

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2018

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.14165 of 2009 &
M.P.No. 1 of 2009

M/s."Van Oord ACZ Marine Contractors bv"
formerly called as "Van Oord ACZ bv"
having its registered office at
Jan Blankenweg 2, 4207 HN Gorinchem, the Netherlands,
c/o CNGSN & Associates
Chartered Accountants
"Agastiar Manor"
New No.20, Old No.13 Raja Street,
T.Nagar, Chennai - 600 017. ...Petitioner
Cause title amended as per order
dt.7.7.10 by DHPJ in MP.1/10 in WP.NO.14165/09

vs.

The Chief Commissioner of Income Tax-I,
121, Mahatma Gandhi Road,
Chennai - 600 034. ...Respondent

PRAYER : Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the respondent herein in CHE/coord/106(W-27)/1/2002 and quash the impugned order passed dated 09.02.2009 and consequently direct the respondent herein to waive the interest u/s 234B and 234C of the Act.

For Petitioner : Mr.R.Sivaraman
For Respondent : Mr.J.Narayanaswamy
Senior Standing Counsel

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O R D E R

Heard Mr.R.Sivaraman, learned counsel for the petitioner and Mr.J.Narayanaswamy, learned Senior Standing Counsel appearing on behalf of the respondent.

2.The petitioner has filed this Writ Petition, challenging an order passed by the respondent, namely, the Chief Commissioner of Income Tax-I, rejecting the petitioner's application for waiver of interest levied under Sections 234B and 234C of the Income Tax Act, 1961 (hereinafter referred to as "the Act").

3.The facts of the case being the petitioner is a non-resident Company, filed its return of income for the assessment year 2000-2001 within the time limit prescribed under Section 139(1) of the Act. The return was processed under Section 143(1) of the Act and interest of Rs.23,53,882/- was charged under Section 234B and Rs.12,17,545/- was charged under Section 234C of the Act. The petitioner filed an application before the respondent seeking waiver of the interest. The sum and substance of the contention raised by the assessee before the respondent was that the assessee could not pay any tax unless the case was decided by the Advance Ruling Authority (AAR) and assuming that even before the decision of AAR, the petitioner is required to pay taxes on its income, the petitioner's book results were a loss and hence, there was no requirement to pay advance tax and consequently, there would be no liability or interest under Section 234B or 234C of the Act. Further, it is stated that the interest under Section 234B or 234C of the Act is chargeable provided the assessee who is liable to pay advance tax under Section 208 of the Act has failed to pay such tax. Further, it is submitted that the petitioner qualifies the conditions specified in the CBDT circulars dated 02.05.1994, 23.05.1996, 30.01.1997 and 26.06.2006 and due to unavoidable circumstances which prevented the petitioner from remitting advance tax. Therefore, the petitioner seeks to bring their case under Clause 2(e) of the circular dated 23.05.1996. Further, it was contended that the liability to pay tax is fastened on the assessee only due to the decision of the AAR and it could not pay any tax unless the case was decided by the AAR. Thus, it was submitted that the levy of interest under both these provisions is not sustainable.

4.The respondent rejected the application by observing that atleast 90% of the amount should have been paid as advance tax which the assessee failed to do and the Chennai Port Trust had also informed the assessee as early as on 30.01.1999 that tax deduction liability was only to the extent of 2.2% of the contract payments and the assessee themselves made provision for tax of Rs.3,63,372/- and Rs.28,623,937/- in the years ended 31.03.1999 and 31.03.2000 in its accounts. Further, the respondent held that the assessee commenced its operation in 1997 and having chosen to apply for AAR in April 1999 cannot attribute the delay in payment of taxes to the receipt of ruling of AAR in September 2000. The clear liability to pay advance tax

on contract receipts by computing the income as per Section 44BBB cannot be postponed by filing an application before the AAR. Therefore, the respondent held that the application for waiver of interest under Section 234B and 234C of the Act is not acceptable.

5. It may not be necessary for this Court to labour much to decide the controversy in the issue in the light of the two decisions. One being the decision of the Hon'ble Divisional Bench of this Court in the case of Chennai Port Trust Vs. Income-Tax Officer, TDS-VIII reported in [2012] 25 taxmann.com 261 (Mad.) which pertains to the very same contract between the Joint Venture Company and Chennai Port Trust and the other decision in the case of the petitioner's sister concern, who were the assessee on the file of the Income Tax Authorities at Mumbai. One of the ground which was canvassed before the Tribunal is with regard to levy of interest under Sections 234B and 234C of the Act and the decision was rendered in favour of the Group Company, sister concern which was affirmed by the decision of Division Bench of High Court of Bombay in ITA.No.3172 of 2010 dated 23.06.2011 and the appeal filed against the said order before the Hon'ble Supreme Court in SLP No.7409 of 2010 is dismissed.

6. The learned Senior Standing Counsel for the revenue vehemently contended that the Court should examine the conduct of the assessee which has been rightly noted by the respondent while rejecting the application for waiver. Further, at the time, when the petitioner insisted upon the Chennai Port Trust to deduct 7% as tax at source, they have conveyed their inability to do so by restricting the recovery only to 2.2% and at that point of time, the ruling in the case of NV Jan De Nul (236 ITR 489 AAR) was holding the field and therefore, the petitioner assessee ought to have paid advance tax. Furthermore, it was submitted that merely because the petitioner assessee had moved the Advance Ruling Authority cannot be a reason to wipe away the tax liability. In fact, the very same contention was advanced before the Advance Ruling Authority by the revenue when the petitioner had approached for necessary advance ruling which was negatived and it was held that the status of the joint venture is not that of association of person. One more contention was advanced stating that the petitioner had obtained the Advance Ruling from the authority by misrepresentation and fraud. All these contentions were considered by the Division Bench in the case of Chennai Post Trust (supra) and it was held that the decision of the Advance Ruling Authority as to the status of the Foreign Company and the debate persisted on the said issue between the Department and the assessee (Chennai Port Trust), the Chennai Port Trust cannot be declared as an assessee in default under Section 192 read with Section 201 of the Act to

attract interest under Section 201(1A) of the Act.

7. The learned Senior Standing Counsel sought to distinguish the decision by contending that the said decision arose out of an issue relating to deduction of Tax at Source. I am unable to accept the said contention for the simple reason that the substantial question of law which was framed for consideration by the Division Bench is exactly on the very same issue as regards the status of joint venture whether it is an association of person or not. Therefore, the decision in the case of Chennai Port Trust would come to the assistance of the assessee herein. At this juncture, it would be beneficial to refer to the operative portion of the Judgment which reads as follows:

"10. The Advance Ruling Authority pointed out that the contention of the assessee that Van Oord ACZ BV, being a foreign company, was aware of the ruling of the AAR only when the Revenue relied on the decision of AAR 469/1999 dated 14.09.2000. Further, the Revenue filed before the Tribunal the copies of the returns filed by the foreign company in the letter addressed by the foreign company to ITO, TDS-VIII, Chennai, along with the return of the joint venture and the status of the joint venture was shown as AOP and a refund of Rs.3.24 crores was claimed. Form No.30 was signed by an authorised representative of the joint venture and the declaration was dated 08.12.1999. Since these facts were not there before the AAR at the time of passing of the original order, the present assessee sought for recalling of the order that there was a misrepresentation. The Advance Ruling Authority passed an order on 29.04.2009 and rejected the assessee's petition that the order passed by the Advance Ruling Authority could not be said to have been obtained by fraud or misrepresentation. It observed that the document brought on record by the Port Trust showed its stand that the joint venture consisting of HCC and VOA was an AOP, resident in India. It also pointed out that the foreign company filed a return of income for 1998-99 on 25.11.1998 as a non-resident company and for 1999-2000, on 29.12.2000. It also filed a return showing the status of joint venture as an AOP on 02.11.1998 before the Income Tax Officer, Ward-34, Mumbai, along with a return for claim of refund. The Authorised Representative for the foreign company also clarified that such application had to be filed to avoid the practical difficulty involved in the foreign company obtaining refund as a separate entity. The Advance Ruling Authority further pointed

out that the return filed in the name of the joint venture as Association of Persons was invalid, it not being in the Saral form and it was wrongly filed in the status of Association of Persons. In order to clear the conflicts thus arising from the positions taken by the assessee on the one hand and the Department's stands on the other, the foreign company thus went before the Advance Ruling Authority for a decision. In the background of these facts, the Advance Ruling Authority held that there was no deliberate suppression of material facts as regards the non-filing of the return before the Department. In that context, the Advance Ruling Authority held that the order of the Advance Ruling Authority was not obtained by the foreign company by misrepresentation or fraud.

11. A reading of this order thus brings out two things very clear. The assessee had taken a consistent stand that the joint venture was to be assessed only as Association of Person. For some reason, the foreign company filed its return originally as a non-resident company, which was followed subsequently by yet another return, which, no doubt, was in a form not conforming to Saral, making the status of the joint venture as Association of Persons. The claim for refund was made in the status of joint venture only and this was sought to be explained by the foreign company that it was done to avoid delay in getting its refund. The order of the Advance Ruling Authority thus clearly shows the conflicting and confused claims then persisting and absolutely, there was no action either from the foreign company, or for that matter, for the assessee herein, to approach the concerned authority for a ruling as to whether there should have been a TDS at all either under Section 194C or under Section 195 of the Income Tax Act. It was submitted that going by the understanding of the terms of the joint venture agreement between the companies and the contract awarded to the joint venture, the assessee entertained a bona fide belief that it was only a joint venture; hence, to be assessed as an Association of Persons, a course of action which could not be taken exception to. Even going by the order of the Tribunal, we see that much of a discussion was as to whether the joint venture could be taken as an Association of Persons or not. The assessee pointed out that at least till the Advance Ruling Authority passed an order, the Department itself did not deem it fit to reject the

assessee's claim that the payments were made under Section 194C, treating the joint venture as Association of Persons. In the background of these circumstances, we hold that the reliance placed on the decision of the Apex Court in CIT v. British Airways [2010] 190 Taxman 304 in almost similar circumstances, comes to the aid of the assessee herein.

12. The Supreme Court observed that till the decision of the Apex Court in CIT v. Eli Lilly & Co. (India) (P.) Ltd. [2009] 312 ITR 225 / 178 Taxman 505, there was a debate on the question as to whether TDS was deductible on foreign salary payment as a component of total salary paid to an expatriate working in India. In the face of such debatable issue, the assessee could not be declared as an assessee in default under Section 192 read with Section 201 of the Income Tax Act. Further, the Apex Court pointed out that since the foreign company-assessee therein had paid the differential tax and the interest and had further undertook not to claim refund for the amount paid, the Supreme Court held that the orders passed under Section 201(1) and 201(1A) could not be upheld. Applying the decision of the Apex Court to the case on hand, which we had already narrated in the preceding paragraph, with the debate on the status of the assessee existing at least till 2000 and the assessee not having any information as regards the order passed by the Advance Ruling Authority, we have no hesitation in accepting the plea of the assessee that the assessee herein could not be declared as an assessee in default for the purpose of interest under Section 201(1A) of the Income Tax Act. It may be of relevance to note herein that the assessee had deducted tax at 2%. The foreign company had paid tax under Section 44BBB at 4.8% and sought for a refund. Taking note of the decision of the Apex Court in Eli Lilly & Co. (India) (P) Ltd. (supra) and the object underlying Section 201 to recover the taxes where there is a shortfall, it is but necessary to find out whether the foreign company had already remitted the tax as per Section 44BBB.

13. It is a matter of record that the foreign company had remitted tax as per Section 44BBB at 4.8% and had also sought for refund therein. In the light of the said decision, we hold that the assessee cannot be mulcted with any liability by way of interest to be charged under Section 201(1A). Thus, applying the decision in British Airways

(supra), considering the consistent stand taken by the assessee and the parties to the agreement that the status of the joint venture was only Association of Persons, we hold that there could be no case for levying interest under Section 201(1A).

14. Even though the question of law raised before this Court reads as to whether the Income Tax Appellate Tribunal is right in law in holding that the joint venture of H.C.C. Ltd and Van Oord ACZ (VOACZ) is not an Association of Persons and the payment made to the joint venture should be treated as a payment made to the foreign company and tax deducted at source on that basis, yet, considering the above decision, we hold that with the decision of the Advance Ruling Authority available as to the status of the foreign company and the debate persisting on the said issue between the Department and the assessee, the assessee could not be declared as an assessee in default under Section 192(sic) read with Section 201 of the Income Tax Act, to attract interest under Section 201(1A).

In the result, the Tax Case Appeals stand allowed. No costs."

8.As pointed out earlier in the case of assessee's sister concern, who were also engaged in similar dredging contracts and registered with the Income Tax authorities and assessed on the file of the Income Tax Authority at Mumbai, an appeal was preferred by the Revenue before the ITAT, Mumbai against the order passed by the Commissioner of Income Tax (A) for assessment year 1999-2000. One of the grounds raised in the appeal was with regard to the levy of interest under Sections 234B and 234C of the Act. The Income Tax Appellate Tribunal took note of the decision in the case of DIT (International Taxation) vs. NGC Network Asia reported in (2009) 18 DTR (Bom) 203 and dismissed the revenue's appeal. The revenue filed an appeal before the High Court of Bombay in ITA No.3172 of 2010 which was dismissed and this order was affirmed by the Hon'ble Supreme Court.

9.In the case of DIT (International Taxation) & NGC Network Asia (supra), the Hon'ble Division Bench of High Court of Mumbai agreed with the view taken by the Uttaranchal High Court in the case of CIT & Anr. vs. Sedco Forex International Drilling Co. Ltd. & Ots reported in (2003) 264 ITR 230 (U) and held that when a duty is cast on the payer to pay the tax at source, on failure, no interest can be imposed on the payee/assessee.

10.This Court in the case of John Baptist Lasrado vs Income Tax Settlement Commission and others in W.P.No.18472 of 2009

dated 27.11.2017 had an occasion to consider somewhat an identical issue and after taking note of the decision in the case of CIT & Anr. Vs Sedco Forex International Drilling Co. Ltd allowed the writ petition and held that the assessee therein was not liable for payment of interest under Section 234B of the Act. Thus, I am of the clear view that the above decisions would clearly cover the case on hand and the circumstances which were considered by the Division Bench in the case of Chennai Port Trust, namely, with regard to conflict and confusion that was persisting till the Advance Ruling Authority passed the order. In fact, the Division Bench pointed out that till the Advance Ruling Authority pass an order, the Department itself did not deem it fit to reject the assessee's (Chennai Port Trust) claim that payments were made under Section 194C of the Act treating the joint venture as an association of persons.

11. Thus, the attempt of the Revenue in the instant case if to be accepted can be at best for statistical purposes. Thus, for the above reasons, the petitioner is entitled to succeed and accordingly, the writ petition is allowed, the impugned order is set aside and consequently it is held that the petitioner is not liable to pay interest under Section 234B and 234C of the Act. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

nl/cse
To
The Chief Commissioner of Income Tax-I,
121, Mahatma Gandhi Road,
Chennai - 600 034.

+1cc to Mr.R.Sivaraman, Advocate Sr.No.490
+1cc to Mr.J.Narayanawamy, Advocate Sr.No.552

LRS (CO)
sm:24.1.2018

W.P.No.14165 of 2009 &
M.P.No. 1 of 2009