

**IN THE INCOME-TAX APPELLATE TRIBUNAL “E” BENCH,
MUMBAI**

**BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
&
SHRI PRABHASH SHANKAR, ACCOUNTANT MEMBER**

**ITA No. 123/MUM/2025
(A.Y. 2008-09)**

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| M/s. Exquisite Jewellery G-7, Gem and Jewellery Complex II, Seepz, Andheri, Mumbai-400 096, Maharashtra | v/s. बनाम | Income Tax Officer – 16(3)(3) , Piramal Chambers, Lalbaug, Mumbai-400012, Maharashtra |
| स्थायी लेखा सं./जीआइआर सं./PAN/GIR No: AABFE2622D | | |
| Appellant/अपीलार्थी | .. | Respondent/प्रतिवादी |

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| Appellant by : | Shri Rahul Sarda, AR |
| Respondent by : | Shri Manish Ajudiya (Sr. DR) |

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| Date of Hearing | 05.03.2025 |
| Date of Pronouncement | 19.03.2025 |

आदेश / ORDER

PER PRABHASH SHANKAR [A.M.] :-

The present appeal arising from the appellate order dated 21.11.2024 is filed by the assessee against the order passed by the Learned Commissioner of Income-tax (Appeal)/CIT(A)-56, Mumbai [hereinafter referred to as “CIT(A)”] pertaining to order u/s. 154 of the Income-tax Act, 1961 [hereinafter referred to as “Act”] dated 12.11.2014 as passed by the Income Tax Officer - 16(3)(3), Mumbai for the Assessment Year [A.Y.] 2008-09.



2. The grounds of appeal are as under:-

1. *The Ld. AO and Ld. CIT(A) - 56 erred in law and in facts in charging interest u/s. 234B amounting to Rs. 20,15,970/- without appreciating the fact that the Appellant was not liable to pay any advance tax on due dates for payment of advance tax.*
2. *The Ld. AO and Ld. CIT(A) 56 erred in law and in facts in charging interest u/s. 234B amounting to Rs. 20,15,970/- on account of deficit in advance tax because of retrospective amendment which could not be anticipated at the time of payment of advance tax.*
3. *The Ld. AO and Ld. CIT(A) 56 erred in rejecting the appellant's application for rectification under section 154 and also failed to follow the direction of the Hon. CIT(A) 15 in Appeal No. CIT(A)-15/Arr.98/2014-15 vide his Order dtd 04/09/2014 directing the AO that "The request made by the appellant is genuine. Accordingly, the AO is directed to dispose of the petition of the appellant u/s. 154 pending with him expeditiously".*
4. *The Ld. CIT(A) - 56 erred in placing reliance on the decision of the Supreme Court in the case of Anjum M. H. Ghaswala & Others 252 ITR 1 (SC) ignoring the fact that no default was committed by the appellant in payment of advance tax on the due dates.*

3. Facts of the case are that the assessee filed its return of income for AY 2008-09 on 27.09.2008 offering income at Rs.29,686/-. The assessee's case was selected for scrutiny and the matter was referred to the Transfer Pricing Officer (TPO) u/s 92CA(1) of the Act. The TPO, vide order dated 31.10.2011 passed order u/s 92CA therein making adjustment of Rs.2,88,55,641/-. The AO, accordingly, added the same to the assessee's income in the assessment order dated 30.12.2011. In appeal, the CIT(A)-15, Mumbai, vide order dated 15.06.2012, partly allowed the assessee's appeal, pursuant to which, the AO vide order giving effect dated 13.08.2012, worked out the total income of the



assessee at Rs.1,07,83,780/- and thereby charging interest u/s 234B incorrectly at Rs.20,15,970/-. Aggrieved, the assessee filed a rectification application u/s 154 of the Act before the AO as well as an appeal before the Id.CIT(A). The CIT(A)-15, Mumbai, vide appellate order dated 02.09.2014 directed the AO to dispose of the assessee's petition u/s 154. However, pursuant to the directions of the CIT(A), while disposing of the said application made by the appellant, the AO, vide order dated 12.11.2024 again added interest u/s 234B amounting to Rs.20,15,970/- and rejected the rectification application made by the assessee. Aggrieved, the assessee again filed appeal before Id.CIT(A) who observed that Section 234B of Act deals with the interest charged for late payment of advance tax. When taxpayers fail to pay the advance tax or pay less than 90% of the assessed tax, interest under Section 234B is attracted. The assessed tax refers to the tax liability determined by the Department based on the declared total income of the taxpayer and deductions claimed. It is the final amount of tax payable by the taxpayer after deducting TDS, advance tax, and any other tax credits. The interest is levied at the rate of 1% per month or part of the month on the unpaid amount of the assessed tax. The interest is computed from the first day after the end of the financial year, that is, from 1st April till the date of actual payment. Thus, in the present case, the assessee filed its return of



income offering income at Rs.29,686/-, whereas the final assessed income of the appellant stands at Rs.1,07,83,780/-, determined by the AO vide order giving effect dated 13.08.2012. On perusal of the provisions of section 234B, it is clear that charging of interest is mandatory, hence, the AO was correct in charging interest u/s 234B, which worked out to Rs.20,15,970/- in the present case. He further held that charging of u/s 234B are mandatory as per the decision of **Hon'ble Supreme Court in the case of Anjum M.H. Ghaswala & Others reported in 252 ITR 1 (SC)**. In view of the above, the appeal of the assessee was dismissed.

4. Before us, the ld.DR has supported the orders of authorities below while the ld.AR of the assessee has vehemently agitated the action of the ld.CIT(A). It is contented that the assessee is a partnership firm engaged in the business of manufacturing and exporting of diamond studded gold jewellery. The unit of the assessee is situated in Seepz and it is claiming exemption u/s 10A of the Act. During the year, it had income of Rs.29,686/- under the head Income from Business and Profession after claiming exemption u/s 10A. It had worked out the interest liability u/s 234B on the basis of above mentioned income and paid the same along with self-assessment tax pertaining to above mentioned assessment year. It paid advance tax by estimating its income



during the previous year 2007-08 in accordance with the then prevailing legal position and the provisions of the Act and hence there was no failure/ default on the part of the appellant in payment of advance tax on provision for excess tariff during the financial year 2007-08, no interest was leviable under sections 234B of the Act. Therefore, the appellant was not liable to pay interest u/s 234B for consequent change in income due to ad-hoc addition in Assessment proceedings or consequent amendment in law.

4.1 It is further submitted that during the course of assessment proceedings, the Transfer Pricing Officer proposed a transfer pricing adjustment since the assessee had purportedly granted 'Excess credit period' to its associated enterprises as compared to the credit period granted to non-associated enterprises. As per para 3 of the order the allegation of the TPO was that the average realization period for associated enterprises was 222 days while that in the case of non-associated enterprises was 110 days. Accordingly, the TPO proposed an adjustment of Rs. 2,88,55,641/- to the income of the assessee. The AO completed the assessment after making the adjustment as proposed by the TPO.



4.2 It is stated that inclusion of 'Excess credit period granted to associated enterprises' within the ambit of the expression "international transaction" was brought by way of an Explanation to section 92B of the Act. **This Explanation was introduced by the Finance Act, 2012 with retrospective effect from 01/04/2002.** The relevant portion of the said Explanation reads as follows:

"Explanation For the removal of doubts, it is hereby clarified that-
(i) *The expression "international transaction" shall include.*
(a)
(b)
(c) *Capital financing, includingpayments or **deferred payment or receivable** or any other debt arising during the course of business....."*

4.3 It is contented that during the year under consideration and at the time of filing of the return of income for AY 2008-09 on 27/09/2008, the above Explanation was not there, and hence, the assessee did not have any occasion to pay advance tax on account of the addition.The fact that the addition made on account of 'Excess credit period granted to associated enterprises was on account of this retrospective amendment is also clear from the fact that the CIT (A) has upheld the adjustment relying on the said retrospective amendment.The AO held that the retrospective amendment was clarificatory and the provisions were existing at the time of filing of the return of income on 27/09/2008. Hence, interest was held to be correctly charged.The CIT (A) held that the charge of interest u/s 234B was mandatory and hence, was correctly levied.



4.4 The Id.AR has further argued that the finding of the AO that the provisions were existing at the time of filing of the return of income are factually incorrect. While the return of income was filed on 27/09/2008, the amendment was introduced only by the Finance Act, 2012. The observation of the AO that the 'amendment was clarificatory in nature' is out of context since the issue before the AO was not whether the amendment could be applied to the assessment year in question or not. The question was whether interest could be levied even when there was no default of the assessee while computing and paying advance tax on the basis of the provisions existing at the relevant time. The observation of the CIT (A) that charging interest u/s 234B is mandatory is also out of context since it fails to take into consideration the peculiar circumstances of a retrospective amendment. The question really is whether an assessee could be burdened with interest for non-payment of advance tax when there was no provision for treating the excess credit period granted to associated enterprises as an international transaction and treating the notional interest as assessee's income. A bare perusal of section 234B makes it clear that the liability to pay interest u/s 234B can arise only if there is a liability to pay advance tax and there is a failure to pay the same. Axiomatically, therefore, if there is no liability to pay advance tax since there were no provisions treating the amount in



question as income at the relevant time, there cannot be any failure to pay the said advance tax. Hence, there cannot be any liability to pay interest u/s 234B. Furthermore, the title of section 234B also makes it clear that the interest is triggered only where there is a “default in payment of advance tax”. Without default, there cannot be any liability to pay interest. During the year under consideration when advance tax was being paid, there was no occasion to know that there would be a retrospective amendment in the law, and hence, certain additional income would be brought to tax. Hence, there cannot be any default on the part of the assessee. Interest u/s 234B cannot be levied for shortfall in payment of advance tax when such shortfall arises due to addition made during assessment based on a retrospective amendment in the Act. The assessee relied on the judgements in support of this proposition on the case of **Prime Securities Ltd. v. ACIT (Inv.) [2011] 333 ITR 464 (Bom.)**, **CIT v. JSW Energy Ltd. [2015] 379 ITR 36 (Bom.)**, **Emami Ltd. v. CIT (2011) 337 ITR 470 (Cal)** and also on the judgement of the Supreme Court in the case of **ACIT v. Saurashtra Kutch Stock Exchange Ltd. [2008] 305 ITR 227 (SC)**.

5. We have carefully pondered over the issue, taken into consideration rival submissions, provisions of the law and the legal



position emerging from cited decisions above. It is undisputed fact that at the time of filing of the return, the assessee had paid taxes due as per the returned income disclosed. Interest u/s 234B was charged by the AO due to subsequent amendment in the provisions of the Act relating to Transfer pricing provisions as discussed in paras 4.1 and 4.2 above. The assessee could not have foreseen amendment at the time of filing of return so as to work out its advance tax liability. The fact that the addition made on account of 'Excess credit period' granted to associated enterprises was on account of this retrospective amendment is also clear from the fact that the Id.CIT (A) has upheld the adjustment relying on the said retrospective amendment. In such a situation, the assessee cannot be branded as a defaulter in payment of advance tax so as to attract interest u/s 234B of the Act. In this regard, it would be worthwhile to refer to the following decisions of various High Courts which support the contentions of the assessee. The Hon'ble Calcutta in the case of **Emami Limited reported in 337 ITR 470 [Cal]** held as follows:

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

12. 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 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 in its total income and the book profit both as nil. consequent to the amendment of the provisions contained 115JB of the Act by virtue of the [Finance Act, 2002](#), it published in the Official Gazette on May 11, 2002, retrospective effect to the amendment from April 1, appellant first voluntarily paid a sum of Rs.1,55,62,511/- of the tax payable on book profit as provided in the provision of section 115JB and then filed its revised return on March 31, 2003, declaring its business income as nil but the L under section 115JB as Rs. 20,63,65,711, The Assess) accepted such return of income but imposed interest und 2348 and 234C of the Act amounting to Rs.44,00,937 and Rs.11,78,960 respectively.

13. In our opinion, the amended provision of section 1 come into force with effect from April 1, 2001, the appellant cannot be held defaulter of payment of advance tax. As pointed on the last date of the financial year preceding the assessment year, as the book profit of the appellant in a with the provision of law was nil, we cannot conceive any "advance tax" which in essence is payable within the last financial year preceding the relevant assessment year a. In sections 207 and 208 or within the dates indicated in s of the Act which inevitably falls within the last date of the financial year preceding the relevant assessment year. Consequently, the assessee cannot be branded as a defaulter in payment of advance tax as mentioned above".

5.1 Further, Hon'ble Bombay High Court has taken the similar view in the case of [CIT vs JSW Energy Ltd.](#) reported in **379 ITR 36 [Bom]** in the context of 115JB, clause [h] of Explanation 1 that was brought in by the [Finance Act, 2008](#) with retrospective effect from 01.04.2001. The Hon'ble Bombay High Court has taken the view that the levy, of interest u/s.234B by virtue of the retrospective amendment is not warranted. The following observations of the Hon'ble Bombay High Court are relevant :

"17. In the present case, what the assessee has pointed out is that some of the amounts included in the book profits as per Explanation) to section 115JB were brought in by the [Finance Act, 2008](#) with retrospective effect from 1st April, 2001. The assessee cannot be held be liable for failing to make a provision for payment of advance tax which was not possible on the last date as per the law then prevailing. Thus clause (h) which is reproduced above having been brought in with retrospective effect but by [Finance Act 2008](#), the advance tax computation by the assessee for the year 2006-07 cannot be faulted and it cannot be said that the assessee is in default and therefore, there is any liability to pay interest in terms of [section 234B](#) of the Income-tax Act, 1961.

18. In the present case of *Star India (P.) Ltd. v. CCE*[2006] 280 ITR 321/150 Taxman 728 the Hon'ble Supreme Court held to be liable for failing to that the service of "broadcasting" was made a taxable service with effect from July 16, the [Finance Act, 2001](#). The appellant disputed its liability to payment for service tax on the ground that it did not broadcast. The Commissioner, however, held against the appellant the matter was carried before the Commissioner of Income Tax and during pendency of appeal the [Finance Act, 2001](#) was by the [Finance Act, 2002](#). The effect of amendment, inter o make an agent, such as the appellant, before the Supreme Court to pay service tax as broadcaster.



19. The Supreme Court noted that the Appellants' appeal pending before the Commissioner was rejected by him on the basis of this amendment. The tribunal also maintained this order and that part of the order passed by the Commissioner was not challenged in appeal. However, the appellant was aggrieved by the fact that the tribunal held it liable to pay Interest on the amount which it was required to pay by reason of the 2002 amendment. The assessee contended that once the amendment was brought in, pending the appeal, there was no question of applying section 234B or any analogous provision and payment of interest. It is in that regard that the Hon'ble Supreme Court held as under:

"7. In any event, it is clear from the language of the validation clause, as quoted by us earlier, that the liability was extended not by way of clarification but by way of amendment to the Finance Act with retrospective effect. It is well established that while it is permissible for the Legislature to retrospectively legislate, such, retrospectivity is normally not permissible to create offence retrospectively. There were clearly judgments decrees or orders of courts and Tribunals or authorities, which required to be neutralised by the validation clause. We can only assume that the judgment decrees or orders, etc., had, in fact, held that persons situated like the appellants were not liable as service providers. This is also clear from the Explanation to the validation section which says that no act or acts on the part of any person shall be punishable as an offence which would not have been so punishable if the section had come into force.

8. The liability to pay interest would only arise on and is really in the nature of a quasi punishment liability although created retrospectively could not be the punishment of payment of interest with retrospective effect."

20. The Supreme Court held that the liability to pay interest would only arise on default and is really in the nature of a quasi punishment. The liability to tax although created retrospectively could not entail punishment of payment of interest with retrospective effect. It is this principle which has been laid down which is followed by the Calcutta High Court. It is that principle relied upon by the High Court which has been applied by the Tribunal to the circumstances of the present case. We do not think that the assessee before us can be called upon to pay interest in terms of section 234B once the explanation was introduced or brought in with retrospective effect but by Finance Act, 2008. Then, there was no liability to pay interest in terms of this provision. That was because the assessee cannot be termed as defaulter in payment of advance tax computation on the basis of the un-amended (sic) provision therefore could not have been entertained.

21. We do not see any broader or wider question arising for our determination as the view taken even on this question is perverse or neither vitiated by any error of law apparent on the record".

6. In view of the above facts and the legal position emanating from above decisions followed respectfully, we are of the considered opinion that the Id.CIT(A) has erred in upholding charging of interest u/s 234B of the Act by the AO without appreciating the facts of the case in the right perspective. Accordingly, we direct the AO to delete the interest charged, thus allowing the appeal of the assessee.



7. In the result, appeal of the assessee stands allowed.

Order pronounced in the open court on 19/03/2025.

Sd/-

NARENDER KUMAR CHOUDHRY

(न्यायिक सदस्य / JUDICIAL MEMBER)

Sd/-

PRABHASH SHANKAR

(लेखाकार सदस्य / ACCOUNTANT MEMBER)

Place: मुंबई / Mumbai

दिनांक / Date 19.03.2025

Lubhna Shaikh / Steno

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त / CIT
4. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण DR, ITAT,
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आयकर अपीलीय अधिकरण / ITAT, Bench,
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