IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 105 of 1990

with

INCOME TAX REFERENCE NOS. 147/90, 192/90, 193/90,
195/90, 110/91, 115/91, 161/91, 173/91, 185/91,
187/91, 217/91, 219/91, 220/91, 227/91, 234/91, 245/91,
14/92, 27/92, 51/92, 60/92, 61/92, 83/92, 283/92,
285/92, 378/92, 392/92, 270/95, 284/95, 285/95,
62/96, 66/96, 68/96 AND 69/96.

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

COMMISSIONER OF INCOME-TAX

Versus

RANOLI INVESTMENT PVT LTD.
& ORS.

Appearance:

MR MIHIR THAKORE, with MR MANISH R BHATT, Advocates

for Petitioner

MR D.A. MEHTA, MR. R.K. PATEL, MR. M.K.PATEL AND

MR. B.D. KARIA, ADVOCATES for the Respondents.

CORAM :MR.JUSTICE R.K.ABICHANDANI and
MR.JUSTICE KUNDAN SINGH

Date of decision: 31/03/98

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

In this group of References, similar question is involved though worded slightly differently as indicated hereunder and all these matters have been argued together taking ITR No. 105/90 as a lead matter and both the sides have filed therein a copy of the decision of the Tribunal in I.T.A No. 2037/Ahd/86 in Kanchanjunga Investments Pvt.Ltd. (IVL), Ahmedabad Vs. ITO, which decision has been followed by the Tribunal in all these matters.

2. In ITR Nos. 105/90, 147/90, 192/90, 193/90, 195/90, 110/91, 115/91, 161/91, 173/91 and 187/91, the question referred is worded as under:-

"Whether, the Appellate Tribunal is right in law and on facts in holding that tax deductible at source should be deducted and thereafter interest should be calculated"?

In ITR Nos.217/91 and 392/92, the question referred is worded as under:-

"Whether, the Appellate Tribunal is right in law and on facts in holding that the interest under Section 215 of the Income Tax Act should not be levied without giving credit for tax deducted at source?"

In ITR Nos.219/91, 227/91, 234/91, 14/92, 60/92, 61/92 and 283/92 the question referred reads as under:-

"Whether, the Appellate Tribunal is right in law and on facts in holding that interest under Section 215 should be charged after giving credit for the tax deducted at source which was not actually deducted during the year but was

actually deducted and paid in the next year?"

In ITR Nos. 270/95, 62/96, 66/96, 68/96 and 69/96, the question referred is worded as under:-

"Whether the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in holding that it is the tax deductible at source and not the tax actually deducted at source which is to be taken into consideration while computing the interest under Section 215 of the Income Tax Act, 1961?"

In ITR No. 185/91, the question referred is worded as under:-

"Whether the Appellate Tribunal is right in law and on facts in holding that credit has to be given for tax deducted at source for the purpose of charging interest under Section 215?"

In ITR No. 83/92, the question referred is worded as under:-

"Whether the Appellate Tribunal is right in law and on facts in holding that assessed tax had to be arrived at by reducing from the tax determined on the basis of the regular assessment the amount of tax "deductible" under Section 192 to 195 and not the tax actually deducted at source in accordance with these statutory provisions and thereby accepting the assessee's claim for interest under Section 215?"

In ITR Nos. 284/95 and 285/95, the question referred is worded as under:-

"Whether the Appellate Tribunal is right in law and on facts in directing the Assessing Officer to work out the amount of tax deductible at source on the amount of interest income and to give due credit for the same for the purpose of working out the assessed tax under Section 215(5), notwithstanding the fact that no tax was in fact deducted at source?"

In ITR No. 220/91 and 51/92, the question referred is worded as under:-

"Whether, the Appellate Tribunal is right in law and on facts in accepting the assessee's claim and coming to the conclusion that charging of interest under Section 215 is to be computed after giving credit for tax deducted at source?"

In ITR No. 245/91, the question referred is worded as under:-

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that in computing interest under Section 215 of the I.T Act, 1961, the credit should be given in respect of tax deductible at source on the interest income including in the total income although such tax was deducted and credited to the account of the Central Government in the next financial year by the party who paid the interest income?"

In ITR No. 27/92, the question referred is worded as under:-

"Whether, the Appellate Tribunal is right in law and on facts in directing the I.T.O. to compute the interest charged under Section 215 after giving credit for tax deductible at source?"

In ITR No. 378/92, the question referred is worded as under:-

"Whether the Appellate Tribunal is right in law and on facts in holding that the interest under Section 215 of the I.T Act should not be deducted at source?

In ITR No. 285/92, the question referred is worded as under:-

"Whether, the Appellate Tribunal is right in law and on facts in holding that interest under Section 215 should be levied after giving credit for tax deducted at source which was not actually deducted during the year but deducted and paid in the next year?"

3. Though questions are worded slightly differently, the controversy involved is the same and boils down to the aspect whether in the said definition of the words "assessed tax" incorporated in sub-section (5) of Section 215 of the Act for the purpose of Sections 215, 217 and 273, the tax determined on the basis of the regular assessment is to be reduced by the amount of tax which was deductible at source under the provisions mentioned therein or it was to be reduced by the amount of tax actually deducted in accordance with those provisions. According to the Revenue, it is the amount of tax which is actually deducted at source, which was to be reduced from the tax determined at the regular assessment while according to the assessee, the amount of tax which was deductible was required to be reduced, notwithstanding the fact whether the payer actually deducted it or not. This distinction has a bearing on spelling out the liability of the assessee to pay interest under Section 215(1) of the Act. If the advance tax paid by the assessee in any financial year is less than 75% of the assessed tax, simple interest at the rate of 12% per annum from 1st day of April next following the said financial year upto the date of the regular assessment becomes payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax.

4. In Income Tax Reference No. 105/90, the relevant assessment year is 1982-83. The return of income was filed by the assessee on 31st July, 1982. The accounting period shown separately for the source of income was 30th September, 1981. The assessee's source of income was, inter-alia, interest income. In respect of the interest income, tax was required to be deducted at source by the payer at the time of giving of credit or making the payment, whichever was earlier, as provided by Section 194A of the Act. The tax was deducted by the payer however, on 16.7.1982 i.e. after the financial year and much after the interest income accrued to the assessee. The assessee was given credit of the amount which was deducted by the payer from the assessee's interest income, but it was not to treated as tax deducted at source as such, and was treated as assessee's deposit, for which credit was given. The Assessing Officer on 22.3.1985, inter-alia, ordered interest under Section 215 to be charged without giving any credit for the said amount. The CIT (Appeals), rejected the assessees' appeal against the charge of interest under Section 215 of the Act. The Tribunal, followed its decision in the case of Kanchanjunga Investments Pvt.Ltd. Vs. I.T.O., and holding that it squarely applied to the facts of these cases which were identical, partly allowed the

appeal pertaining to interest under Section 215 and directed the ITO to recompute the interest after giving benefit of the tax deducted at source from the interest income. Similar orders were made in all other matters from which the aforesaid references arise. This is why both the sides have placed the papers pertaining to the decision of the Tribunal in the case of Kanchanjunga Investments Pvt.Ltd. on the record of the lead matter, being Income Tax Reference No. 105/90. Since in all these matters the Tribunal has incorporated by reference its reasoning in its earlier decision in Kanchanjunga Investments Pvt.Ltd., we would refer to that reason to the extent that it is relevant to the question involved in these references. The aspect of interest under Section 215 was considered in detail by the Tribunal in paragraphs 5 onwards of its decision dated 7th June, 1988 in the case of Kanchanjunga Investments. In that case, the assessee had filed the estimate of advance tax after deducting from tax payable on current income the amount of estimated tax deductible at source on interest income receivable by it. The ITO analysed the question of deducibility of the tax deductible at source for computation of advance tax payable and noted that the entire interest income received by the assessee was from companies. When the interest became due to the assessee at the end of their previous year, instead of crediting the interest amount to the assessees' account, they credited the same to `interest payable account'. At that point of time no credit whatsoever was given to the assessees' account and no tax was deducted at source. The assessee on the other hand debited the interest receivable by it not in the account of the payers, but to `interest receivable account'. This estimated interest was offered by the assessee for taxation. The ITO had noted that this system was being followed by the assessee consistently. It was further noted by him that after a lapse of several months and in some cases exceeding even two years, the payer companies had given the credit of the interest payable by them to the assessee, to the account of the assessee. It was at that point of time that the tax was deducted by them from the interest amount payable to the assessee. The payer companies then sent a note to the assessee company and based upon such notes, the assessee company transferred from the `interest receivable account', the interest receivable by it from those companies to their respective accounts. The ITO therefore, issued necessary notice to the assessee to show cause as to why interest under Section 215 of the Act should not be charged without giving credit for the tax deductible at source from the interest income of the assessee, for the purpose of computation of

advance tax. According to the assessee company, they bonafide believed that the tax deductible at source on the interest income was to be reduced. The ITO was, however, of the opinion that as per the system followed by the companies of Sarabhai Group of the assessee company, tax was not deductible at source during the financial year. He therefore, charged interest under Section 215 of the Act without giving the credit for the tax deductible at source for the purposes of computation of interest under Section 215, though credit was given for the tax actually deducted at source for tax purpose on the ground that the requisite certificate showing deduction of tax was produced before him at the time of the assessment. The CIT (Appeal) had confirmed this decision of the ITO. The Tribunal held that the expression "assessed tax" had a specific meaning as provided by Section 215 (5) of the Act and as per that meaning, the assessed tax would mean, tax determined on the basis of regular assessment as reduced by the amount of tax deductible under the various provisions mentioned therein. It was held that in view of the specific meaning of the expression "assessed tax", the word "deductible" occurring in Section 215(5) could not be confused for the meaning of term "deducted". The Tribunal relied upon the decision of the Madras High Court in CIT Vs. Madras Fertilizers Ltd., reported in 149 ITR 703, in which the High Court while construing the provisions of Section 215 of the Act, held that, where the tax was deductible at source, the person who had failed to so deduct the tax at source, was liable to pay interest and not the assessee, as otherwise, there would be charging of interest twice on the amount of tax in relation to such income. The Tribunal directed the ITO to give credit for the amount of tax deducted at source in computation of the interest income of the assessee. We have referred to the reasoning adopted by the Tribunal in the context of the facts of Kanchanjunga Investments, because, as held by the Tribunal in its decisions from which the aforesaid references arise, the facts of all these cases are also similar and the point involved identical, the Tribunal had followed its decision in Kanchanjunga Investments' case. Both the sides have made their contentions on the footing that the facts as regards the said question in all these matters are similar, the question involved same and the reasoning adopted by the Tribunal common, as reflected from its decision in Kanchanjunga Investments' case.

5. It was contended by the learned Counsel appearing for the Revenue in these references that the entries made

by the assessees in respect of the interest income in the `interest receivable account' and correspondingly made by the payer - companies in the `interest payable account' should be treated as credit of interest to the account of the assessees within the meaning of Section 194A of the Act. It was contended that since the interest income was offered for tax in respect of the relevant previous years by these assessees, and since entries were made in respect thereof in `interest receivable and interest payable accounts' of the parties, the tax became deductible at source at the time when such credit was given by making such entries. It was submitted that, in any event, when the income had actually accrued in the previous year in question and offered for tax in the assessment year by the assessees, it should be treated as having been credited to them without any deduction being made by the payers. It was contended that the assessees knew that the tax would not be deducted by the payer companies from their interest income during the financial year and therefore, the tax was not deductible as contemplated by Section 215 (5) of the Act. In any event after the credit was given by the payer company to the assessee of the full interest income without making any deduction of tax at source, the tax ceased to be deductible at source and it became the liability of the assessee to pay the same. It was contended that merely because the deduction was made by the payer at a later point of time notwithstanding the credit earlier given, it will not make such deduction a tax deductible at source under the Act. It was contended that merely because credit was given at the regular assessment of such amount which was subsequently deducted and paid to the Revenue by treating as a deposit of tax on behalf of the assessee, it cannot be said that such an adjustment would absolve the assessee from its liability to pay interest under Section 215 of the Act. It was contended that the idea behind providing for payment of advance tax and deduction at source, was to recover the tax payable by the assessee and if there was a shortfall, to compensate the revenue for loss of interest by making the assessee liable to pay interest at the prescribed rate, if the difference between the advance tax payable and the assessed tax was wider than 25 per cent. It was therefore, submitted that the word "deductible" in Section 215(5) should be understood as the tax actually deducted. Even if it was to be read as deductible, there was nothing which was required to be deducted after the credit of interest and since no amount remained deductible after the credit in the `income payable' and `income receivable' accounts of the parties, there was no question of reducing any deductible tax from the tax

assessed at the regular assessment. It was contended that the provisions of Sections 199, 202 and 205 indicate that it is only when the tax is actually deducted at source that the liability of the assessee ceases. It was submitted that if the tax is not deducted at source and it is treated as a deductible tax to be reduced from the assessed tax and no interest is to be charged thereon, it would frustrate the very object underlying Section 215 of the Act. It was also submitted that the consequence ensuing from non-deduction of tax at source against the payer are distinct from the liability of the assessee to pay interest under Section 215 of the Act. It was finally submitted that the use of the words " tax deductible" in Section 215(5) can only mean tax deducted on or before 1st April of the financial year, because, the object of Section 215 is to see that 75 per cent of the assessed tax is paid in the financial year and it is only after the assessee has paid up 75 per cent of the assessed tax inclusive of the amount deductible as tax without any reduction, that his liability to pay interest will not arise.

6. The learned Counsel appearing in all these references for the assessees, on the other hand, contended that the word "deductible" appearing in Section 215(5) was used in context of the advance tax computed under Section 209 of the Act. It was submitted that the word deductible should have the same meaning in Section 215(5) as it had in Section 209 of the Act. It was argued that the provisions of Section 209 cannot be given a go-by, because when the advance tax was worked out under as that provision, the assessee could not have known that the tax will not be deducted at source by the payer. It was further contended that the assessee, in cases where credit is given to his account by the payer but no intimation is given, would have no reason to suspect that the deduction would not be made at source. It was submitted that in cases where the income accrued by way of interest at the end of the previous year which ended in March, the assessee would not, even at the time of payment of his third instalment by 15th March, know whether there would be any deduction made or not by the payer. It was therefore submitted that the expression "deductible at source" in Section 215(5) should carry the same meaning as it has under the provisions of Section 209(1)(a)(iii), which require the income tax calculated for the purpose of advance tax to be reduced by the amount of income tax which would be deductible during the financial year, in accordance with the provisions mentioned therein, on any income (as computed before

allowing any deductions admissible under the Act) on which tax was required to be deducted, and which had been taken into account in computing the total income. It was the net amount of income tax calculated in accordance with sub-clause (iii) that was, subject to clauses (c) and (d), to be the advance tax payable.

7. Chapter XVII of the Act deals with collection and recovery of tax and as provided by Section 190(1), notwithstanding the fact that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction at source or by advance payment, as the case may be, in accordance with the provisions of this Chapter. The provisions regarding deduction at source are contained in Section 192 to 206B falling in Part "B" of Chapter XVII while the provisions regarding advance payment of tax contained in Section 207 to 219 fall in Part "C" of the said Chapter. As provided under Section 191, in the case of income in respect of which provision is not made under this Chapter for deducting income-tax at the time of payment and in any case where income-tax has not been deducted in accordance with the provisions of this Chapter, income-tax shall be payable by the assessee direct. Income tax is deductible at source in respect of any interest other than interest on securities as provided by Section 194A of the Act, which inter-alia lays down that any person (not being an individual or a Hindu undivided family) who is responsible for paying to a resident any income by way of interest other than income chargeable under the head "Interest on securities", shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force. Thus, when credit of such income is given to the account of the payee, earlier than the time of actual payment by any of the modes indicated, the income-tax would be deductible at the earlier point of time of giving of such credit. In other words, the tax in such a case would be deductible at source at the time when credit was given to the account of the payee and not thereafter at any subsequent stage including that of actual payment.

When the tax is deducted at source, it would be treated as income received by the assessee, as provided by Section 198 of the Act. The person who deducts the tax, under the provisions of Section 200, is required to pay the same within the prescribed time limit to the credit of the Central Government or as the Board directs.

Any deduction made in accordance with the provision of Section 194A and paid to the Central Government is to be treated as payment of tax on behalf of the person from whose interest income the deduction was made and credit is to be given to him for the amount so deducted on production of the certificate furnished under Section 203 in the assessment, if any, made for the immediately following assessment year, under the Act as provided by Section 199. Under Section 203, the person deducting the tax at source is required to furnish to the person to whose account such credit is given or to whom such payment is made, a certificate to the effect that tax has been deducted and specifying the amount so deducted, the rate at which the tax has been deducted, and such other particulars as may be prescribed. Such certificate was required to be given in Form 19A prescribed under Rule 31 (4A) of the Income Tax Rules in force at the relevant time. This certificate in the prescribed form was required to indicate the date on which the amount deducted at source was paid to the credit of the Government and if not paid, the date by which it would be paid to the Government. As provided by Section 205 of the Act, where tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which it has been deducted from the relevant income. Thus, from the aforesaid provisions it emerges that as soon as the tax is actually deducted at source by the person responsible to make payment, the liability of the assessee to pay that tax gets discharged and it is for the person who has deducted the tax at source to deposit the same with the Government. If the tax is not so deducted, then as noticed above, it remains payable by the assessee direct under Section 191 of the Act.

The consequences of failure to deduct the tax at source or failure to pay the tax deducted to the Government, are provided for in Section 201 of the Act as per which, if no deduction is made or if the deducted amount is not paid as required by the Act, the person whose duty it was to deduct the tax at source and to pay, is to be treated as an assessee in default in respect of the tax, but no penalty is to be charged under Section 221 from such person, if the ITO is satisfied that the failure to deduct and pay the tax had occurred due to good and sufficient reasons. As provided by sub-section (1)A of Section 201, without prejudice to the provisions of sub-section (1), if such person did not deduct the tax or having deducted, fails to pay the tax, he or it shall be liable to pay simple interest at 12 per cent per annum on the amount of such tax from the date on which it was deductible to the date on which it was actually paid.

The liability to pay interest under sub-section (1A) of Section 201 imposed on the person who fails to deduct the tax at source or does not pay the tax deducted, is absolute and runs throughout the period from the date when the tax was deductible till the date it was actually paid. When the tax is not deducted at source, it is required to be paid by the assessee directly but in such a case the liability to pay interest consequent upon failure to deduct tax at source will nonetheless remain with such person who was duty bound to deduct, till the date when the tax is actually paid by the assessee or on his behalf. It is only when the tax has not been paid after it is deducted, that the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) of Section 201 shall be a charge upon all the assets of the person who has failed in his duty to pay the tax deducted, as provided by sub-section (2) of Section 201. The power to levy tax by deduction at source is without prejudice to any other mode of recovery, as stated in Section 202 of the Act. It will thus, be seen that where the tax is not deducted, the liability to pay the tax directly will be on the assessee, but so far as the interest is concerned, the liability has been fastened on the person who had failed to deduct the tax while crediting the interest income to the assessee.

8. Advance tax is payable during the financial year where the total income, exclusive of capital gains and income falling in Section 2(24)(ix), of the assessee, referred to in Section 209(a)(i) exceeds the amount specified in sub-section (2) of Section 208 or where it is payable by virtue of the provisions of Section 209A relating to computation and payment of advance tax by assessee. In cases where the assessee has been previously assessed by way of regular assessment, he is required to send a statement of advance tax payable by him under Section 209A(1)(a) computed in the manner laid down in clause (a), or as the case may be, sub-clause (i) of clause (d) of sub-section (1) of Section 209, and such amount of advance tax is to be paid in equal instalments on the dates applicable in his case under Section 211 of the Act. While computing the advance tax payable by him as per Section 209(1) (a), the income-tax calculated as per sub-clauses (i) and (ii) of clause (a) of sub-section (1), is required to be reduced by the amount of income tax, which would be deductible during the said financial year in accordance with the provisions of Sections 192 to 194, 194A, 194C, 194D and 195 on any income (as computed before allowing any deductions admissible under the Act) on which tax is required to be deducted under the said

Sections and which has been taken into account in computing the said total income. It is only the net amount of income tax calculated as per clause (iii) of Section 209(1) that is to be the advance tax payable.

9. We now come to the provisions of Section 215 to which the question referred to us relates and which is required to be interpreted, keeping in view the aforesaid scheme of deduction at source and payment of advance tax by assessees. The relevant portion of Section 215, as it operated during the period relevant to these references, reads as under:-

"Interest payable by assessee.

215. (1) Where, in any financial year, an assessee has paid [advance tax under section 209A or section 212 on the basis of his own estimate (including revised estimate)], and the advance tax so paid is less than seventy five per cent of the assessed tax, simple interest at the rate of twelve per cent per annum from the 1st day of April next following the said financial year upto the date of the regular assessment shall be payable by the assessee upon the amount by which the advance tax so paid falls short of the assessed tax:

Provided that in the case of an assessee, being a company, the provisions of this sub-section shall have effect as if for the words "seventy five per cent", the words "eighty three and one-third per cent" had been substituted.

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xxx xxxxx xxxxx

(4) In such cases and under such circumstances as may be prescribed, the Income tax Officer may reduce or waive the interest payable by the assessee under this section.

(5) In this section and sections 217 and 273, "assessed tax", means the tax determined on the basis of the regular assessment (reduced by the amount of tax deductible in accordance with the provisions of Sections 192 to 194, Section 194A, Section 194C, Section 194D and Section 195) so far as such tax relates to income subject to advance tax and so far as it is not due to

variations in the rates of tax made by the Finance Act enacted for the year for which the regular assessment is made."

The provisions of Section 215 get attracted in cases where in the financial year an assessee has paid advance tax on the basis of his own estimate and the advance tax so paid is less than 75 per cent of the assessed tax. If therefore, such difference between the advance tax paid and the assessed tax is more than 25 per cent interest at the rate of 12 per cent per annum would become payable from 1st of April next following the said financial year when the advance tax is paid up, to the date of the regular assessment upon the difference i.e. upon the amount by which the advance tax paid falls short of the assessed tax. As regards the assessee-companies, if the advance tax paid is less than 83 1/3 per cent i.e. if the said difference is more than 17.2/3 per cent, the interest at the said rate becomes payable by the assessee on the amount by which the advance tax paid falls short of the assessed tax. The words "assessed tax" occurring in sub-section (1) of Section 215 are to be read in the light of the special meaning given to them under sub-section (5) of Section 215 and accordingly, assessed tax would mean not the full amount of the assessed tax determined on the basis of the regular assessment, but the amount reduced therefrom to the extent of tax deductible in accordance with the provisions of Sections 192 to 194, 194A, 194C, 194D and 195 so far as it related to income subject to advance tax and so far as it is not due to variations in the rates of tax.

The words "reduced by the amount of tax deductible in accordance with the provisions of Sections 192 to 194, 194A, 194C, 194D and 195", which appear in sub-section (5) of Section 215 also occur in clause (iii) of Section 209(1)(a). The amount of tax deductible in accordance with Section 194A would obviously mean the tax as was required to be deducted in respect of the interest income at the time of credit to the account of the payee or payment whichever is earlier. If the legislature wanted only the tax actually deducted to be reduced irrespective of what was deductible under the relevant provisions which had gone into consideration at the time of computation of advance tax, there was no easier way than that of simply using the expression "tax deducted" instead of "tax deductible" in Section 215(5) of the Act. Elsewhere, the legislature has used the expression tax deducted, wherever it wanted to convey that meaning. The expression "tax deducted" occurs in various provisions,

such as Sections 191, 198, 199, 200, 201, 203 and 205. There is therefore, no warrant for attributing to the legislature that it had unwittingly used the expression deductible in place of deducted and that what it really meant was that only the tax actually deducted at source was to be reduced from the assessed tax under Section 215(5) of the Act.

When the tax is not deducted at source, the assessee is liable to pay the tax under Section 191, as noted above. When advance tax is computed, under Section 209A read with Section 209(1)(a) the assessee would legitimately expect that the tax which was required to be deducted at source in respect of his interest income in view of the specific mandate on the payer contained in Section 194A would be so deducted at source by the payer. Accordingly, he would be justified in reducing the income tax calculated by the amount of the tax deductible at source as required by clause (iii) of Section 209(1)(a) of the Act for working out the advance tax payable by him. Admittedly the interest income of the assessees accrued and became payable to them at the end of the previous year.

If the amount of tax deductible at source is not so deducted by the payer at the time of giving credit or making the payment in any of the modes prescribed, whichever be the earlier, he entails liability under Section 201 to be treated as a defaulter and inter-alia to pay interest. The liability to pay interest arising due to failure to deduct the tax at source and the liability to pay tax deductible at source are treated separately, inasmuch as the liability to pay interest under sub-section (1A) of Section 201 on account of failure to deduct the tax at source is mandatory and such person has to pay interest on such amount of tax until it is realised by the Revenue while the tax not deducted at source becomes the direct liability of the assesee.

10. The words "at the time of credit of such income to the account of the payee" in Section 194A would take within their sweep the interest debited to "interest account" or any other nominal account when the debit is for a specific amount calculated with reference to the deductors' liability to a particular creditor in accordance with the terms and conditions of the loan. In such cases the interest payable to a creditor has been constructively credited to the account of the payee and

the apparent nomenclature of the particular account in which the credit is made would not be conclusive in the matter. The nominal accounts like `interest payable account', `liability for expense account' or `suspense account' are heads or captions meant to cover only stray transactions of unidentifiable receipts and payments. Except in stray cases, failure to credit the interest to the account of the payee cannot also be called a method of accounting regularly employed within the meaning of Section 145(1) of the Act and would not therefore be accepted as an explanation for the consequential failure to deduct the tax at source. The time of deduction would be when the interest is credited. Thus, understood the expression "at the time of credit of such income to the account of the payee" has no ambiguity and any payment subsequent to the credit so made would not be subject to tax deduction and the liability of the deductor would arise for failure to make deduction at the time of credit notwithstanding that it came to be made later on at the time of actual payment. Deduction made at such belated stage of payment, in cases where the credit of such income in the account of the payee is already made earlier, would not be `tax deducted at source' properly so-called and such subsequent deduction even when deposited with the Government, can not be treated as tax deducted at source. This is why in the assessment order dated 22.3.1985, which was made in case of the assessee (ITR No. 105/90), the ITO had held that since the tax deductible at source on interest was deducted on 16.7.1982, it could not be treated as tax deducted at source as such, but was to be treated as assessee's deposit for which credit was being given. Therefore, merely from the fact that credit is given of such an amount while passing the regular assessment order, it cannot be said that it should be treated as tax deducted at source eventhough it was not deducted at the time of credit of the interest income to the account of the payee when it was deductible. The amount of tax which was not deducted at the time of making of the credit entry became payable directly by the assessee and the liability of the payer to pay interest due to failure on his part to deduct the amount arose immediately when the entries were made in the `interest payable account' corresponding to the entry made by the assessee in the `interest receivable account' in respect of the interest income in question.

In these references, the liability to pay tax is not in issue and admittedly the tax was ultimately paid up by adjusting the amounts which were subsequently deducted much after the credit was given from the

interest amount and deposited with the Government. It was open for the Assessing Officer to adjust such amounts which were not strictly speaking tax deducted at source, towards the liability of the assessee to pay tax assessed at the regular assessment. The liability to pay the tax which ought to have been deducted at source that related back to the assessee under Section 191 at the time when the tax was not deducted while giving credit, ultimately came to be discharged when the amount deposited was given credit of in the regular assessment. The liability to pay interest however, got fastened on the payer from the date when it credited the amount in the `interest payable account' and it continued till the tax came to be actually paid, in view of the provisions of Section 201(1A) of the Act. The question is whether the assessee who became liable to pay the tax as it was not deducted at source, also became liable to pay interest under Section 215 of the Act. The payment of tax and interest have been separately dealt with in the law. When on regular assessment the assessee is found to be liable to pay tax higher than the advance tax paid by him and the tax deducted at source, his liability to pay interest would arise under Section 220(2) only after issuance of a demand notice under Section 156 specifying tax, interest, penalty, fine or any other sum payable in consequence of any order passed under the Act. The liability to pay interest under Section 215 would however, arise only if the advance tax paid by the assessee is less than 75 per cent of the assessed tax and the interest is payable till the date of regular assessment. This provision clearly recognizes the margin of difference because the advance tax is worked out on the basis indicated under Section 209(1)(a) while in reality the income may turn out to be different. This is also why the advance tax payable can be revised at the dates of the three instalments thereof. However, when tax is deductible at source and is required to be reduced as per clause (iii) of Section 209(1)(a), there may remain no scope for revising the advance tax payable at the stage of the third instalment when the interest income is to accrue thereafter, at the end of the previous year. The assessee cannot foresee that the tax deductible under a statutory duty imposed upon the payer will not be so deducted. If the person responsible to make payment of interest does not send the certificate required to be sent by him under Section 203 at the time of giving of credit to the payee, the assessee may not even know whether the tax was at all deducted at the time when credit entry was made. Therefore, one cannot find any fault on the part of the assessee in such cases if he proceeds on an assumption that the deduction of tax statutorily required to be made at source would be so

made or that it must have been made. The liability to pay interest in respect of such deductible amount is therefore clearly excluded to that extent by defining the words "assessed tax", so as not to include the tax that was deductible at source under the specified provisions including Section 194A. If the machinery devised by the statute for levy of tax by collecting through the medium of the payer obliging him to deduct the tax at source fails, the blame cannot be shifted on the assessee by attributing him with a foresight at the time of computing the advance tax payable, that the deduction will not be so made. The statute has taken care of the liability to pay the tax by specifically providing in Section 191 that the assessee would be liable to pay the tax deductible at source directly if it is not so deducted. However, the nature of liability to pay interest imposed on the assessee under Section 215 is different from the liability imposed by Section 201(1A) on the person who has defaulted by not making deduction. The liability to pay interest of the assessee would arise only if he has paid advance tax less than 75 per cent of the assessed tax and it is not absolute while the liability of the payer to pay interest for non-deduction of tax at source is mandatory and absolute and would arise even if the assessee was not liable to pay interest under Section 215. This ensures that the payer will compensate the Revenue in respect of loss of interest on the amount of tax which he was required to deduct at the time of credit, but he did not, until it is paid. The fact that the Revenue does not proceeded against the payer for recovery of interest would not make the assessee jointly and severally liable with him to pay interest on the amount of tax which by virtue of not being deducted, is required to be paid by the assessee.

If the assessee fails to pay the tax which he is required to pay by virtue of Section 191 due to failure on the part of the payer to deduct tax at source before furnishing return under Section 140A, the ITO can impose penalty as provided by sub-section (3) thereof. If the amount is not paid after the demand notice, then there are provisions of Section 220(2) under which the assessee would be liable to pay simple interest at 12 per cent after the period specified under sub-section (1) of Section 220. While these provisions will operate against the assessee, the liability of the person who has failed to deduct the tax at source that had arisen under Section 201(1A) continues and he is required to pay interest right from the date on which the tax was deductible till the date on which such tax is actually paid. These provisions would also suggest that there is no reason to

distort the meaning of the expression "deductible in accordance with the provisions of Sections 192 to 194, 194A, 194C, 194D and 195 so far as such tax relates to income subject to advance tax and so far as it is not due to variations in the rates of tax", appearing in sub-section (5) of Section 215, by attributing the meaning that only the amount of tax actually deducted was intended by this expression. In this view of the matter, we are of the opinion that the Tribunal was right in holding that the tax deductible at source should be reduced from the tax determined on the basis of the regular assessment and thereafter the liability to pay interest should be calculated under Section 215 of the Act.

Similar view has been taken by the Madras High Court in CIT Vs. Madras Fertilizers Ltd. (supra), on which the Tribunal rightly relied upon. The contrary view expressed in CIT Vs. Borhat Tea Co.Ltd., reported in 193 ITR 134 in context of the provisions of Section 273(1)(b) being penal proceedings taken against the assessee for not filing the statement of advance tax and not paying the same, with respect, does not commend to us for the reasons that we have given.

We therefore answer the question referred in all these references in the affirmative in favour of the assessee and against the Revenue. Each of these references stand disposed of accordingly with no order as to costs.

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*/Mohandas