment in a civil suit does not specify any amount to be recovered, the decree could not contain such amount. Similarly, when the assessment order under Section 143 (3) of the Act does not indicate that interest would be leviable, the notice of demand under Section 156 of the Act levying interest would be wholly illegal since interest is payable in consequence of an order passed as is clear from

Section 156 of the Act. Consequently, the notice of demand cannot go beyond the assessment order and the assessee cannot be served with any such notice demanding interest. There is another aspect of the matter. The assessee must know that he has been charged with interest under a particular section of the Act. That must be specified in the assessment order and, only thereafter, a notice of demand under Section 156 of the Act could be issued.

17. In the light of the aforesaid, the court is of the opinion that if the assessment order does not specify charging of interest, then it could not be charged or levied under Section 156 of the Act. The question of law is answered accordingly. In the light of the aforesaid, the appeal filed by the appellant fails and is dismissed. In the circumstances of the case, parties shall bear their own cost.

**(U. C. Dhyani, J.) (Tarun Agarwala, A.C.J.)**

Dated 14<sup>th</sup> October, 2011

LSR