

The Asst. Commissioner of Vs. Adani Export Limited and Adani

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SooperKanoon Citation : sooperkanoon.com/75372

Court : Income Tax Appellate Tribunal ITAT Ahmedabad

Decided On : Dec-28-2006

Judge : R Garg, Vice, P Bansal, I Bansal

Appellant : The Asst. Commissioner of

Respondent : Adani Export Limited and Adani

Judgement :

1. The facts and circumstances in both these appeals are identical excepting the quantum of disputed amount. These are therefore taken together for the sake of convenience and disposed of by a common order by discussing the fact and figures as are appearing in the case of Adani Exports Ltd. On a difference of opinion between the Accountant Member and Judicial Member, the following common point of difference is referred to me as Third Member by the President, Income Tax Appellate Tribunal Under Section 255(4) of the Act: Whether on facts and in the circumstances of the case interest Under Section 201(1A) of I.T. Act, 1961 is chargeable from the date of payment of "usance interest" or from the date of pronouncement of decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors.

2. In a survey action carried out in cases of certain foreign banks, it was found that the assessee had remitted usance interest through these banks. This was paid in respect of outstanding amount of purchase price of equipments. The assessee had not deducted tax at source on such payment of interest in terms of Section 195 of the Act, by entertaining the belief that it was part of the cost of acquisition of

the equipments in view of the decision of the Andhra Pradesh High Court in the case of CIT v. Vishakhapatnam Port Trust 144 ITR 146 (AP). By an order dated 12.7.2004, the Assessing Officer held the assessee liable to deduct tax Under Section 195(1) on the payment of such usance interest and accordingly directed the assessee to pay the amount of tax deductible at source Under Section 201(1) at Rs.52,80,400 along with interest Under Section 201(1A) amounting to Rs. 11,55,060. the assessee made an application for rectification on various grounds, one of which was that the assessee was not liable to deduct tax on payment of such usance interest and also contended that the decision of the Gujarat High Court in the case of CIT v. Vijay Ship Breaking Corporation and Ors. 261 ITR 113 (Guj.) was not applicable to it. The Assessing Officer did not accept the contention of the assessee that the decision of Vijay Ship Breaking Corporation (supra) was not applicable. According to him, tax was deductible and therefore there was no mistake apparent from record. He however rectified the order for some computation and other mistakes and reworked the liability at Rs. 15,58,350 [Rs. 11,89,718 TDS + Rs.3,68,632 Under Section 201(1A)]. A revised working is also annexed along with order Under Section 154, which demonstrated that in some cases the due date for deduction and payment of TDS was ranging between the period 7th May, 2002 and 7th April, 2003. Some of the dates fall before the date of the judgment of Vijay Ship Breaking Corporation (supra), i.e., 23.3.2003 and the others, after that date.

3. Against the order Under Section 154, the assessee filed appeal before the CIT (A). The assessee's contention before the CIT (A) was that the only decision available at the relevant time was the decision of the Andhra Pradesh High Court holding that usance interest as part of the cost of the equipment and that the decision of Gujarat High Court in the case of Vijay Ship Breaking Corporation (supra) holding usance interest, as a payment of interest liable to deduction of tax Under Section 195, came subsequently. The CIT (A) held that though the assessee was under genuine impression after the decision of the Andhra Pradesh High Court, but since the matter has been decided by the Gujarat High Court, he had no option but to confirm the liability of the assessee to deduct TDS amount of Rs.11,89,718. He, however, deleted the levy of interest Under Section 201(1A) of Rs.3,68,632 by stating that the liability of the assessee to deduct the tax as also to

pay the interest starts from the day the decision has been delivered by the Gujarat High Court and it being after the decision of the Andhra Pradesh High Court, the assessee was under the genuine impression that no TDS provisions were applicable to usance interest, and thus, in the natural course the assessee has not deducted the TDS amount and also not paid the interest thereon. According to him, though the issue of levy of TDS amount has been decided against the assessee, the decision of Supreme Court in respect of interest is clear in stating that one cannot accept the payment of liability retrospectively in case of payment of interest. That decision of Supreme Court is in the case of *Star India Pvt. Ltd. v. CCE 280 ITR 321*. He, accordingly, deleted the entire interest levied of Rs. 3,68,632 without taking into consideration the fact that some of the liabilities did pertain to the period after the decision of the Gujarat High Court in the case of *Vijay Ship Breaking Corporation (supra)*.

4. The Revenue came in appeal against the deletion of interest whereas the assessee filed C.O against the confirming the liability to deduct tax. There is no dispute between the two Members on the issue that there was a liability to deduct tax at source by the assessee in view of the decision of *Vijay Ship Breaking Corporation (supra)*. The difference between the two Members is on the liability to pay interest for the non-deduction and delayed payment of TDS. The Accountant Member directed the Assessing Officer to impose interest on the assessee from the date when the Gujarat High Court decision in the case of *Vijay Ship Breaking Corporation (supra)* was pronounced and upto the date the tax was actually paid by the assessee. The Judicial Member, however, expressed a different opinion and held that there being no dispute about the liability to deduct tax at source and the interest Under Section 201(1A) being mandatory and compensatory in nature should be levied right from the date when the assessee paid the usance interest and on which date it was to deduct tax at source, till the actual payment of TDS. Therefore, according to him, the Assessing Officer was right in holding the assessee to be liable for interest and the CIT (A) has wrongly applied the law to deduct the tax at source from the date of pronouncement of the decision of *Vijay Ship Breaking Corporation (supra)*.

5. The learned D.R. Mr. A K Panda submitted that interest Under Section 201(1 A) of the I.T. Act is compensatory in nature and levy of interest is mandatory as held by courts in various decisions reported in Pentagon Engineering Pvt. Ltd. 212 ITR 92 (Bom.) and West Bengal State Electricity Board 278 ITR 218 (Cal) etc. and therefore the interest under Section 201(1 A) can neither be waived nor reduced; that courts can not legislate and they interpret the law as it has been since the inception of the provision; that TDS was to be made as per the statute and therefore taking shelter of decision of A.P. High Court in Vishakhapatnam Port Trust (supra) by the assessee is not warranted; that to compensate the Revenue for the intervening period, the assessee should pay interest and face the consequence as it took the risk in following the solitary decision which Was otherwise not in its favour; that the TDS liability is a creation of Statute and it is not dependent on decision of a court and as the Gujarat High Court in Vijay Ship Breaking Corpn. has held that the decision of A.P. High Court was rendered in a different context, the said decision can not assist the assessee; and that in any case it was not an authority to hold that tax was not deductible on such interest. He then referred to decisions on the issue Law declared by court whence effective and submitted that decisions are in favour of the submission that interest should be charged from the date of inception of the provision and not from the date of court decision. These are: a) Assam Oil Co. Ltd. 133 ITR 204 (Cal.), wherein it has been held that on principle, the Supreme Court does not make the law from the date it is pronounced but declares it to be so from its very inception.

b) Deep Chand Jain v. Board of Revenue (1966) ALJ 112 (All), wherein it has been held that "The courts while deciding cases do not make law. When the courts interpret any law, they only explain what the pre -existing law is. They do not create or impose it. The courts do not possess the power to say that its view of the law will hold good from a date of its choice or for a period of time that set by itself, that will in substance amount to amending the law from time to time. That is a power which vests exclusively in the law-making authority and not in the courts.

The true rule appears to be that the court's declaration is co-extensive with the life of the law. It is effective for the whole of the time that the law remains in force.

c) ACE Investments Ltd. and Anr. v. Settlement Commission 264 ITR 571,577 (Mad) wherein it has been held that "When a superior court declares the law, it is not "making" law on the date of judgment but merely declaring the law. The decision being an enunciation of the true and correct position of law, becomes applicable from the date when the concerned law came into effect. If, therefore, the apex court or the concerned High Court declared the true position on the point of law, it relates back to the date of the enactment itself.

If so, the law so declared is deemed to have existed and applied, on the date of the order which is sought to be rectified. Hence the validity of the order will necessarily have to be examined with reference to the legal position as enunciated by the apex court, even though such enunciation may be subsequent to the order of assessment. Although a decision of the apex court may not reopen a concluded decision, if before a decision is arrived at the decision of the apex court is rendered, such decision shall be binding on the court or the Commission for that matter. There was no finality arrived at by the Commission on the application of the petitioner as admittedly the same was pending on the date when the apex court declared the law. Therefore, the decision as declared by the apex court is applicable to the pending proceedings before the Settlement Commission. The decision of the apex court, being a declaration of the true and correct position of law becomes applicable to all transactions and proceedings which have not become final and concluded. As a necessary corollary, the true and correct position of law declared by the apex court applies not only to transactions and proceedings subsequent to the decision, but also to transactions and proceedings prior to the decision, but, of course, subject to the rule of finality of proceedings. Since there was no finality arrived at on the application filed by the petitioners, the Commission is bound by the law declared by the apex court in Express Newspapers Ltd.'s case [1994] 206ITR 443.

In this context, useful reference could be made to the observation in Salmond on Jurisprudence (Twelfth edition) which reads thus: As we have seen, the theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law.

Hence, any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are *res judicatae*, or accounts that have been settled in the meantime.

d) *Madras Auto Service v. ITO* 101 ITR 589, 591 (Mad) observing that when a statutory provision is interpreted as to its precise ambit and effect, it will have effect right from inception of the statutory provision. In other words, when the law is declared by the court, it has its effect not merely from the date of decision but also from the inception of statutory provision.

e) *Karmchand Premchand Pr.Ltd.* 101 ITR 46,52 (Guj.) holding that such declaration of law has retrospective effect.

f) *Mysore Cement Ltd.* 116 CTR 284 (Kar) held that when a superior court declares the law, it is not 'making' law on the date of judgment but merely declaring the law. The decision being an enunciation of the true and correct position of law, becomes applicable from the date when the concerned law came into effect. If, therefore, the Supreme Court or the concerned High Court declared the true position on the point of law, it relates back to the date of enactment itself. If so, the law so declared is deemed to have existed and applied, on the date of the order which is sought to be rectified. Hence, the validity of the order will necessarily have to be examined with reference to the legal position as enunciated by the Supreme Court, even though such enunciation may be subsequent to the order of assessment. If so done, it would be seen that the order to the contrary, suffers from an error apparent from the record g) *Shivdham Wood Products Pvt. Ltd. v. CTO* (1999) 112 STC 87, 90 (WBTT) stating that unless the Supreme Court in any case expressly declares that its decision in the case would operate prospectively, any declaration made in regard to any legal provision of a statute in such decision will operate retrospectively. In other words, the legal position, so clarified, could be deemed to be operative from the date from which the legal provision in question of the statute has come into force.

h) *N.A. Jailabdeen v. State of Kerala* (1999) 113 STC 100, 101 (Ker) stating that the cardinal principle of law is that the Supreme Court does not make law but it

simply declares what the law was.

6. The counsel of the assessee Shri S.N. Soparkar on the other submitted that after the pronouncement of the Gujarat High Court decision in CIT v. Vijay Ship Breaking Corporation 261 ITR 113 on 20.3.2003 law was required to be understood as pronounced therein; that the substantive aspect of that law should be understood to have been that way right from the beginning; that the existence of understanding of law before 20.3.2003 was relevant, particularly for understanding and judging the conduct of an assessee; that the Andhra Pradesh High Court decision in Vishakhapatnam Port Trust (supra) held the field for almost twenty long years and more so after the rejection of Department's SLP by the Supreme Court thereagainst; and that there are quite a few reported decisions, which are rendered on the footing that the position prevailing during the intervening period has got a bearing on the issue. He cited a few as follows: Reassessment under Section 147(b) - Information - Decision of High notice under Section 148 was issued prior to decision of Supreme Court reversing the decision of Rajasthan High Court order for reassessment was valid - Section 147(b) of IT ACT, 1961.

Reassessment under Section 147(b) - Information - Audit's opinion on law point - Reassessment proceedings also initiated in the meantime on basis of an information from audit Department that such expenses not allowable -Though an information on point of law, reopening still valid as the same was initiated prior to pronouncement of the Supreme Court's judgment in Indian and Eastern Newspaper Society v. CIT .

Issue involved- Appeal (Tribunal) - Rectification under Section 254(2) -Exemption under Section 80P(2)(a)(i) -Mistake apparent from record must be obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may be conceivably two opinions - Tribunal had come to the same conclusion with respect to exemption under Section 80P(2)(a)(i) as in the earlier years -Merely because subsequently the High Court took a contrary view, it could not be said that there was any error apparent in the order -On the date of purported rectification there was no order of the High

Court and decision was pending in appeal before Supreme Court -It cannot be said that no debatable point is involved -Therefore, there was no mistake apparent from record in the impugned order of the Tribunal-Section 254(2) of the IT Act, 1961.

7. He further submitted that in this case interest Under Section 201(1A) is chargeable for non-compliance of Section 195 from which two very important aspects emerge: -i) that the amount paid or payable by the assessee should be chargeable to income tax and ii) that the assessee is required to effect the TDS by an overt act expected from the assessee. He submitted that the condition of the amount being chargeable to income tax will bear further analysis. The first being the understanding as to whether it is really chargeable and the second being the point of time of such understanding. It should be reasonably understood as chargeable at the time at which TDS is to be effected.

This last mentioned aspect is all the more important when viewed in the light of the fact that effecting TDS involves an overt act on the part of the assessee. It is submitted that the assessee would deduct TDS, if at the time of effecting TDS, it was absolutely clear that the amount to be paid would be chargeable to tax. In other words, if at the time of payment of relevant amount it was abundantly clear to the assessee that the amount was not chargeable to tax, he could not have been expected to perform the overt act of deducting TDS. According to him ultimately it boils down to this that whether the assessee was justified in understanding at the time of payment of usance interest that it was not chargeable to tax. He submitted that based on the Andhra Pradesh High Court decision which held the field for almost twenty long years most of the people connected with the aspect of payment of usance interest thought and understood that usance interest was not chargeable to tax. Even the Tribunal (Rajkot Bench) in the matter of that very assessee viz. Vijay Ship Breaking Ltd. also took same view that payments of usance interest was not liable to TDS and hence provisions of Section 201(1A) were not attracted. He further submitted that presumably even the Government of India and the Parliament thought that usance interest was not chargeable to tax, which is obvious from the fact that the Gujarat High Court decision in Vijay Ship Breaking Ltd. was delivered in March 2003 and the Government in effect nullified it

by amending the Act by inserting a new Explanation below Section 10(15)(iv)(c), more importantly making this amendment retrospectively from 1.4.1962. This Explanation declares for the removal of doubts, that the usance interest payable outside India by an undertaking engaged in the business of ship-breaking in respect of purchase of a ship from outside India shall be deemed to be the interest payable on a debt incurred in a foreign country in respect of the purchase outside India.

8. Mr. Soparkar further submitted that to the best of assessee's knowledge and belief, no assessee (at least in Gujarat) was effecting TDS from the usance interest before the pronouncement of the Gujarat High Court decision in March 2003 in the case of Vijay Ship Breaking Corpn. Therefore, according to him it cannot be said that at the time of paying usance interest the assessee too should have taken a view that such usance interest was chargeable to tax. It is submitted that it is not a case of existence of mere cleavage of judicial opinion or of existence of two possible views. It is actually a matter which most of the people connected with the aspect of usance interest understood it as not chargeable to tax. After the pronouncement of the Gujarat High Court decision on 20.3.2003 that understanding turned out to be wrong but then the point is that at the time of payment of usance interest that understanding or misunderstanding held the field. 9. Section 201(1), he submitted, is a levy on failure to deduct or to pay tax. The word failure has to be interpreted and has to be given its proper meaning. Whenever assessee has acted on the basis judicial interpretation (Vishakhapatnam case and Tribunal decision in Vijay Ship Breaking Corpn.) there is no question of any failure on the part of the assessee, and when there is no failure Section 201 and 201(1 A) are not attracted. There is no failure on the part of the assessee. It is submitted that on this aspect useful guidance (albeit indirectly) can be had also from the Supreme Court decision in Star India Pvt. Ltd. (supra) in so far as it is laid down that under certain circumstances levy of interest may not be wholly compensatory and would be in the nature of quasi punishment. In that case, consequent upon amendment of law when liability was fastened for interest, it was held that the same was not justified. In the assessee's case it is not the amendment of law but it is the reversal of prevailing understanding by a High Court decision. It is submitted that the said principle applies here as well.

10. Without prejudice, Mr. Soparkar placed reliance on the Supreme Court decision in *Gopaldas Udhavdas Ahuja v. Union of India*. In this case under the Gold Control Act, a large quantity primary gold was found and seized. On adjudication it was confiscated also. On evidence, it was proved that the persons concerned were not in the know of the existence of that gold, as it had been bought and kept by a person who had died long before Gold (Control) Act, 1968 came into force. It was, therefore, held that the confiscation was not justified because the possession was not conscious possession. He submitted that point is that if there is some contravention of law, the person concerned should be in the know of the facts and the position of law consciously. Before March 2003, the assessee and almost everybody genuinely believed that the usance interest was not chargeable to tax, therefore, the quasi punishment of levying interest should not be inflicted.

11. In reply to the submissions of the assessee, the Id. CIT-DR Mr. A K Panda submitted that a decision is only an authority for what it actually decides, not what can logically be deduced therefrom; what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it 188 ITR 402, 424 (SC) Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since generality of the expressions found there are not intended to be expositions of the whole law but governed by particular facts of the case. He submitted that in the first two decisions i.e. *Assam Oil Co.*

Ltd. and Export Enterprises (P) Ltd relied upon by the assessee, it was held that where the reassessment proceedings under Section 147(b) were validly initiated on the basis of a High Court decision and a subsequent reversal of the decision of the High Court by the Supreme Court would not render the reassessment proceedings void abinitio. In the third decision i.e. *Sagar Co-operative Central Bank Ltd.*, it was held that an order granting exemption under Section 80P (2) to a co-operative society in respect of commission on collection of electricity bills could not be rectified by withdrawing such exemption.

The decision of Star India P. Ltd. (supra) is also on different facts as in that case liability to pay interest on service tax was extended by way of amendment to Finance Act with retrospective effect, which in the present case it is not so.

12. Parties are heard and rival submissions considered. Section 195 under which liability to deduct tax is there of the assessee reads as under: 195 Any person responsible for paying to a nonresident, any interest or any other sum chargeable under the provisions of this Act shall, at the time of credit of such income to the account of the payee or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

13. Section 201 provides for the consequences of failure to deduct tax and it reads as under: 201.(1) If any such person [referred to in Section 200] and in the cases referred to in Section 194, the principal officer and the company of which he is the principal officer does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any further consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax : Provided that no penalty shall be charged under Section 221 from such person, principal officer or company unless the [Assessing] Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of Sub-section (1), if any such person, principal officer or company as is referred to in that Sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at twelve per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid [and such interest shall be paid before furnishing the quarterly statement for each quarter in accordance with the provisions of Sub-section (3) of Section 200.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount of the tax together with the amount of simple interest thereon referred to in Sub-section (1A) shall be a charge upon all the assets of the person, or the company,

as the case may be, referred to in Sub-section (1).

14. Both the members held the assessee liable to TDS. The assessee also did not dispute its liability to deduct tax but wanted exemption from interest upto the date of High Court judgment in Vijay Ship Breaking Corporation (supra) on the ground of bonafides and effective date of application thereof.

15. As to the effect of the High Court order, the cardinal principal is that on pronouncement of the decision the High Court declares the law as to what it mean and what the law had always been. Salmond's Jurisprudence (Twelfth Edition) at page 148 in this connection may be usefully mentioned stating that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law and hence, any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision and that the overruling is retrospective, except as regards matters that are res judicata, or accounts that have been settled in the meantime.

16. There are two decisions of Gujarat High Court itself on the issue.

One, in the case of Parshuram Pottery Works Co. Ltd. 100 ITR 651 and the other, in the case of Standard Radiator 165 ITR 178. In the first case the High Court held that in the decisions of the Supreme Court in the case of Raipur Manufacturing Company and Kesoram Industries & Cotton Mills though were passed after the assessment order was made, but these decisions did not enact or make law in any sense but merely interpreted the expression used in the statute. The Court held that these decisions, insofar as they declared that the amounts claimed by an assessee in respect of provision for taxation are deductible in computing the net wealth of the assessee since they represent "debt owed" by the assessee within the meaning of Section 2(m) of the Act, merely stated what the law had always been and must always be understood to have been. The fact that these decisions were not before the WTO when he made the orders of assessment in the petitioner's cases are held to have no material bearing on the question whether the) said orders disclose any mistake apparent from the record. If that be the correct legal position, the Court held that the only conclusion possible was that the

assessment orders, insofar as they disallowed the claim for deduction in respect of the amount of provision for taxation, proceeded on a wrong view of the law and the said orders were bad at their very inception, on the date on which they were made.

17. In the other case of Standard Radiator (supra) the Gujarat High Court held that the fact that its decision in Hasanali Khanbhai 's case was not before the ITO when he made the assessment order in the assessee's case, had no material bearing on the question whether the said order disclosed any mistake apparent on the record. When this Court held that capital gains were taxable in the hands of a registered firm, it merely stated: "What the law had always been and must always be understood to have been". If the capital gains were liable to payment of tax as has been held by this Court in Hasanali Khanbhai's case, the only conclusion possible is that the assessment order insofar as it failed to determine the tax payable on capital gains proceeded on a wrong view of law and was bad from its very inception, i.e., from the date on which it was made.

18. This view was reiterated by Gujarat High Court in subsequent two decisions of Suhid Geigy Ltd. 237 ITR 835(Guj) and in Saurashtra Kutch Stock Exchange 262 ITR 146(Guj). In 1959, the Bombay High Court when it had jurisdiction over Gujarat also held in the case of Bhagwandas Kevaldas 36 ITR 538 (Bom.) at 543 that "When the Court decides a matter, it does not make the law in any sense but all it does is that it interprets the law and states what the law has always been and must be understood to have been.

19. Besides above jurisdictional high court decisions, the Calcutta High Court in Assam oil Co. Ltd, Allahabad High Court in Deepchand Jain, Madras High Court in ACE Investment Ltd, and in Madras Auto Services, Kerala High Court in N A Jailabdeen and Karnataka High Court in Mysore Cement Ltd. have taken a similar view as stated and submitted by the Id. DR above. In Mysore Cement's case, the decision of Kerala High Court in Kil Kotagiri Tea & Coffee Estate 174 ITR 579 is noted which held that "When the Court decides a matter, it does not make the law in any sense but all it does is that it interprets the law and states what the law has always been and must be understood to have been. Where an order is made by an authority, on the basis of a particular decision, the reversal of such decision in

further proceedings will justify a rectification of the order based on that decision....

20. The two contrary decisions of the Calcutta High Court and a decision of the MP High Court referred to by Id. Counsel would be of no help in view of the majority decisions of the High courts and the decisions of jurisdictional High court on the issue. Even otherwise the Calcutta High Court held that for purposes of Section 147(b) the earlier decision of High Court was taken an 'information' and that did not cease to be so, if that decision was reversed by the Supreme Court later. In Madhya Pradesh decision the judgment of High Court on the date of rectification was not in force as it was pending in appeal before the Supreme Court.

21. If the effect of the judgment of Vijays Ship Breaking Corporation (supra) is seen and understood in the light of the aforesaid decisions of Gujrat High Court and the decision of Bombay High Court, then the liability of the assessee cannot be said to be arising only from the date of judgment of the High Court; it has to be right from inception as per the provisions of the Act, which were there on the statute. What the decision of Vijay Ship Breaking Corporation (supra) has decided is that the usance interest is a payment of interest within the meaning of Section 195(1) of the Act and is subject to deduction of tax at source.

This is a proposition of law, which has to be understood as available right from the beginning of the enactment fastened upon the assessee right from the date of the transaction itself and not from the date of the judgments of the High Court who only interpret the law and do not make it.

22. It might be true that the assessee was under a bonafide impression that he was under no liability to deduct tax because of the decision of the Andhra Pradesh High Court in the case of Vishakhapatnam Port Trust (supra) but that does not make a change in the law. It is a view expressed by the High Court, which has been interpreting the law in the particular manner the same way the Gujarat High Court has interpreted it in the case of Vijay Ship Breaking Corporation (supra), the other way. The liability of the assessee to deduct tax has to be understood in the light of the jurisdictional High Court decision and if that be so understood, the assessee was liable right from the inception of making the payment of usance

interest to the foreign banks.

Consequently, the assessee was liable to pay interest thereon for not deducting the same or upto the date of payment thereof.

23. The liability to interest, it may be stated, is not a penal one but a compensatory in view of the decisions of Supreme Court in *Anjum Ghaswala* 252 ITR 1(SC) and *Central province Manganese Co. Ltd* 160 ITR 961 (SC) as also various High courts decisions i.e., *Pentagon Engineering Pvt. Ltd.* 212 ITR 92 (Bom.); *Dhanalakshmy Weaving Works* 245 ITR 13 (Ker.); *Prem Nath Motors (P) Ltd.* 253 ITR 705 (Del.); *Kanoi Industries (P) Ltd.* 261 ITR 488 (Cal.), *West Bengal State Electricity Board* 278 ITR 218 (Cal.) and *Ernakulam District Cooperative Bank Ltd.* 272 ITR 95 (Ker). Therefore the bonafide belief of the assessee, even if was there, would not of any help and on compensatory ground the assessee had to pay interest as the money due to Govt, was utilized by the assessee until paid. Assessee's contention that it was not wholly compensatory but quasi-punishment if viewed in the light of *Star India Pvt. Ltd.* (supra) has no force. The decision of the Supreme Court was rendered in the context of retrospective amendment, on account of which the liability to pay service tax has arisen and in that context the Supreme Court held that interest cannot be charged retrospectively.

Here the provisions were already in existence therefore its interpretation has to be effective from the insertion of law.

Similarly, the decision of the Third Member in the case of *Haryana Warehousing Corporation v. DCIT* [supra] was a case where the liability to pay interest was fastened retrospectively by statute and it was held to be a case where the assessee could not anticipate the same in the absence of the provisions of law existing at the relevant time. The case of *Gopaldas Udhavdas Ahuja* (supra) was a case of confiscation of goods which was held to be not warranted as the assessee was not in know of possession of primary gold. For charging interest, which is compensatory, this decision has no bearing.

24. Further, in the case of *Vijay Ship Breaking Corporation* (supra), the Gujarat High Court itself states that the decision of Andhra Pradesh in the case of

Vishakhapatnam Port Trust (supra) was rendered in context of liability to pay tax on the basis of Double Taxation Agreement (DTAA). The case of the German company was that it had no permanent establishment in India, and therefore, since Section 9(1)(i) of the Act was subject to the DTAA, it was not taxable in India, but taxable in the other contracting State. It was further observed that the assessment in that case related to the period prior to the introduction of Section 9(1)(v) in the Act with effect from 1st June, 1976, under which by a deeming fiction interest, such as usance interest payable by a resident, would be deemed to accrue and arise in India. The Gujarat High Court, therefore, held that the decision of the Andhra Pradesh High Court did not assist the assessee as it was rendered in a different context. From this view of the matter also, it cannot be said that assessee was not under a liability to deduct tax in view of the decision of the Andhra Pradesh High Court in the case of Vishakhapatnam Port Trust (supra) as it was prior to the provisions of Section 9(1)(v) but Under Section 9(1)(i) of the Act under which the usance interest was held to be part of cost of plant.

25. Amendment to Section 10(15)(iv)(c) by inserting the Explanation is an exception created by statute for giving benefit of exemption of interest paid by shipping industries. It is not of a general exemption and application. On the contrary, it gives an impression that to other industries the position of law of usance interest as laid by Gujarat High Court still hold good and these other assesseees are deducting tax and not taking any shelter of the amendment.

26. The liability of the assessee to deduct tax at source was there from the beginning. It cannot be said that it has been introduced by the decision of the Gujarat High Court in the case of Vijay Ship Breaking Corporation (supra). It has been only clarified to be so in existence by the Gujarat High Court decision, and consequently, for non-deduction thereof or for delayed payment thereof, the assessee would be liable to pay tax Under Section 201(1) and also interest Under Section 201(1A) of the Act.

27. The contention that circumstances must show that the assessee was reasonably sure that the payment of usance interest was chargeable to tax on the date of its payment has no force. It is not the understanding of the assessee or the

businessman about the chargeability of a particular payment including usance interest that matters, but it is the legal effect thereof which has a bearing on the issue. The jurisdictional High Court having held in the case of Vijay Shipping that usance interest payment was chargeable to tax, the assessee is to be held liable to deduct tax from the date of payment of such interest as per the law so pronounced by the jurisdictional High Court. If the assessee had not deducted the tax at source in accordance with the law, there was a failure on the part of the assessee and nothing more is to be established for charging interest on such non-deduction. He then would be liable to interest for such failure. A minute reading of Section 201(1A) would further reveal that it charges interest in two situations-i) if an assessee does not deduct tax required to be deducted; or ii) if after deducting he fails to pay the tax. In the present case the assessee has not deducted tax at all and therefore he would be liable to pay interest on account of this simple fact and there is no requirement to further find whether there was a failure thereof. The requirement of failure of an assessee is for the second situation, namely, if he deducts but does not pay. In this second situation alone failure is a necessary to charge interest.

28. By the proviso to Section 201(1A) the concept of reasonable cause is implicit but it provides it only for exonerating the assessee from the levy of penalty Under Section 221 and not from the levy of interest. It provides that no penalty shall be charged under Section 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax. Therefore in the context of levying the interest the reasonability of the cause or existence of good and sufficient reasons for non deduction or failure to pay is no criterion.

29. In my opinion, therefore, as the assessee was liable to deduct tax at source in respect of usance interest as held by both the Members, it would be liable to interest Under Section 201(1A) if the same was not paid or paid belatedly. The decision of the CIT (A) is therefore to be reversed and that of the Assessing Officer is to be restored.

30. In the result Revenue's appeals are to be allowed and COs by the assesseees are to be dismissed.

31. As there is a difference of opinion, the matter is being referred to the President, Income-tax Appellate Tribunal, with a request that following question may be referred to a Third Member or pass such order as the President may deem fit.

32. Whether on facts and in the circumstances of the case interest Under Section 1 201(1A) of IT Act, 1961 is chargeable from the date of payment of "usance interest" or from the date of pronouncement of decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors.

261 ITR 113 (Guj)? Sd/- sd/- (I.P. Bansal) (P.K. Bansal) Judicial Member Accountant Member 1. I have carefully gone through the order proposed by Id. Accountant Member. I have discussed the issue with him but I could not persuade myself to agree with his order vide which it has been held that assesseees is liable to pay interest under Section 201(1 A) only from the date of pronouncement of decision by Jurisdictional High Court in the case of CIT v. Vijay Ship Breaking Corporation and Ors. 261 ITR 113 i.e. from 20.3.2003 to the date of actual payment. I, therefore, proceed to express my view on the subject.

2. The assessee paid "usance interest" on purchase of ship on which tax was not deducted at source on the ground that in the case of CIT v. Vishakhapatnam Port Trust 144 ITR 146 (A.P.), it was held that the interest agreed to be paid was part of sale consideration itself and could not be treated as an independent source of income and, therefore, no liability to tax arose on the said interest in the hands of recipient. Taking clue from the said decision, the assessee did not deduct tax on usance interest. However, subsequently Hon.

Jurisdictional High Court in the case of CIT v. Vijay Ship Breaking Corporation and Ors. 261 ITR 113 has held that usance interest paid by the assessee to non-resident in connection with purchase of ships was not a part of the purchase price of the ships but was interest and the assessee being responsible for paying to the non-resident usance interest which was chargeable under the provisions of the IT

Act, 1961, was liable to deduct income-tax thereon under Section 195(1); disallowance under Section 40(a)(i) for failure on the part of the assessee to deduct tax at source from usance interest paid to the non-resident was justified. Their Lordships of Jurisdictional High Court also observed that the above mentioned decision of Andhra Pradesh High Court was not an authority to hold that tax was not deductible on such interest.

3. As per arguments of the assessee, interest under Section 201(1A) can be levied only from the date when the decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors. (supra) was rendered i.e. from 20.03.2003. It is the submission of assessee that earlier to above mentioned decision of Hon. Jurisdictional High Court no tax was deductible on "usance interest" in accordance with aforementioned decision of Andhra Pradesh High Court in the case of CIT v. Vishakhapatnam Port Trust (supra). For this purpose, reliance mainly has been placed on the decision in the case of Haryana Warehousing corporation v. DCIT 75 ITD 155 (Del) (TM) wherein it has been held that assessee being allowed exemption under Section 10(29) on the basis of a High Court decision, interest under Section 234B, cannot be charged on subsequent reversal of High Court decision by the Hon. Supreme Court.

4. To decide the controversy it will be relevant to understand the nature of levy of interest Under Section 201(1A), Reference in this regard can be made to the following decisions: 1. Pentagon Engineering Pvt Limited. v. Commissioner Of Income-Tax.

212 ITR 92 (Bom): The use of the word "shall" in Section 201(1A) makes the liability to pay interest in circumstances mentioned mandatory and there is no pre condition of consideration of "reasonable cause" for non-payment in time of tax deducted under Section 192 of the Act. We hold that Section 201(1A) of the Act is mandatory and the Tribunal was right in law in taking the view that the Income-tax Officer was not required to take into consideration the "reasonable cause" for non-payment of taxes deducted under Section 192 of the Act.

Thus it was held provisions of Section 201(1A) for levying interest are mandatory and the ITO is not required to take into consideration the reasonable cause for

non-payment of taxes deducted under Section 2. *Bennet Coleman & Co. Ltd. v. Mrs. V.P. Damle*, Third Income-tax Officer and Ors. 157 ITR 812 (Bom) It is admitted that the petitioners failed to remit within the prescribed time the tax deducted at source from the salaries of their employees. They, therefore, became assesseees in default under Section 201(1) and they became liable to pay interest at the rate of 12% per annum. Such liability arose immediately upon each default and can be computed only with reference to the law as it then stood.

Rule 119A was not introduced till long after. Rule 119A can have, therefore, no bearing on the computation of such interest. Section 201(1A) makes the payment of simple interest mandatory. The payment of interest thereunder is not penal provision. There is, therefore, no question of the waiver of such payment on the basis that the default was not intentional or on any other basis.

Thus it was held that Section 201(1A) makes payment of interest mandatory and therefore it could not be waived on the basis that default was not intentional; Rule 119A introduced long after has no bearing.

Section 201(1) deems a person to be an assessee in default in respect of tax if, after deducting tax deductible at source, he fails to remit it as required under the Act. Under Sub-section (1A), if that person, after deducting such tax, fails to remit it as required under the Act, he is made liable to pay interest It is admitted that the petitioners failed to remit within the prescribed time the tax deducted at source from the salaries of their employees. They, therefore, became assesseees in default under Section 201(1) and they became liable to pay interest at the rate of 12% per annum. Such liability arose immediately upon each default and can be computed only with reference to the law as it then stood.

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Thus it was held Section 201(1A) makes payment of interest mandatory and therefore it could not be waived on the basis that default was not intentional.

Levy of interest is of a compensatory measure for withholding tax which ought to have gone to the exchequer. Provision makes it clear that the levy is mandatory. It is true that the use of the expression "shall" is not always determinative of the fact whether a provision is directory or mandatory in nature. But the context in which the expression "shall" is used in Section 201(1A) makes it unambiguously clear that the levy is mandatory. Purpose of the levy is to claim compensation on the amount which ought to have been deducted and deposited and has not been done. Use of the word "shall" raises a presumption that the particular provision is imperative. But this prima facie inference may be regarded by other considerations such as the object and scope of the enactment and consequences flowing from such construction. "Interest" is a consideration paid either for use of money or for forbearance in demanding it after it has fallen due. It is a compensation allowed by law or fixed by parties or permitted by custom or usage for use of money belonging to another or for the delay in paying the money after it has become payable. It can be said to be the cost of using credit or funds of another. Liability for payment of interest at the rate stipulated accrues automatically on a failure to pay the amount of tax by the due date. This is so because such a provision is not a claim for any tax, but is a procedural matter providing machinery for recovery of tax which is compensatory in nature. Liability to pay interest arises by operation of law, being automatic. Looking at the nature of levy, it is clear that it is compensatory in character and not in the nature of penalty. It is seen that there are several provisions where the Legislature has made a distinction between interest payable and penalty imposable. Ultimate liability for tax being not there does not dilute the requirements for the noncompliance of which interest is levied under Section 201(1A).

Judged in that background, levy of Interest is justified and Tribunal was not justified in deleting it. *Sainik Motors v. State of Rajasthan of Kerala* , *CST v. Quereshi Crucible Centre* (1993) 89 ITR 467 (SC) and *Prahlad Rai v. STO* applied.

Therefore, it was held levy of interest under Section 201(1A) is mandatory, interest is chargeable for failure to deduct tax at source even if ultimately no tax was payable by the payee. CIT v. Prem Nath Motors (P) Ltd. The levy of interest under Section 201(1A) is of a compensatory measure for withholding tax which ought to have gone to the exchequer. The provision makes it clear that the levy is mandatory.

It is true that the use of the expression "shall" is not always determinative of the fact whether a provision is directory or mandatory in nature. But the context in which the expression "shall" is used in Section 201(1A) makes it unambiguously clear that the levy is mandatory. The purpose of the levy is to claim compensation on the amount which ought to have been deducted and deposited and has not been done. The use of the word "shall" raises a presumption that the particular provision is imperative. But this prima facie inference may be regarded by other considerations such as the object and scope of the enactment and consequences flowing from such construction. Liability to pay interest arises by operation of law, being automatic. Looking at the nature of levy, it is clear that it is compensatory in character and not in the nature of penalty. It is seen that there are several provisions where the Legislature has made a distinction between interest payable and penalty imposable.

Ultimate liability for tax being not there does not dilute the requirements for the non-compliance of which interest is levied under Section 201(1A). The ultimate liability for tax being not there does not dilute the requirements for the non-compliance with which interest is levied under Section 201(1A). Judged in that background, the levy of interest was justified and the Tribunal was not justified in directing its deletion- Sainik Motors v. State of Rajasthan, Karimtharuvi Tea Estate Ltd. v. State of Kerala Therefore, it was held that levy of interest under Section 201(1A) is a compensatory measure for withholding tax and such levy is mandatory and automatic; assessee having not properly deducted tax at source as required under Section 192 it was liable to pay interest under Section 201(1A).

5. Kanoi Industries (P) Ltd. v. Asstt. Commissioner of Income-tax 261 ITR 488 (Cal) Sub-section (1A) of Section 201 is without prejudice to the provision of Sub-

section (1). Therefore, in order to interpret Sub-section (1A) aid of Section 221 is not material. It has to be interpreted independent of it. The expression used in Sub-section (1A) is clear and unambiguous. It postulates liability to pay interest at the rate provided on the amount deductible as tax from the date on which such tax was deductible until it is actually paid, if the "assessee in default" does not deduct the tax. Similarly, the "assessee in default" is liable to pay interest in the same manner, if the "assessee in default" after deducting, fails to pay the tax.

Non-payment of tax, on account of failure to deduct or on account of any other reason after deduction, makes the 'assessee in default' liable to pay interest on the amount deductible made recoverable as a charge on the assets of the "assessee in default" under Sub-section (2). The charging of interest has been made continuous till it is actually paid. The use of the expression "shall" in Sub-section (1A) makes the liability to pay interest in the circumstances mentioned mandatory. Unlike Sub-section (1), no pre-condition of reasonable cause for non-payment of tax in time has been included in Sub-section (1A). Unlike the restriction provided for in Sub-section (1), Sub-section (1A) does not contain any restriction for charging interest thereunder. The provision of Sub-section (1A) is mandatory and automatic. The interest is payable from the date the tax was deductible till the date it is actually paid. The liability is absolute. It is obligatory for the Assessing Officer to charge interest upon non-compliance of any of the provision requiring deduction at source if noticed by him. It may be for failure to deduct or for failure to pay after deduction. The expression "actually paid" is the outer limit for the purpose of calculation of interest. If it is not paid within the period prescribed under Section 200, then the liability accrues and continues until the amount is actually paid voluntarily or non-voluntarily pursuant to or through recovery proceedings. The actual payment of tax is relevant only for the purpose of determining the period up to which a defaulting person would be liable to pay interest under that section. Therefore, this case does not involve any substantial question of law for admission. The appeal is, therefore, dismissed.-CIT v. Darshan Treading and Finance (P) Ltd.(Guj), Grindlays Bank Ltd. v. CIT and Grindlays Bank Ltd, Therefore it was concluded Section 201(1A) postulates mandatory liability to pay interest at the rate provided on the amount deductible as tax from the date on which such tax was deductible until it is actually paid, and the liability continues

until the amount is actually paid voluntarily or non-voluntarily pursuant to or through recovery proceedings, no substantial question of law is involved.

6. West Bengal State Electricity Board v. DCIT and Anr.

The scheme in which Sub-section (1 A) of Section 201 has been framed does not leave any scope or ambiguity to hold such liability contingent upon good and sufficient reasons or otherwise. On the other hand, it makes it clear that an assessee-in-default is liable to pay simple interest for the period stipulated in Sub-section (1A) in no uncertain terms. This is further supported by making such interest chargeable upon all the assets of the assessee-in-default under Sub-section (2) in case after deduction the tax is not paid together with the tax. Inasmuch as in case the liability to pay tax accrues if the deduction is not made, in that event, interest cannot be avoided in a case where tax was not deducted on the date the tax was deductible till the date it was deducted and deposited. The deprivation of the receipt of the tax by the Department within the stipulated time entails payments of interest by way of compensation, which is payable without prejudice to the provisions of Sub-section (1), cannot be interpreted as discretionary. Therefore, the interest payable under Section 201(1A) is mandatory and can neither be waived nor the rate could be reduced.--Kanoi Industries (P) Ltd. v. Asstt.

CIT Pentagon Engineering (P) Ltd. v. CIT CIT v. Assam Small Industries Development Corporation Ltd. . relied on; The State v. Amru Tulsi Ram and Anr.

It is the settled proposition of law that even in respect of administrative orders, if visits a person with penal consequences, then hearing is to be given even though the statute may not provide.

Natural justice is to be read into the provision. An interpretation that saves the constitutionality is to be preferred than what exposes it to unconstitutionality. Having regard to the above principle, failure to give opportunity while passing the order in respect of the asst. yr. 1985-86 has affected the right of the assessee. Order having been passed admittedly without giving an opportunity cannot be sustained and as such should be determined afresh after giving opportunity to the

assessee by the officer presently having jurisdiction in relation to Chapter XVII-B. Therefore, in respect of the asst. yr. 1985-86, the order is set aside and the appropriate authority currently having jurisdiction is directed to decide the matter after giving opportunity of hearing to the assessee in accordance with law--A.K. Kraipak and Ors. v. Union of India and Ors.

Superintendent, Preventive Service Customs and Ors. v. Charan Das Malhotra applied.

Thus it was held interest payable under Section 201(1A) is mandatory and it can neither be waived nor reduced; however, an opportunity of hearing has to be given to the assessee before charging inter 7. Ernakulam District Co-operative Bank Ltd. v. ACIT (TDS) and Anr.

:In Pentagon Engineering (P) Ltd. v. CIT , it was held as follows : "use of the word 'shall' in Section 201(1A) made the liability to pay interest, in the circumstances mentioned, mandatory and there was no precondition of consideration of 'reasonable cause' for non-payment in time of tax deducted under Section 192. Therefore, the ITO was not required to take into consideration the 'reasonable cause' for non-payment of taxes deducted under Section 192". In CIT v. Prem Nath Motors (P) Ltd. , it was held as follows: The levy of interest under Section 201(1A) is of a compensatory measure for withholding tax which ought to have gone to the exchequer. The provision makes it clear that the levy is mandatory.

It is true that the use of the expression 'shall' is not always determinative of the fact whether a provision is directory or mandatory in nature. But the context in which the expression 'shall' is used in Section 201(1 A) makes it unambiguously clear that the levy is mandatory. The purpose of the levy is to claim compensation on the amount which ought to have been deducted and deposited and has not been done. The use of the word 'shall' raises a presumption that the particular provision is imperative. But this prima facie inference may be regarded by other considerations such as the object and scope of the enactment and consequences flowing from such construction. Liability to pay interest arises by operation of law, being automatic. Looking at the nature of levy, it is clear that it is compensatory in character and not in the nature of penalty.

8. To the same effect is the case reported in CIT v. Dhanalakshmy Weaving Works . In another Division Bench decision of this Court of which one of us was a party (Sankarasubban, J.) reported in CIT v. K.K. Engineering Co. , it was (b) For the purpose of levy of interest Under Section 201(1A) it is irrelevant to take into consideration the existence of reasonable cause as reasonable cause has nothing to do with the liability of interest under Section 201(1A); (c) levy of interest under Section 201(1A) is compensatory measure for withholding tax and such levy is mandatory and automatic and in case of non-deduction and payment of tax at source assessee is liable to pay interest under Section 201(1A) until TDS is actually paid and liability continues until the amount is actually paid voluntarily or non-voluntarily; and (d) Interest payable under Section 201(1A) can neither be waived nor reduced.

6. Ld. AR also admitted that liability to pay interest under Section 201(1A) is mandatory but his only objection raised is that prior to pronouncement of the decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors. (supra) there was no liability to deduct tax at source of the assessee in view of the decision of Andhra Pradesh High Court in the case of CIT v. Vishakhapatnam Port Trust (supra).

Therefore, it is his contention that the interest should be charged only for the period from the pronouncement of decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors. (supra) till the payment of TDS. This contention of assessee is based principally on the argument that liability of assessee to deduct tax at source only commence from the date on which the decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors.

6.1. There is little force in such contention of the assessee. After narrating and analyzing all the relevant provisions their Lordships of Jurisdictional High Court in the case of CIT v. Vijay Ship Breaking Corporation and Ors. (supra) have held that assessee was liable to deduct tax at source. Reference can be made to the following observations: The article of the DTAA's concerning the taxation of interest does not deal with the procedural aspects of tax collection. The mode of tax collection including by deduction at source as provided under Section 195(1) read

with Section 4(2) of the Act, which enjoin a duty on these assesseees who were responsible for paying to the non-residents usance interest, to deduct income-tax thereon at the time of credit to the payee's account or at the time of payment by means by irrevocable letter of credit whichever was earlier, could be validly enforced against them and having failed in making deduction of income-tax on the interest paid by them to the non-residents, they cannot claim any deduction of the amount in respect of such interest which was payable outside India, in view of the provisions of Section 40 of the said Act. The finding of the Tribunal that the assesseees were not liable to deduct tax at source from the said payment of interest and that disallowance of interest under Section 40(a)(i) of the Act was not warranted, is, therefore, obviously erroneous.

Their Lordships further found that reliance to contend that the assessee was not liable to deduct tax at source from 'usance interest' on the decision of Andhra Pradesh High Court was misplaced as the said decision was rendered in a different context. Reference can be made to the following observations: The decision of the Andhra Pradesh High Court in CIT v. Visakhapatnam Port Trust, was rendered in the context of liability to pay tax on the basis of the DTAA and the case of the German company was that it had no "permanent establishment" in India and therefore, since Section 9(1)(i) of the said Act was subject to the DTAA, it was not taxable in India, but in the other contracting State. The assessments in that case related to the years prior to the introduction of Section 9(1)(v) in the Act with effect from June 1, 1976, under (which by a deeming fiction interest, such as usance interest payable by a resident, would be deemed to accrue and arise in India. Therefore, the said decision of the Andhra Pradesh High Court cannot assist the assesseees. It will be noticed that article VIII concerning taxation on interest in the DTAA with Germany existing at that time was worded differently from the article concerning taxation of interest of the revised Model Convention 77 and the DTAAs relevant to the present cases followed that Model Convention which included the expression "debt claim of every kind" in the article concerning taxation of interest which expression was absent in the said article VIII of the agreement with Germany. The decision of the Andhra Pradesh High Court was therefore, rendered in a different context. We are, however, for the foregoing reasons unable to subscribe to the view that the outstanding purchase price of

goods is not a debt.

In view of above observations of their Lordships of Jurisdictional High Court the arguments that assessee was not required to deduct tax at source from 'usance interest' earlier to the pronouncement of decision in the case of CIT v. Vijay Ship Breaking Corporation (supra), is liable to be rejected as the decision of Andhra Pradesh High Court was rendered in a different context and thus was not an authority to be relied upon to escape from the liability to deduct tax at source from 'usance interest'. It has also been found by Jurisdictional High Court that provisions considered by Andhra Pradesh High Court, in the case of CIT v. Vishakhapatnam Port Trust (supra) were different from the provisions applicable to the case of CIT v. Vijay Ship Breaking Corporation (supra) Thus the decision of Andhra Pradesh High Court cannot be said to be an authority to hold that assessee was not liable to deduct tax at source.

6.2 The liability of assessee to deduct tax at source is a statutory liability. The incidence of liability does not depend on pronouncement of decision by a Court but depends upon the provisions of law. The pronouncement of decision of High Court is explaining 'what the law had always been and must always be understood to have been'. By the pronouncement of decision, in the case of CIT v. Vijay Ship Breaking Corporation (supra) it was stated that assessee was liable to deduct tax at source from the 'usance interest' on the basis of relevant provisions of law and that position of law was "what it had always been and must always be understood to have been". The fact that the said decision was not there on the date when the incidence to deduct tax at source arose, has no material bearing on the issue as the same cannot restrict the liability of the assessee to pay interest under Section 201(1A) for the rest of the period i.e. from the date of pronouncement of decision in the case of CIT v. Vijay Ship Breaking Corporation (supra) till the actual payment of TDS. The liability to pay interest Under Section 201.(1A) was from the date of payment of usance interest as the tax was not deducted and-paid on usance interest. Such liability was creation of statute and is not dependent on pronouncement of decision. The proposition of law that decision of High Court is "statement of law which law had always been and must always be understood to have been" is supported by the following decision: Parshuram Pottery Works Co.

Ltd. v. D.R. Trivedi, Wealth Tax Officer and Ans. 100 ITR 651 (Guj): 5. We are of the opinion that the submission is not well-founded. It is true that the WTO did not have before him the decision of this Court in Raipur Manufacturing Company's case (supra) or that of the Supreme Court in Kesoram Industries & Cotton Mills' case (supra) when he passed the assessment orders in the petitioner's cases and that both the decisions were given after the assessment orders were made. But these decisions did not enact or make the law in any sense but merely interpreted the expression "debt owed" occurring in Section 2(m) of the Act which was undoubtedly on the statute book at the time when the assessment orders were made by the WTO. These decisions, insofar as they declared that the amounts claimed by an assessee in respect of provision for taxation are deductible in computing the net wealth of the assessee since they represent "debt owed" by the assessee within the meaning of Section 2(m) of the Act, merely stated what the law had always been and must always be understood to have been. The fact that these decisions were not before the WTO when he made the orders of assessment in the petitioner's cases has, therefore, no material bearing on the question whether the said orders disclose any mistake apparent from the record. If that be the correct legal position, and we hold that it is, the only conclusion possible is that the assessment orders, insofar as they disallowed the claim of the petitioner for deduction in respect of the amount of provision for taxation, proceeded on a wrong view of the law and the said orders were bad at their very inception, on the date on which they were made. In view of above observations, the arguments of the assessee that it was not liable to deduct tax at source from the 'usance interest' earlier to the decision in the case of CIT v. Vijay Ship Breaking Corporation (supra) is based on wrong view of law. From very inception the correct law was that the assessee is liable to deduct tax at source from 'usance interest' and if the same is not deducted, its liability to pay interest under Section 201(1A) existed since inception.

6.3 The above proposition of law that pronouncement of decision by High Court is statement of law 'what it had always been and must always be understood to have been' is reiterated by Jurisdictional High Court subsequently in the case of Standard Radiator v. CIT 165 ITR 178 (Guj).

It will be relevant to reproduce following observations from the said decision: The fact that the decision of this Court in Hasanali Khanbhai's case (supra), was not before the ITO when he made the assessment order in the assessee's case, has no material bearing on the question whether the said order disclosed any mistake apparent on the record. When this Court held that capital gains were taxable in the hands of a registered firm, it merely stated : "What the law had always been and must always be understood to have been," If the capital gains were liable to payment of tax as has been held by this Court in Hasanali Khanbhai's case (supra), the only conclusion possible is that the assessment order in so far as it failed to determine the tax payable on capital gains proceeded on a wrong view of law and was bad from its very inception, i.e., from the date on which it was made.

7. In my view reliance is also misplaced on the decision in the case of Haryana Warehousing Corporation v. DCIT (supra) for the following reasons: (i). The said decision was rendered for the liability of interest under Section 234 which relates to liability of interest regarding failure of assessee to pay appropriate advance tax on the basis of estimate during the Financial Year relevant to Asst. Year for which the assessee is liable to pay advance-tax. If income is not arising to assessee upto a particular date when instalment of advance-tax did not fall due, it was held that assessee could not visualize such accrual of income upto a particular date, therefore, assessee was not liable to deposit advance-tax by that due date. Here in the present case the facts are entirely different. It cannot be said that assessee could not quantify the amount which is liable to deduct at source as there is no dispute regarding quantification of "usance interest (ii) The decision of Third Member was rendered prior to the decision of Hon. Supreme Court in the case of CIT v. Anjum M.H. Ghaswala 252 ITR 1 (SC) as upto that date the issue of chargeability of interest under Section 234B was debatable and that decision of Tribunal did not have the benefit of later pronouncement of Hon. Supreme Court in the case of CIT v. Anjum M.H. Ghaswala (supra).

8. Since there is no dispute regarding the liability of the assessee to deduct tax at source, the interest under Section 201(1A) being mandatory and compensatory in nature should be levied right from the date when assessee paid "usance interest" till the actual payment of TDS. Therefore, the Assessing Officer was right in

holding that assessee is liable for interest under Section 201(1A) and CIT (A) has wrongly concluded that liability to pay interest only arises from the date of pronouncement of decision in the case of CIT v. Vijay Ship Breaking Corporation and Ors.

9. In view of above discussion, I am of the opinion that assessee is liable to pay interest under Section 201(1A) from the date of payment of "usance interest" till actual payment of TDS thereof. Therefore, the order of CIT (A) in this regard is set aside and that of Assessing Officer is restored. I decide accordingly.

1. This appeal as well as the cross objection arise out of the order of the CIT(A) dated 30.05.06. The revenue has taken the following effective ground of appeal: The Id. CIT (A) erred in law and on the facts of the case in deleting the interest of Rs. 3,68,632/-, levied Under Section 201(1A) of the I.T. Act, 1961 ignoring the fact that the provisions of Section 201(1A) are on the statute and not amended retrospectively and hence the facts in this case and that of Star India pvt. Ltd 280 ITR 321 (SC) are distinguishable.

1. On the facts and in the circumstances of the case, the Id. CIT (A) has erred in upholding the demand of Rs. 1558350A on account of TDS. 2. On the facts and in the circumstances of the case, the Id. CIT(A) has failed to appreciate that having regard to the facts of the case, the decision in the case of Vijay Ship Breaking Corporation 261 ITR 113 (Guj) would not be applicable to the assessee's case.

3. The brief facts of the case are that the assessee company has paid the usance interest during the year which consists of the usance interest paid to the foreign banker as well as to the foreign branches of Indian Banker. The assessee was of the view that no income tax at source is deductible in view of the only decision available at that time in the case of Vishakhapatnam Port Trust, 144 ITR 146.

Subsequently on 20.3.2003, Gujarat High Court in the case of Vijay Ship Breaking Corporation 271 ITR 113 (Guj) took the view, contrary to the view taken by the Andhra Pradesh High Court in the case of Vishakhapatnam Port Trust that the TDS provisions are applicable to the usance interest. Due to the decision of the Gujarat High Court, the demand for TDS not deducted Under Section 195(1) r.w.

Section 201(1) amounting to Rs.52,80,400/- and also the interest Under Section 201(1A) r.w. Section 201(1) was raised by the A.O. vide order dated 12.7.04, The assessee found certain mistakes in the order and therefore he moved an application Under Section 154 vide letter dt. 03.08.2004, the A.O. partly accepted the application of the assessee and reduced the demand of the TDS not being deducted Under Section 195(1) r.w. Section 201(1) at Rs. 11,89,718/- but imposed the interest Under Section 201(1A) r.w.

Section 201(1) amounting to Rs. 3,68,632A ignoring the contention of the assessee that the interest should be levied from the date when the decision of the Gujarat High Court in the case of Vijay Ship Breaking Corporation (supra) i.e. 20.03.2003 4. The assessee went in appeal before the CIT(A), the CIT(A) deleted the interest by observing as under: In respect of interest levied of Rs. 3,68,632 Under Section 201 (1A), the ARs have drawn my attention to the recent decision by the Supreme Court in the case of Star India Pvt. Ltd. v. Commissioner of Central Excise reported in 280 ITR 329. The ARs have pleaded that interest is in the nature of quasi punishment as held by the Supreme Court. Therefore, the liability to pay interest if created retrospectively by virtue of retrospective legislation, the normal course is that there can not be any quasi punishment to pay the interest retrospectively. The decision of the Apex Court is upholding the principles of natural justice. Therefore, there can not be any liability to pay interest by virtue of legislation retrospectively. In the instant case, there was no decision on the issue and the decision of Hon'ble Andhra Pradesh High Court in the case of Viskhapattanam Port Trust was prevailing. Therefore, the appellant was under the bonafide impression that on the usance interest, no TDS is deductible and therefore, no interest is also payable. However, the jurisdictional High Court has decided the issue reversing the decision of Andhra Pradesh High Court and stated that the TDS provisions are applicable in respect of Usance interest, as decided in the case of Vijay Ship Breaking Corporation.

Thus, the liability of the appellant to deduct the tax and also to pay the interest starts from the day the decision has been delivered by the Hon'ble Gujarat High Court. Since the Gujarat High Court has decided the issue after the decision by the Andhra Pradesh High Court, the assessee was under the genuine impression

that no TDS provisions are applicable to usance interest. Thus, in the natural course the appellant has not deducted the TDS amount and also not paid the interest. The issue of levy of TDS amount has been decided, but the decision of Supreme Court in respect of interest is clearly stating that one can not accept the payment of liability retrospectively in case of payment of interest. Therefore, owing to the decision of Supreme Court, the A.O. is directed to delete the interest levied Under Section 201(1A) of Rs. 368,632/- 5. The Id DR contended that the levy of the is mandatory. There is no provision Under Section 201(1A) to reduce or waive the interest. The reliance was placed on the decision of the Hon'ble Supreme Court in the case of CIT v. Anjum M H Ghaswala, and Ors. 252 ITR 1. The word used Under Section 201(1A) is "shall". It can not be read as "May" the legislature made the collection of the interest mandatory therefore the word 'shall' has been used. The reliance was also placed on the decision of Mumbai High Court in the case of Pantagon Engg. Pvt. Ltd. v. CIT 212 ITR 92 (Bom). Referring to the order of the CIT(A) it was contended that the CIT (A) was not correct in law in relying on the decision of the Hon'ble Supreme Court in the case of Star India Pvt.

Ltd. v. Commissioner of Central Excise, 280 ITR 329 (SC). This case was not applicable to the facts of the case before us. It was pointed out that this case relate to the Service Tax and the case relate to the liability to pay the interest has arisen due to the fact that there had been retrospective amendment and due to which the liability to pay tax has arisen and assessee was treated to have committed default retrospectively. In the case of the assessee the assessee has committed the default in accordance with the existing provisions of the law and therefore the A.O. has rightly imposed the interest Under Section 201(1A) of the Income Tax Act. Thus, it was contended that the order of the CIT(A) be set aside and that of the A.O. be restored.

6. The Id. AR on the other hand vehemently relied on the order of Hon'ble Andhra Pradesh High Court in the case of Vishakhapatnam Port Trust, 144 ITR 146 (AP). It was pointed out that in this case it was held that usance interest is not chargeable in India interest would be taxable if it arose out of indebtedness and therefore no question of deduction of the income tax arise. The assessee was under a bonafide belief that no TDS has to be deducted on the usance interest as

Section 195(1) was not applicable. Referring to the decision of Hon'ble Gujarat High Court in the case of CIT v. Vijay Ship Breaking Corporation, 261 ITR 113 it was pointed out that it is only for the first time by this decision Hon'ble High Court has held that this interest is liable to deduction at source. The Hon'ble High Court while deciding so, did not agree with the decision of Hon'ble Andhra Pradesh High Court in the case of Vishakhapatnam Port Trust (supra). This decision was delivered on 20th March, 2003. Prior to this decision the assessee was since not liable to deduct the tax at source, the question of imposition of the interest does not arise. The assessee since was under the bonafide belief that no TDS is to be deducted on the usance interest paid by him, it cannot be said that the assessee has committed the default. At the most it was pointed out that the default could have been committed only from the date when the Judgement of the Hon'ble Gujarat High Court has become publicly known. The liability to deduct the tax has also arisen on the date due to the Judgement of the Hon'ble Gujarat High Court, reliance was heavily placed on the Third Member decision of Delhi Bench of Income Tax Appellate Tribunal in the case of Haryana Warehousing Corporation v. DCIT 252 ITR (AT) 34. It was pointed out that in this case also the assessee was granted exemption in respect of certain income in prior years on the basis of only High Court decision on the subject subsequently Rajasthan High Court delivered the Judgement on 1.12.1993 that the exemption is not available in respect of those incomes. The decision of Rajasthan High Court was subsequently affirmed by the Hon'ble Supreme Court when the interest Under Section 234B was imposed it was held that although the interest is mandatory but it is imposable only if assessee was liable to pay advance tax. The assessee was under bonafide belief in view of the decision of Allahabad High Court in the case of UP State Warehousing Corporation till 31.03.1992 that the assessee is not liable for the advance tax in respect of those incomes for the A.Y. 1992-93. When the matter went on a difference of opinion to the Third Member, the Third Member held that the interest Under Section 234B is not leviable in view of the fact that at the relevant point of time the assessee could not foresee the decision of the Supreme Court on the point, reliance was also placed on the decision of Chandigarh Bench of the Tribunal in the case of Davinder Kaur Sekhoh v. ACIT 67 ITD 407 (Chd). Thus, it was vehemently contended that since the assessee was not liable to deduct TDS

prior to 20.03.2003 when the case of Gujarat High Court was delivered, no question of imposition of interest arise.

7. We have carefully considered the rival submissions alongwith the material on record as well as the case law relied on before us. This is an admitted fact that prior to the decision of the on'ble Gujarat High Court, there was only one decision of Andhra Pradesh High Court in the case of Vishkhapatnam Port Trust (Supra) in which it was held that the usance interest is not chargeable to tax and therefore no question of any default Under Section 201(1) arise Subsequently Gujarat High Court in the case of CIT v. Vijay Ship Breaking Corporation (Supra) vide its order dated 20.03.2003 held that the provision for deduction of tax at source are applicable to the usance interest as it is chargeable to tax. We have gone through the decision of Income Tax Appellate Tribunal (TM) in the case of Haryana Warehousing Corporation v. DCIT (supra) in which we find that at page 55 on the question of charging of the interest Under Section 234B when the certain income in prior year were exempt Under Section 10(29) of the Income Tax Act in view of the only decision of one High Court and subsequently the exemption to the said income was not available due to the decision of Hon'ble Rajasthan High Court delivered on 1.12.1993 and confirmed by the Supreme Court, it was held The learned Departmental Representative submitted that the provision of Section 10(29) was unambiguous. The assessee was not entitled to get benefit in respect of Section 10(29) on the incomes which it claimed. There was no decision of jurisdictional High Court or of the apex court at the relevant point of time dealing with this issue. As such, the assessee ought to have paid the due tax. It was further argued that the levy of interest under Section 234B is mandatory. Interest charged under Section 234B is compensatory in nature. As such, the assessee cannot be exonerated from the charge of interest.

The defaults, which attract charge of interest under Section 234B, are as under: (i) Failure to pay advance tax during the financial year which an assessee is liable to pay under Section 208; and (II) Payment of advance tax under Section 210 by an assessee. which is less than 90 per cent of the "assessed tax".

Admittedly, up to the assessment year 1991-92 the assessee did get the benefit of Section 10(29) of the Act. It was assessed on nil income. The exemption was granted on the basis of the Allahabad High Court decision in U./P. State Warehousing Corporation's case (1992) 195 ITR 275. Till March 31, 1992, this was the only decision available on the point. The assessee acted bona fide in conformity with the decision of the High Court. Just because the decision was reversed by the apex court liability to pay advance tax can not be fastened on the assessee. At the relevant point of time it was impossible on the part of the assessee to foresee the decision of the Supreme Court on the point. Law is trite on the subject It is canonized in the well known common law dictum.

LEX NON COGIT AD IMPOSSIBILIA" (Law cannot compel you to do the impossible).

I am inclined to agree with the argument of the learned Departmental Representative that Section 234B is mandatory in nature. But before invoking Section 234B it is also essential to see that whether the assessee comes within the sweep of this section. The condition precedent for invoking the provisions of Section 234B are that the assessee must be fastened with the liability to pay advance tax under Section 208. Taking into consideration the entire conspectus of the case. I am of the opinion that the assessee was not liable to make the payment of advance tax. The case of the assessee falls beyond the provision of Section 208 of the Act. As such, it is not coming within the ambit of Section 234B of the Act. Therefore, I am inclined to agree with the view taken by the learned Accountant Member.

8. We also noted that the Special Bench in the case of Dy. CIT v. Oman International Bank 100 ITD 285 (SB) has held that the decision of Third Member will have the same sanctity as the decision of the Special bench.

9. We feel it necessary to refer to the provisions of Section 201(1A).

This section stipulates as under: (1A) Without prejudice to the provisions of Sub-section (1), if any such person principal officer or company as is referred to in that Sub-section does not deduct the whole or any part of the tax or after deducting

fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at required by or under this Act, he or it shall be liable to pay simple interest at twelve per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

10. On the plain reading of the aforesaid section, (1) it is apparent that the liability to pay simple interest arises if any person does not deduct the whole or any part of the tax (2) if any person after deducting tax failed to pay the tax as required by or under this Act (3) the interest is payable on the amount of such tax from the date on which such tax was deductible to the date on which the tax is actually paid.

11. Now the question before us arises when the tax was deducted in the case of the assessee. This is an admitted fact that the usance interest was not chargeable to tax prior to the decision of Gujarat High Court in the case of Vijay Ship Breeding Corporation (supra) as prior to this the only High Court decision was that of Vishakhapatnam Port Trust (supra). The decision of Vijay Ship Breaking Corporation (supra) was pronounced by the Hon'ble Gujarat High Court on 20-3-2003. In view of the decision of the Third Member in the case of Haryana Warehousing Corporation v. DCIT (supra) the assessee could not foresee that the usance interest will be chargeable to tax by the decision of the Hon'ble Gujarat High Court and thus will become liable to deduct tax at source. The law cannot compel the assessee to do the imposition. Since the decision of the Gujarat High Court has come on 20-3-2003, therefore, the assessee was liable to deduct the tax at source on the usance interest on or after 20-3-2003 in accordance with the provisions of Income-tax as in our opinion, the liability to deduct tax has arisen on that date. Therefore, in view of the provisions of Section 201(1A) the assessee is liable to pay interest on the amount of such tax from the date when the liability to deduct the tax has arisen i.e. on 20-3-2003.

12. We have also gone through the decision of Supreme Court in the case of Star India P. Ltd. v. Central Excise (2006) 280 ITR 321 as relied upon by the CIT(A). We find that in this decision, there was retrospective amendment and due to retrospective amendment the liability to pay service tax has arisen and accordingly, the interest was charged retrospectively. This case, in our opinion, will

not help the assessee because in that case there was amendment and the law cannot provide for a punishment and offence retrospectively. The view taken in the case of *Star India P. Ltd.* (supra) is consistent with the law in a number of decisions earlier given by the Supreme Court as in the case of *General Finance Co. v. ACIT 257 ITR 338*. In our opinion, the case of the assessee is duly covered by the decision of the Third Member in the case of *Haryana Warehousing Corporation* and respectfully following the said decision we direct the A.O to impose the interest on the assessee from the date when the decision of Hon'ble Gujarat High Court in the case of *Vijay Ship Breaking Corporation* (supra) was pronounced till the date the tax was actually paid by the assessee.

Thus the appeal of the revenue is partly allowed.

13. Coming to the Cross Objection filed by the assessee the Id. A.R was fair enough to concede that in view of the decision of the Gujarat High Court in the case of *Vijay Ship Breaking Corporation* (supra), the assessee was liable to deduct the tax at source on the usance interest with effect from 20-3-2003. Accordingly, we do not find any merit in the cross objection taken by the assessee as, in our opinion, the CIT(A) was correct in law in sustaining the demand of Rs. 11,55,060ss raised on the assessee in respect of failure to deduct the tax at source Under Section 195(1) read with Section 201(1). Thus the cross objection filed by the assessee stands dismissed.

14. In the result, the appeal of the revenue is partly allowed while the cross objection filed by the assessee is dismissed.

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