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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 5423/2016

PIONEER OVERSEAS CORPORATION USA
(INDIA BRANCH)

..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha and Ms. Mehak Gupta, Advocates.

versus

COMMISSIONER OF INCOME TAX (INTERNATIONAL
TAXATION)- 2 DELHI

..... Respondent

Through: Mr. Dileep Shivpuri, Senior standing
counsel with Mr. Sanjay Kumar, Junior Standing
counsel.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE CHANDER SHEKHAR

ORDER
17.05.2017

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Dr. S. Muralidhar, J.:

1. This is a writ petition by M/s. Pioneer Overseas Corporation USA, seeking a direction to quash the impugned order dated 6th May 2016 passed by the Respondent, Commissioner of Income Tax (International Taxation) – 2, Delhi ('CIT') whereby the application filed by the Petitioner for waiver of interest under Section 220 (2) of the Income Tax Act, 1961 ('Act') was rejected on the ground that the Petitioner failed to meet the very first condition laid down in Section 220 (2A) of the Act viz., that it failed to show that it had suffered 'genuine hardship'.

2. The background facts are that the Petitioner is the branch office of Pioneer Overseas Corporation, United States of America ('POC US'). The Petitioner is engaged in Contract Research Activities and cultivation of parent seeds. Since the Petitioner has been regularly filing its returns of income. Since the Assessment Year ('AY') 1993-94, it has been claiming exemption by treating its entire income as agricultural income in terms of Section 10 (1) read with Section 2 (1A) of the Act. It is stated that this claim was accepted by the Department for the said AY as well as for the succeeding AYs 1994-95, 1995-96 and 1996-97.

3. While concluding the assessment for the AY 1997-98 and onwards, the Assessing Officer ('AO') treated the entire income of the Assessee as 'business income'. The AO attributed the deemed income from research activity holding the Petitioner to be a Permanent Establishment ('PE') of POC US carrying on research activity in India.

4. The appeal filed by the Petitioner against the aforementioned assessment order was partly allowed by the Commissioner of Income Tax (Appeals) [CIT (A)] by deleting 50% of the addition made by the AO on account of estimated attribution of income holding *inter alia* that only that much profit could be attributed to the PE which was derived from the assets and activities of the PE in India.

5. In the further appeal filed by the Petitioner, the Income Tax Appellate Authority ('ITAT') for the AYs 1997-98 to 2001-02 held by its orders dated 30th November 2009 and 24th December 2009 that only 10% of income was,

therefore, to be treated as agricultural income and the balance was to be taxed as 'business income'. On the issue of attribution of income on account of research activity carried out by the Petitioner, the ITAT remanded the matter to the AO for attribution of profits based on the transfer pricing method employed by the AO in subsequent AYs 2002-03 to 2006-07.

6. In the remand proceedings, the AO attributed reimbursed cost plus mark-up of 17% as appropriate arm's length price for the research services provided by the Petitioner to POC US for the AYs 1997-98 to 2001-02. In the year 2005 POC US invoked the Mutual Agreement Procedure ('MAP') under Article 27 of the India-US Double Taxation Avoidance Agreement ('DTAA') and sought resolution of the tax matters pertaining to the Petitioner. Consequent upon negotiations between the Competent Authorities of the two countries, an agreement was concluded with respect to allocation of taxing rights *qua* the income taxable in India in the hands of the Petitioner branch (PE) and setting off of the taxes paid in India by the Petitioner against the taxes payable in the US by POC US. On this basis, the assessment for AYs 1997-98 to 2006-07 were finalized and taxes along with interest were paid by the Petitioner under Section 220 of the Act.

7. By a letter dated 10th August 2011, the MAP ruling was finalized by the US authorities by providing tax credit in USA to the Petitioner for the tax assessed in India on 90% of income held to be business income. The relief was granted on double taxation in the US tax years corresponding to the Indian assessment years under consideration.

8. On 26th December 2011, the Petitioner filed an application before the CIT

under Section 220 (2A) of the Act for waiver of interest levied under Section 220 (2) of the Act. This was followed by a letter dated 27th April 2012 wherein the Petitioner reiterated its request.

9. By the impugned order dated 6th May 2016, the CIT dismissed the aforementioned application on the ground that no genuine hardship had been caused to the Petitioner.

10. This Court has heard the submissions of Mr. Ajay Vohra, learned Senior counsel for the Petitioner and Mr. Dileep Shivpuri, learned Senior standing counsel for the Respondent.

11. Mr. Vohra first submitted that the reasons that weighed with the CIT for declining the relief to the Petitioner were based on the misconception that the mere fact that the Petitioner was part of the global conglomerate ‘DuPont’, which made humongous profits in billions of dollars meant that it did not suffer any ‘genuine hardship’. Referring to the decision of the Supreme Court in ***B.M. Malani v. Commissioner of Income Tax (2008) 306 ITR 196 (SC)***, Mr. Vohra submitted that “a genuine hardship would, *inter alia*, mean a genuine difficulty. That *per se* would not lead to a conclusion that a person having large assets would never be in difficulty as he can sell those assets and pay the amount of interest levied.” Mr. Vohra has also relied on the decision of the High Court of Kerala in ***Commonwealth Trust (India) Limited v. Deputy Commissioner of Income-tax (Assessment), Special Branch, Calicut (2006) 280 ITR 70 (Ker.)*** to urge that “whether the non-payment of the tax is due to circumstances beyond the control of the Assessee and whether the payment of interest would cause genuine hardship

have to be analyzed and appreciated taking into account various other factors also, some of which are indicated above, regarding the accumulated loss, liability to other statutory bodies, the conduct of the parties, the nature of the transaction, the financial position etc.”

12. Mr. Vohra referred to Instruction No. 2 dated 28th April 2003 issued by the Director (FTD), which *inter alia* provided that in the context of the Memorandum of Understanding between India and USA regarding suspension of collection during the course of pendency of the MAP, the collection of outstanding taxes in case of taxpayers, who were residents of USA and whose request under the MAP was under consideration of the Competent Authorities, shall be kept in abeyance subject to the Assessee furnishing a bank guarantee of an amount equal to the amount of tax under dispute and interest accruing thereon as per the provisions of the Act.

13. Mr. Vohra pointed out that all the three conditions under Section 220 (2A) of the Act stood satisfied in the present case, viz., (i) that the payment of interest under Section 220 (2) of the Act would cause genuine hardship; (ii) the default in the payment of the amount on which interest was paid or payable was due to circumstances beyond the Petitioner’s control; and (iii) the Petitioner cooperated in any inquiry relating to the assessment or any proceeding for recovery of the amount due from it. With the Petitioner having paid interest, there was no bar to the CIT considering application on its merits in accordance with law.

14. Mr Vohra referred to the decision in ***K.L. Jaiswal v. Wealth-Tax Officer (1996) 221 ITR 426 (MP)***, where it was explained that the words ‘genuine

hardship' cannot be construed only as financial hardship but would include other forms of hardships in the facts and circumstances of a case. Further, the long period when the negotiations were in progress i.e., nearly the six years was not on account of any default of the Petitioner. Furthermore, the disputed demand during such period was covered by bank guarantee in terms of the Instruction No. 2 dated 28th April 2003. It is stated that the amount of interest levied under Section 220 (2) of the Act was exceptionally high as it constituted approximately 50% of the total taxable income for some of the relevant AYs.

15. Having considered the respective submissions, the Court is not persuaded to hold that any error was committed by the CIT in rejecting the Petitioner's request for waiver of interest under Section 220 (2) of the Act. Under Section 220 (2A) of the Act, the three conditions that are required to be satisfied are (i) payment of the amount towards interest under Section 220 (2A) of the Act should cause the Assessee 'genuine hardship' (ii) default in the payment of the amount should be due to circumstances beyond the control of the Assessee; and (iii) the Assessee should have cooperated in the proceedings for recovery of the amount.

16. What was urged before the CIT and was reiterated by Mr. Vohra in this Court was that interest under Section 220 (2) of the Act was paid besides incurring costs on maintaining a bank guarantee was more than 1.5 times of the tax amount. As rightly noted by the CIT, the mere fact that the interest was 1.5 times the tax by itself does not have any relevance for determining whether the Assessee was suffering from any 'genuine hardship'.

17. The fact that the Assessee is a part of 'DuPont', a global conglomerate which had in 2011 \$37.96 billion in net sales and \$6.253 billion as operating profit, cannot be said to be an irrelevant factor in considering whether any 'genuine hardship' was undergone by the Petitioner. Further, in comparison to the profitability of the Petitioner over the years, the amount paid by it towards interest under Section 220 (2) of the Act was merely \$0.004 billion (approx). In the circumstances, the conclusion arrived at by the CIT that no 'genuine hardship' can be said to have been caused to the Petitioner cannot be said to be an erroneous exercise of discretion by the CIT. It was a plausible view to take and does not call for interference by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution.

18. For the aforesaid reasons, the writ petition is dismissed but, in the circumstances of the case, with no orders as to costs.

S.MURALIDHAR, J

CHANDER SHEKHAR, J

MAY 17, 2017

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