Non-resident couldn't be penalized with sec. 234B interest if its whole income was subjected to withholding tax

Summary – The Chennai ITAT in a recent case of Van Oord ACZ Marine Contractors BV., (the Assessee) held that where payments received by assessee, a non-resident company from its Indian subsidiary were subjected to TDS provisions, assessee could not be further held liable to pay consequential interest under section 234B.

ORDER

1. This appeal filed by the assessee for assessment year 2003-04, is directed against the order of Commissioner of Income-tax (Appeals)-VII Chennai, dated 16.8.2013, passed in Appeal No.875/13- 14, in proceedings under section 143(3)/254 of the Income-tax Act, 1961 (in short the 'Act').

2. The sole substantive ground pleaded by the assessee challenges levy of interest u/s 234B of the Act amounting to Rs. 45,93,808/- by the Assessing Officer vide order dated 31.3.2013 and affirmed by the CIT(A).

3. In the course of hearing, assessee contends that being a payee/deductee, it could not have been made liable to pay the impugned interest in view of case law *CIT* v. *Madras Fertilisers Ltd.* [1984] 149 ITR 703/[1985] 20 Taxman 349 (Mad.), *DIT* v. *Jacabs Civil Incorporated/Mitsubishi Corpn.* [2011] 330 ITR 578/[2010] 194 Taxman 495 (Delhi) and *DIT (International Taxation)* v. *Maersk Co. Ltd.* [2011] 334 ITR 79/198 Taxman 518/10 taxmann.com 269 (Uttarakhand)(FB)..

4. The Revenue supports the order of the CIT(A) confirming levy of interest u/s 234B. Taking cue from the same, it argues that the lower appellate authority has rightly pierced corporate veil in assessee's case to hold it liable for payment of impugned interest.

5. Facts of the case are in a very narrow compass. This is second round of litigation being the issue of interest u/s 234B of the Act. The assessee; a 'Dutch' entity, is engaged in the business of dredging, reclamation, port related and marine services. It has also set up an Indian subsidiary by the name of M/s Van Oord ACZ India (P) Ltd. The assessee had been awarded a dredging contract at Mundra Port by M/s Gujarat Adani Ltd. Vide agreement dated 18.7.2001, it preferred to further assign the same to its subsidiary entity. There is no quarrel between the parties that the assessee had acted as an interface between the subsidiary and other service providers. It had also let the associate entity to avail logistic and technical know-how facility. In relevant previous year, the assessee got reimbursed in lieu of aforesaid services from its subsidiary entity to the extent of Rs. 11,53,52,883/-. As the case file reads,

the payer/assessee's subsidiary company had approached the Director General, International Taxation, New Delhi, seeking certificate u/s 195(2) of the Act for remittance of reimbursements without 'withholding' tax. On 22.11.2002, the same stood rejected and the applicant/subsidiary was directed to deduct @ 42% on the estimated profits @ 11% with a further clarification that this was only a provisional arrangement subject to computation of actual profitability determined in 'regular' assessment in assessee's case. In compliance thereto, the deductor/ assessee's subsidiary deducted TDS of Rs. 70,88,567/-.

6. Coming to assessment proceedings, the assessee claimed that reimbursements of Rs. 11,53,52,883/- were not taxable in its hands being in lieu of expenses. This plea failed to impress upon the assessing authority, Dispute Resolution Panel as well as the 'tribunal'. In order dated 11.5.2012 passed in I.T.A.No.1733/Mds/2011 filed by the assessee, the co-ordinate bench (headed by one of us Dr.O.K.Narayanan, VP), treated the same as 'fee for technical services' liable to be taxed. At the same time, issue of interest u/s 234B, the bench remitted it back to Assessing Officer for redoing the exercise keeping in mind the duty of the payer to deduct tax at source in the light of various judicial pronouncements. In this manner, the quantum proceedings attained finality upto the 'tribunal'.

7. Coming to the consequential proceedings, we find that the Assessing Officer held on 31.3.2013 the assessee to be liable to pay the impugned interest of Rs. 45,93,808/- u/s 234B of the Act.

8. In assessee's appeal, the CIT(A) has chosen to lift corporate veil after taking into consideration the assessee's status as a 'holding' company with the subsidiary company(supra) to observe that "there stands very much the assessee". Further observation accuse the assessee of trying to frustrate the lawful exercise taken by the Assessing Officer for charging the impugned interest. The CIT(A) has also taken into account order dated 22.11.2002 (supra) and affirmed the levy of interest under challenge.

This leaves the assessee aggrieved.

9. We have heard both parties and gone through the case file. Admittedly, the fact remains that qua 'fee for technical services', the assessee's status is only that of a payee. The payer turns out to be its subsidiary company. We find that case law *Madras Fertilisers Ltd.* (*supra*) holds that in case of TDS deduction, the payee concerned need not pay advance tax and interest u/s 234B of the Act. Their lordships have observed that in case interest is levied in such a payee's case; it would lead to double levy of interest qua the same income. Similarly, the hon'ble Delhi High Court *Jacabs Civil Mitsubishi Corpn.* case (supra) observes that in case of a payer-payee relationship, the payee concerned is not absolved from the tax liability in case of shortfall in TDS deduction. However, in such a case, interest liability u/s 234B cannot be fastened to the payee. Similar principle stands echoed by the full bench of hon'ble Uttarakhand High Court *Maersk Co. Ltd.* (supra). Thus, the net conclusion which flows from the aforesaid case law is that a payee/deductee whose payments have already been subjected to TDS provisions cannot be held liable to pay consequential interest u/s 234B of the Act.

10. Coming to the order of the CIT(A) releasing the corporate veil (supra), there is no dispute so far as facts are concerned. The assessee is a 'holding' company of its Indian subsidiary. The fact remains that both are independent assessees. Once they are separately assessed to tax we do not see any reason to lift the corporate veil nor see any attempt on its part to frustrate interest provisions of the Act. It is made clear that we are dealing with a tax statute wherein the benefit of doubt always goes to the assessee. Needless to say, in the aforesaid case law, no such exception has been pointed by any of the hon'ble high courts. So, this inference drawn by the CIT(A) seems to be wholly unwarranted. Accordingly, we agree to assessee's arguments challenging impugned interest u/s 234B.

11. The assessee's appeal is allowed.