In the Income-Tax Appellate Tribunal,
Delhi Bench 'F', New Delhi

Before : Shri Amit Shukla, Judicial Member And
Shri L.P. Sahu, Accountant Member

ITA No. 6985/Del/2014
Assessment Year: 2006-07

D.C.I.T., Circle-II, Dehradun. **(Appellant)**	**vs.**	Reed Hycalog Limited Partnership, C/o SRBC & Associates LLP, 4th and 5th Floor, Plot No. 2B, tower-2, Gautam Budh Nagar, Sec. 126, Noida. PAN – AAJFR5191E **(Respondent)**

C.O. No.164/Del/2017
(in ITA No. 6985/Del/2014)
Assessment Year: 2006-07

Reed Hycalog Limited Partnership, C/o SRBC & Associates LLP, 4th and 5th Floor, Plot No. 2B, tower-2, Gautam Budh Nagar, Sec. 126, Noida. **(Appellant)**	**vs.**	D.C.I.T., Circle-II, Dehradun. **(Respondent)**

Revenue by	Sh. Surender Pal, Sr. DR
Assessee by	S/Sh. Kamal Sawhney, Prashant and Divyansh, Advocates.

Date of Hearing	21.02.2019
Date of Pronouncement	

ORDER

Per L.P. Sahu, A.M.:

The Revenue has filed the appeal and the assessee has filed the Cross-objection against the order passed by the ld. CIT(A)-II, Dehradun dated 13.10.2014 for the assessment year 2006-07 on the following grounds :

Grounds of Revenue's appeal:

1. Whether on the facts and in the circumstances of the case, the Ld CIT(A) has erred in holding that income of the assessee from the business of supplying drill bits may be computed @ 1.34% of receipts on account of direct sales and @ 10% on receipts on account of consignment sales, as against the action of the Assessing Officer ('AO') in computing the income of the assessee at a deemed profit rate of 25% on gross receipts.

1.1 Whether on the fact and in the circumstances of the case, the Ld CIT(A) has erred in reversing the action of the AO in computing the income of the assessee at a deemed profit rate of 25% of the gros receipts from execution of the contract involving sales of drill bits in India on the ground that the assessee was not put to notice regarding computation of Income from both types of revenue streams @ 25% of gross receipts.

1.2 Whether on the fact and in the circumstances of the case, the Ld CIT(A) has erred in admitting and considering additional evidence in the form of PE Attribution Report filed by the assessee during the appellate proceedings when none of the conditions laid sown in Rule 46A of the Income tax Rule,1962 was satisfied in this case.

1.3 Without prejudice to the forgoing, the Ld CIT(A) has erred in ignoring the contention of the AO that the PE attribution analysis submitted during the appellate proceedings was not reliable as the assessee had taken as comparables a set of entities not engaged in a similar line of business.

1.4. Whether on the facts and circumstances of the case, the Ld CIT(A) has erred in holding that only 35% of the contractual revenue from direct sales of drill bits is attributable to the assessee's PE in India, ignoring the fact that the income of the assessee has been earned from execution of contract in India and therefore, the entire income from these contracts is liable to tax in India, particularly in view of the facts that the assessee had failed to produce copies of contracts/purchase orders during the assessment proceedings.

Grounds in Cross objection:

1. That oil the facts and circumstances of the case, the Ld. Commissioner of Income Tax Appeals ('CIT(A)') erred in not appreciating the fact that the

assessment proceedings were reopened by the learned Assessing Officer ('AO') under section 147 of the Income Tax Act. 1961 ('the Act') without any 'reason to believe' that income has escaped assessment. Thus the reassessment notice issued under section 148 of the Act by the Td. AO is illegal, bad in law and is liable to be quashed.

2. That on the facts and circumstances of the case, the Hon'ble CIT(A) erred in not appreciating that the reasons furnished by the Td. AO amount to review of facts submitted along with the return of income. Reopening of assessment in order to review return of income is bad in law and liable to be quashed.

3. That on the facts and circumstances of the case, the Hon'ble CIT(A) erred in not appreciating that the Ld. AO has reopened the assessment without any new tangible material being brought on record and that reopening assessment without any new tangible material is bad in law and liable to be quashed.

4. That the Ld. CIT(A) as well as the Ld. AO has erred in law and in fact, in levying interest under section 234B of the Act and thereby disregarding the fact that the appellant is a non-resident, whose income is subject to tax deduction at source. Accordingly, interest under section 234B is not leviable to a non-resident.

5. On the facts and circumstances of the case, the Ld. AO has erred in law and in fac s, by levying interest under section 234C of the Act and thereby disregarding the fact that the appellant is a non-resident, whose income is subject to tax deduction at source. Accordingly, interest under section 234C of the Act is not leviable to a non-resident.

RELIEF:
Your respondent respectfully prays that:

a) The impugned order of the Ld. CIT(A) may be modified to the above extent and

b) Grant any other relief as may be deemed necessary.

2. The brief facts of the case are that Reed Hycolog Ltd. Partnership (RHLP) is a firm formed in the United State of America (USA). RHLP ultimately owned by Grand Prideco Inc., a US based company registered on US stock exchange. The assessee is a tax resident of USA and is eligible to claim benefits under the Double Taxation Avoidance Agreement entered into between India and USA (India-USA DTAA). The assessee is engaged in the business of manufacture and sale of Drill-bits used in the extraction and production of mineral oil. The assessee filed its return of income alongwith computation of income and notes to computation, giving the basis for offering its income to tax on 06.03.2007 declaring total income at Rs.62,12,620/- as income from offshore direct sale and offshore consignment sales. During the impugned year, the total offshore direct sales was made by assessee in USD 10,33,302 and consignment sales amount to USD 12,94,334 and has offered income from direct sales at 1% of the gross receipts of Rs.4,54,70,972/- and on consignment sales 10% of gross receipts of Rs.5,17,79,849/-. The return of income was processed u/s. 143(1) on 29.03.2008. Subsequently, the case was reopened by issuing notice u/s. 148 after recording the reasons on 29.03.2012. In response, the assessee vide letter dated 14.05.2012 stated that the return filed originally may be treated as return filed in response to notice u/s. 148. The reasons were provided to the assessee and the assessee filed objections which were disposed of by the Assessing Officer. The assessee company also filed writ petition before Uttarakhand High Court challenging the reopening of assessment which was rejected. The reasons recorded for reopening read as under :

"The assessee was engaged in sales of equipment i.e. drill bits used in extraction and production of mineral oil to ONGC, Cairn Energy India Pty Limited, Oil India, Reliance Industries Limited, GSPC Niko Resources Ltd., Hindustan Oil Exploration Company Ltd, Premier Oil, Aban Llyod Chiles Offshore Ltd., etc. During

the year under consideration assessee has shown gross revenues on account of "Direct Sales" amounting to USD 10,33,302 and "Consignment Sales" amounting to USD 12,94,334. In computation of income assessee has only offered direct sales @ 1% of gross revenues under the claim that it involved offshore sales computed outside India and consignment sales @ 10% of gross revenues. However, no justification or basis of computation of income thereof is available on records. The income has therefore not been offered to tax in full and therefore income has escaped assessment. In view of this receipts of Rs. 4,54,70,972/- on account of direct sales and gross receipts on account of consignment sales Rs. 5,17,79,849/- has escaped assessment. "

On the basis of material available before the Assessing Officer, it was concluded that the contract entered was in relation to activities performed in India. Therefore, as per the provisions of section 9(1) of the Act, the income is accruing or arising in India. Accordingly, gross receipts whether alleged outside India sales are inside India and are taxable in India. The Assessing Officer during the course of assessment proceedings asked the assessee to file copy of contract/PO's which was not provided. Therefore, the assessee's claim that nature of activities involved only sales of equipments was not maintainable. The assessee was also unable to provide any other basis for profit component in respect of contractual revenue earned by the assessee. The assessee had executed multiple contracts with various companies in India. Finally, for want of requisite documents, the Assessing Officer computed 25% of profit on the basis of estimate. The assessee has not maintained books of account nor has it produced any documentary evidence/statement of computation of income from the total sales. Accordingly, he made addition of Rs.1,94,50,164/- to the income of the assessee. The assessee carried the matter in appeal before the ld. CIT(A) and also filed additional evidences before him. The ld. CIT (A) called for remand report from the Assessing Officer who submitted the same on 11.06.2014

objecting to admission of additional evidence because ample opportunities were provided in the assessment proceedings. The comparables cited in the attribution report are not specifically similar to the line of business of appellant and thus cannot be relied upon as appropriate comparables and lastly it has been averred that the assessee has been shifting its stand, as at one time (during proceedings for recovery of demand) he had presented a study to show only 2.38% profit margin. The copy of remand report was provided to the assessee and the assessee filed rejoinder which has been duly incorporated by the CIT(A) in his order. During the appellate proceedings, the assessee also filed study report after selecting some companies. The ld. CIT(A) after considering the rejoinder, partly allowed the appeal of the assessee. Aggrieved, the Revenue is in appeal and the assessee has filed cross-objection.

3. The ld. DR relied on the order of the Assessing Officer and submitted that in the re-assessment proceedings the assessee did not submit the documents as required by the Assessing Officer for determining the profits as per provisions of the IT Act. Therefore, the Assessing Officer was justified for applying 25% of the profit on the total sales. The assessee was given ample opportunities for submissions of documents and therefore, the additional evidence submitted before the CIT(A) have wrongly been accepted. The ld. CIT(A) has given the relief to the assessee after following the instruction of CBDT which was prevailing only for three years. Therefore, the order of the ld. CIT(A) is not correct. Further in respect of cross objection of the assessee, the ld. DR submitted that the CIT(A) has rightly rejected the plea of the assessee on validity of reopening of assessment after considering the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers, 291 ITR 500 (SC) and also the fact that the writ

petition of assessee on this issue also stood dismissed by Hon'ble jurisdictional High Court. It was also submitted that the interest u/s. 234B and 234C is applicable when the payment of taxes is not made within the stipulated time.

4. The ld. AR of the assessee submitted that all the information were provided in the return of income along with notes to computation of income. Therefore, the reopening of the case was not justified. He reiterated the submissions made before the ld. CIT(A). Further, in respect of addition on merits, he supported the order of the ld. CIT(A). He also filed a written synopsi on levy of interest u/s. 234B & 234C which is as under :

> Provisions of sections 234B and 234C of the Act are applicable in cases where an assessee who is liable to pay advan e tax under provisions of section 208 of the Act, defaults / defers payment of such advance tax. Further, as per the provisions of section 208 read with section 209(1)(d) of the Act, advance tax payable has to be computed after reducing from the estimated tax liability the amount of tax deductible at source on income which is included in computing the estimated tax liability. It is pertinent to note the use of the words tax deductible at source' and not 'tax deducted at source' in section 209(1)(d) of the Act.
>
> On perusal of provisions of section 195 of the Act, tax is deductible at source from payments made to non-residents. Since the assessee is a non-resident, tax is deductible at source from the payments made to the assessee under section 195 of the Act. Accordingly, since tax was deductible at source on all the payments made to the appellant, no advance tax was payable by the assessee as per the provisions of section 208 read with section 209(1)(d) of the Act. Hence, in the absence of any liability for payment of advance tax, the provisions of section 234B and 234C of the Act would not be applicable in appellant's case.
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> **Judicial Pronouncements**
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> **DIT v. Jacabs Civil Incorporated/Mitsubishi Corporation (330 ITR 578) (Hon'ble Jurisdictional Delhi HC)**
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> The Hon'ble Delhi HC relying on the decision of Hon'ble Uttaranchal HC in the case of CIT v. Sedco Forex International Drilling Co. Ltd (264 ITR 320) and Hon'ble Bombay HC

in the case of DIT v. NGC Network Asia LLC (222 CTR 85) has held in para 8 of the decision as under:

This clause categorically uses the expression "deductible or collectible at source " and it is this clause which is incorporated by the Uttaranchal High Court in the said judgment (supra) in the manner already pointed above. The scheme of the Act in respect of non-residents is clear. Section 195 of the Act puts an obligation on the payer, i.e., any person responsible for paying to a nonresident, to deduct income-tax at source at the rates in force from such payments excluding those incomes which are chargeable under the head 'Salaries'. Therefore, the entire tax is to be deducted at source which is payable on such payments made by the payee to the non-resident. Section 201 of the Act lays down the consequences of failure to deduct or pay. These consequences include not only the liability to pay the amount which such a person was required to deduct at source from the payments made to a non-resident hut also penalties, etc. Once it is found that the liability was that of the payer and the said payer has defaulted n deducting the tax at source, the Department is not remedy-less and, therefore, can take action against the payer under the provisions of section 201 of the Income-tax Act and compute the amount accordingly. No doubt, if the person (payer) who had to make payments to the non-resident had defaulted in deducting the tax at source from such payments, the non-resident is not absolved from payment of taxes thereupon. However, in such a case, the non-resident is liable to pay tax and the question of payment of advance tax would not arise. This would be clear from the reading of section 191 of the Act along with section 209(1)(d) of the Act. For this reason, it would not be permissible for the evenue to charge any interest under section 234B of the Act.

9. We thus, answer the aforesaid question in favour of the assessee as we are of the opinion that the Tribunal has rightly held that the assessee was not liable to pay any interest under section 234B of the Act following the judgments of the Uttaranchal and Bombay High Courts.

DIT (IT) v. GE Packaged Power Inc (373 ITR 65) (Hon'ble Jurisdictional Delhi HC)

The Delhi HC following the decision of DIT v. Jacabs Civil Incorporated/Mitsubishi Corporation (supra) has held in para 23 of the decision as under:

... no interest is leviable on the respondent assessees under Section 234B. even though they filed returns declaring NIL income at the stage of reassessment. The payers were obliged to determine whether the assessees were liable to tax under Section 195(1). and to what extent, by taking recourse to the mechanism provided in Section 195(2) of the Act. The failure of the payers to do so does not leave the Revenue without remedy; the payer may be regarded an assessee in- default under Section 201, and the consequences delineated in that provision will visit the payer.

CIT v. Sedco Forex International Drilling Co. Ltd. (134 Taxman 109) (Hon'ble Uttaranchal HC)

The Hon'ble Uttaranchal HC in para 15 of its decision has held as under:

Although we agree with the conclusions of the Tribunal, we prefer to give our own reasons in support of our conclusion that on the facts and circumstances of this case, levy of interest under section 234B on the assessee is not justified. Firstly, the decisions of the Tribunal on the interpretation of the contracts regarding on period and off period salary were conflicting. Ultimately, the Legislature has stepped in to clarify the position by the Finance Act. 1999. In this connection, it is important to note that section 234B imposes interest, which is compensatory in nature and not as a penalty - Union Home Products Ltd. v. Union of India [1995] 215 ITR 758, 7661 (Kar). Secondly, although section 191 of the Act is not overridden by sections 192,208 and 209(1)(a)(d) of the Act, the scheme of sections 208 and 209 of the Act indicates that in order to compute advance tax the assessee has to, inter alia, estimate his current income and calculate the tax on such income by applying the rates in force. That under section 209(1)(d) the income- tax calculated is to be reduced by the amount of tax which would be deductible at source or collectible at source, which in this case has not been done by the employer company according to the law prevailing for which the assessee cannot be faulted. As slated above at the relevant time there were conflicting decisions of the Tribunal. A bona fide dispute was pending. Tim assessee had to estimate his current income. The words used under section 209(1)(a) make the assessee estimate his current income and since a bona fide dispute was pending, imposition of interest under section 234B was not justified without hearing and without reasons. Accordingly, we answer this question in the affirmative, i.e. in favour of the assessee and against the Department.

DIT v. Ngc Network Asia LLC 222 CTR 85 (Hon'ble Bombay HC)

The Hon'ble Bombay HC following the decision of C1T v. Sedco Forex International Drilling Co. Ltd. (supra) has in para 7 and 8 of its decision held that when a duty is cast on the payer to pay the tax at source, on failure, no interest under section 234B can be imposed on the payee assessee.

DCIT v. SMS Mevac UK Ltd (ITA No. 3841/DeI/2015) (Hon'ble Delhi Tribunal) (decision of Hon'ble Member Shri L P Sahu and Shri Amit Shukla)
The Hon'ble Delhi Tribunal following the Hon'ble Delhi HC decision in the case of D1T (IT) v. GE Packaged Power Inc (supra) has held in para 4 of its decision as under:

...it is well settled proposition of the Jurisdictional High court that where assessee is a non resident company and if the entire tax which was to be deducted at source on payments made by the payer to it. then there is was no question of payment of advanced tax by the assessee and consequently no interest u/s 234B can be charged. Hon'ble High Court after detailed reasoning and reference to various judgments has concluded that interest u/s 234B cannot be charged from non-resident where the entire tax was deducted at source by the payer.

DCIT v. Andritz AG (ITA No. 3413/DeI/2015) (Hon'ble Delhi Tribunal) (decision of Hon'ble Member Shri L P Sahu)

The Delhi Tribunal following the Hon'ble Delhi HC decision in the case of DIT v. Jacabs Civil Incorporated/Mitsubishi Corporation (supra) and Hon'ble Bombay HC decision in the case of DIT v. NGC Network Asia LLC (supra) has held in para 5 of its decision as under:

We find that the conclusion reached by the Id. CIT(A) is based on the decision rendered by Hon'ble jurisdictional High Court on the issue of interest whether leviable on the non-resident assessee or not. as per provisions of section 234B of the Act. as the assessee was subject to withholding lax u/s. 195 of the Act. No counter decision is placed on record on behalf of the Revenue. We. therefore, finding no infirmity in the impugned order, are not inclined to interfere with the same. Accordingly. the appeal of the Revenue deserves to be dismissed.

DDIT v. Societe International De Telecommunication (153 TTJ 55) (Hon'ble Mumbai Tribunal) (decision of Hon'ble Member Shri Amit Shukla)

The Mumbai Tribunal following the Hon'ble Bombay HC decision in the case of D1T v. NGC Network Asia LLC (supra) has held in para 4.2 as under:

As the assessee before us is a non resident, naturally any amount payable to it which is chargeable to tax under the Act is otherwise liable for deduction of tax at source. In that view of the matter and respectfully following the above precedents, we hold that no interest can be charged under sections 234B and 234C of the Act.

In view of abov , since all payments to the appellant were subject to withholding of taxes as provided in section 195 of the Act, it is most respectfully prayed before your goodself that no interest under section 234B and 234C of the Act shall be levied to the appellant."

5. After hearing both the parties and going through the entire material available on record, we find that the ld. CIT(A) has done good reasoned order in respect of profit determined by the ld. CIT(A) @ 1.34% on direct sales and 10% on consignment sales. The findings reached by the ld. CIT(A) read as under :

4.3 The findings Ld.AO and the assessments of Ld. ARs have been carefully considered. It is not in doubt that the profit attribution report should be

accepted simply because there is no reason to believe that the Ld. AO, at the time of impugned proceedings, ever revealed his mind about taxing both types of revenue streams @ 25% of gross receipts. Also there is a duty cast to determine the correct tax liability of an assessee and towards this end the attribution report would come in handy.

Furthermore, Instruction number 1767 (supra) though is no longer in force, has some persuasive value even in the present matter. Thus the Ld.AR was asked to work out margins under various scenarios discussed with him. The position that emerges from this exercise may be summarized as under: -

Particulars	Arm in $	Profit attributable to India										
		As per return	As per order	Comparable Margin		Deemed profit C						
		@1% / 10%	@25%	@3.83%	@3.83% on Direct sales	@10%	@3.5% (0% X 35%)	@3.5% on Direct sales	@8.75% (25% X 35%)	@8.75% on Direct sales	@134% (3.83% X 35%	@134% on Direct sales
Direct sales in USD	$1,033,302	$ 10,333	$ 258,326	$ 39,575	$ 39,575	$ 103 330	$ 36,166	$ 36,166	$ 90,414	$ 90,414	$ 13.151	$ 13,851
Consignment sales in USD	$1,294,334	$ 129,433	$ 323,584	$ 49,573	$ 129 433	$ 129,433	$ 45,302	$ 129,433	$ 113,254	$ 129,433	S 45302	$ 129,433
Total revenues in USD	$2,327,636	$ 139,766	$ 581,909	$ 89,148	$ 169,009	$ 232,764	$ 81,467	$ 165,599	$ 203,668	$ 219,847	$59,153	$ 143,285
Tax @ 33.66% in USD		$ 47,045	$ 195,871	$ 0,00	$ 56,888	$ 78,348	$ 27,422	$ 55,741	$ 68,555	$ 74,001	$ 19,911	$ 48,230
Exchange rate		$44.45	44.45	44. 5	44.45	44.45	44.45	4445	44.45	44.45	44 45	44.45
Tax in INR		20,91,167	87,06,447	13,33,828	25,28,689	34,82,579	12,18,903	24,77,670	30,47,256	32,89327	8,85,041	21,43309

4.4.1 Following the case of Rolls Royce (supra) it is held that on direct sales profits be attributed @ 35 % of 3.83% = 1.34% of gross receipts. However, on consignment sales the originally offered 10% of gross receipts needs to be accepted since there is a precedent in the shape of section 44BB of the Act which determines such profits for oil and gas industry where books of account are not maintained. The Ld. AO is directed accordingly.

6. It is clear from the above order of the ld. CIT(A) that the ld. CIT(A) has followed the order of Tribunal in the case of M/s. Rolls Royce Plc vs. DDIT (2008) 113 TTJ 446 while working out the profit attribution against the direct sales @ 35% of 3.83% which comes to 1.34%. The profit on consignment sales has also

been rightly accepted @ 10%.The ld. DR could not be able to substantiate the profit @ 25% as worked out by the Assessing Officer on entire sales. No counter Authority has been cited by the Revenue against the aforesaid decision of the Tribunal. We, therefore, do not find any justification to interfere with the order of the ld. CIT(A) on this score. As regards the admission of additional evidence, the ld. CIT(A) had given reasonable opportunity to the AO to controvert and comment on the same by calling for the remand report especially when there was no evidence with the AO to support the profit @ 25% on entire sales of the product in India which were manufactured outside India. Further, the Assessing Officer did not give any good reason to discard the profit attribution calculated by the assessee on the basis of study report submitted before the ld. CIT(A). We accordingly, do not find any substance in the contention of the ld. DR that the additional evidences have been wrongly admitted.

7. Adverting to the cross objection of assessee, it is seen that the cross objection filed by the assessee is delayed by 25 days, for which the assessee has filed an application to condone the delay stating that the notice of Tribunal regarding filing of appeal by the Revenue did not contain the grounds of Revenue, which were later on provided to the assessee on 13th June, 2017 causing delay in filing the cross-objection. This reason being bona fide, the delay of 25 days in filing of cross objection is condoned.

8. The legal ground raised by the assessee against validity of reopening appears to have been rightly rejected by the ld. CIT(A) after following the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. (supra) and that the return of assessee was processed u/s. 143(1) and

also keeping in view the fact that the validity of impugned reopening proceedings was challenged by the assessee in writ petition before the Hon'ble Jurisdictional High Court also, which stood rejected by Hon'ble Court, as mentioned by the CIT(A) in his order. We, therefore, do not find any justification to interfere with the conclusion reached by the ld. CIT(A) on this score.

9. We, however, find that no interest u/s. 234B & 234C is exigible in the hands of the assessee in view of various decisions relied by the assessee in the written submissions as reproduced above. Accordingly the cross objection of the assessee deserves to be partly allowed.

10. In the result, the appeal of the Revenue is dismissed and the cross-objection of the assessee is partly allowed

Order pronounced in the open court on 12.04.2019.

Sd/-	Sd/-
(Amit Shukla)	**(L.P. Sahu)**
Judicial member	**Accountant Member**

Dated: 12.04.2019
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Copy of order forwarded to:

(1)	*The appellant*	*(2)*	*The respondent*
(3)	*Commissioner*	*(4)*	*CIT(A)*
(5)	*Departmental Representative*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi