IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCH 'B', BANGALORE

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI JASON P BOAZ, ACCOUNTANT MEMBER

IT(IT)A No.1143(B)/2013
(Assessment year : 2011-12)

The Deputy Commissioner of Income-tax,(Intl.Taxation)
Circle-1(1) 6th Floor, RP Bhavan,
Bangalore-560 001 Appellant

Vs

M/s Infosys BPO Limited,
Building 48, 4th Floor,
26/3, 26/4,26/6, Electronic City,
Bangalore-560 100
PAN No.AACCP4478N Respondent

IT(IT)A Nos.8 & 9(B)/2014
(Assessment years : 2011-12 & 2012-13)

The Asst. Director of Income-tax(Itl.Taxation)
Cirle-1(1), 6th Floor, RP Bhavan,
Bangalore-560 001 Appellant

Vs

M/s Infosys BPO Limited,
Building 48, 4th Floor,
26/3, 26/4,26/6, Electronic City,
Bangalore-560 100
PAN No.AACCP4478N Respondent

CO Nos.83 & 84(B)/2014
(In IT(IT)A Nos.8 & 9(B)/2014)
(Assessment years : 2011-12 & 2012-13)
(By Assessee)

Revenue by : Dr. P.K.Srihari, Addl.CIT
Asasesee by : Shri Padamchand Khincha, CA

Date of hearing : 15-06-2015
Date of pronouncement : 29-06-2015

O R D E R

PER SHRI VIJAY PAL RAO, JM:

The appeal in ITA No.1143(B)/2013 is filed by the revenue to challenge the composite order of CIT(A) dated 03-05-2012 and 23-05-2013 for the assessment years 2011-12 & 2012-13. Since the said appeal filed by the revenue was defective as it was filed in respect of two assessment years, therefore, the revenue has substituted the said appeal by filing the two separate appeals in IT(IT)A Nos.8 & 9(B)/2014 respectively. Thus, the appeal of the revenue in IT(IT)A No.1143(B)/2013, becomes non-nest, in view of the subsequent appeals filed by the revenue. Accordingly, the said appeal in ITA No.1143(B)/2013is dismissed.

2. In IT(IT)A No.8(B)/2013 the revenue has raised the following grounds;

> *"1. Whether ld.CIT(A) was right in holding that the section 206AA(1) does not apply to those cases whose alight tax liability u/s 115AA and under DTAA while ignoring the fact that 206AA begins with non-obstante clause.*
>
> *2. Whether on the facts and circumstances of the case the ld.CIT(A) was right in holding that the tax deduction at source cannot be at a rate prescribed u/s 206AA which is higher than the rate at which the relevant income is chargeable to tax under Act or DTAA.*

3. Whether on the facts and circumstances of the case ld.CIT(A) was right in deleting the interest under section 200A(1)(b) levied on short deduction of tax".

3. We have heard the learned DR as well as learned AR and considered the relevant material on record. At the outset our attention was brought to the order of the Hon'ble jurisdictional High Court dated 11-08-2014 in the Writ Petition Nos.377311/2013 & 38706-38708/2013 filed by the assessee against adjustment made by the AO u/s 200A(1) of the IT Act, 1961 and intimation issued for raising the demand. The Hon'ble jurisdictional High Court while considering with the issue of applicability of amended provisions of Section 246A of the Act, vide Finance Act, 2012 observed in para-5 & 6 as under;

" However, by amending Section 246A of the Act by Finance Act, 2012, a remedy of appeal is provided against an intimation under section 200A(1) of the Act with effect from 01-07-2012. It is fairly not disputed by the learned Standing Counsel for the respondents that if the appeals had been filed on or after 01-07-2012, the appeals were maintainable. Accordingly, as o the date of consideration of the appeals, the appeals were maintainable. It is stated that the appeals in question were filed on 11-04-2012. If the petitioner had filed these appeals after 01-07-2012, the appeals could not have been dismissed on the ground of maintainability. The only additional thing the petitioner

should have done was to apply for condonation of the delay in filing the appeals. Hence, in my opinion, on the facts of this case and in the interest of justice, the Appellate Authority ought to have examined the appeals on merits by treating them as having been filed on 01-07-2012 and by condoning the delay, if any.

6. In view of the above, the impugned order is set aside and the matter, is remitted to the Appellate Authority for re-consideration of the appeals on merits without going into the question of maintainability".

Vide the above order of the Hon'ble High Court the matter was remanded to the records of the CIT(A) for deciding the appeals on merits, without going into the question of maintainability. Thus, the appeal filed by the revenue for the assessment years 2011-12 becomes infructuous, in view of the order of Hon'ble jurisdictional High Court dated 21-08-2014. Hence, the appeal of the revenue in ITA No.8(B)/2014 for the assessment year 2011-12 is dismissed as not maintainable and consequently, cross objection of the assessee No.83(B)/2014 is also dismissed.

4. For the assessment year 2012-13, the revenue in IT(IT)A No.9(B)/2014 has raised the following grounds;

"1. *Whether ld.CIT(A) was right in holding that the section 206AA(1) does not apply to those cases whose alight tax liability u/s 115AA and under DTAA while*

ignoring the fact that 206AA begins with non-obstante clause.

2. Whether on the facts and circumstances of the case the ld.CIT(A) was right in holding that the tax deduction at source cannot be at a rate prescribed u/s 206AA which is higher than the rate at which the relevant income is chargeable to tax under Act or DTAA.

3. Whether on the facts and circumstances of the case ld.CIT(A) was right in deleting the interest under section 200A(1)(b) levied on short deduction of tax".

5. The assessee is engaged in the business of business process outsourcing (BPO). The assessee filed statements of deduction of tax at source in the form-2Q for various quarters of the financial year 2010-11 and 2012-13 relevant to assessment year under consideration in respect of payments made to non-resident during the period. The AO after processing issued intimation u/s 200A of the IT Act, wherein he pointed out short deduction of tax at source and accordingly, raised the tax demand alongwith the interest charged on such short deduction. This demand of tax was raised by the AO by issuing the intimation u/s 200A on the ground that the assessee has not furnished the PAN of the non-resident deductee/recipient and accordingly, as per the provisions of Sec.206AA of the Act, the TDS should have been deducted at the rate of 20%. Aggrieved by this intimation the assessee challenged the action of the AO before the CIT(A) including the objections raised against the

jurisdiction of the AO u/s 200A for making such adjustment and raising the consequential demand. The CIT(A) has rejected the objections of the assessee regarding the scope of Sec.200A for making such adjustment and consequential demand. However, the CIT(A) has decided the matter in favour of the assessee by holding that the non-resident recipient of the payment is eligible for the benefit of DTAA and therefore, the tax deducted at source cannot be more than the tax liability provided under the DTAA. Thus, the revenue as well as the assessee challenged the impugned order of the CIT(A) in their respective appeal and cross objection.

6. Before us the learned DR has submitted that in the proceedings of issuing intimation u/s 200A of the Act, the AO is empowered to make the adjustment in respect of statement of tax deducted at source if inter-an incorrect claim is made which is apparent from the information in the statement. Thus, in the proceedings u/s 200A of the IT Act, the AO has rightly took the rate of tax as 20%, when the assessee failed to furnish the PAN of the deductee/recipient in terms of provisions r.w.s.206AA of the Act.

On the other hand, learned AR of the assessee submitted that there is no dispute that the benefit of DTAA is available to the non-resident in question and therefore, the rate of TDS cannot be more than the tax liability of the recipient under the provisions of the Act or DTAA whichever

is beneficial. He has supported the order of the CIT(A) and also relied upon the following decisions;

1) Dy.DIT(ITII) Vs Serum Institute of India Ltd. in ITA No.792(Pune)2013 dated 30-03-2015.

2) Bosch Ltd Vs ITO Itnl.Taxation in ITA Nos.552 to 558(B)/2011 dated 10-11-2012

3) M/s Bharti Airtel Ltd Vs DCIT in ITA Nos.158 to 163 dated 14-08-2014

7. We have considered the rival submissions as well as the relevant material on record. In the case in hand, the assessee made payment to the non-resident on account of royalty in some cases and on account of fee for technical services in some other cases. The assesee deducted TDS at the rate of 10% in some cases and at the rate of 10.56% in some other cases as per the provisions of Sec.115A(1)(b) of the IT Act. There is no dispute that the benefit of DTAA is available to the recipients of the payments in question. Therefore, the tax liability of the recipients could not be more than the rate prescribed under the DTAA or the income tax Act, whichever is lower. In the case in hand, the AO while issuing the intimation u/s 200A has computed the tax liability at the rate of 20%, as provided/s 206AA of the Act. Since the benefit of DTAA is available to recipient. Therefore, in any case, the scope of deduction of tax at source cannot be more than the tax liability under DTAA. In the latest decision of the Pune Bench of the Tribunal in the case of Dy.DIT Vs M/s Serum

Institute of India Ltd. (Supra) an identical issue has been considered by the Tribunal in para-7 as under;

> *"7. We have carefully considered the rival submissions. Section 206AA of the Act has been included in Part B of Chapter XVII dealing with Collection and Recovery of Tax – Deduction at source. Section 206AA of the Act deals with requirements of furnishing PAN by any person, entitled to receive any sum or income on which tax is deductible under Chapter XVII-B, to the person responsible for deducting such tax. Shorn of other details, in so far as the present controversy is concerned, it would suffice to note that section 206AA of the Act prescribes that where PAN is not furnished to the person responsible for deducting tax at source then the tax deductor would be required to deduct tax at the higher of the following rates, namely, at the rate prescribed in the relevant provisions of this Act; or at the rate/rates in force; or at the rate of 20%. In the present case, assessee was responsible for deducting tax on payments made to non-residents on account of royalty and/or fee for technical services. The dispute before us relates to the payments made by the assessee to such non-residents who had not furnished their PANs to the assessee. The case of the Revenue is that in the absence of furnishing of PAN, assessee was under an obligation to deduct tax @ 20% following the provisions of section 206AA of the Act. However, assessee had deducted the tax at source at the rates prescribed in the respective DTAAs between India and the relevant country of the non-residents; and, such rate of tax being lower than the rate of 20% mandated by section 206AA of the Act. The CIT(A) has found that the provisions of section 90(2) come to the rescue of the assessee. Section 90(2) provides that the provisions of the DTAAs would override the provisions of the domestic Act in cases where the provisions of DTAAs are more beneficial to the assessee. There cannot be any doubt to the proposition that in case of*

non-residents, tax liability in India is liable to be determined in accordance with the provisions of the Act or the DTAA between India and the relevant country, whichever is more beneficial to the assessee, having regard to the provisions of section 90(2) of the Act. In this context, the CIT(A) has correctly observed that the Hon'ble Supreme Court in the case of Azadi Bachao Andolan and Others vs. UOI, (2003) 263 ITR 706 (SC) has upheld the proposition that the provisions made in the DTAAs will prevail over the general provisions contained in the Act to the extent they are beneficial to the assessee. In this context, it would be worthwhile to observe that the DTAAs entered into between India and the other relevant countries in the present context provide for scope of taxation and/or a rate of taxation which was different from the scope/rate prescribed under the Act. For the said reason, assessee deducted the tax at source having regard to the provisions of the respective DTAAs which provided for a beneficial rate of taxation. It would also be relevant to observe that even the charging section 4 as well as section 5 of the Act which deals with the principle of ascertainment of total income under the Act are also subordinate to the principle enshrined in section 90(2) as held by the Hon'ble Supreme Court in the case of Azadi Bachao Andolan and Others (supra). Thus, in so far as the applicability of the scope/rate of taxation with respect to the impugned payments make to the non-residents is concerned, no fault can be found with the rate of taxation invoked by the assessee based on the DTAAs, which prescribed for a beneficial rate of taxation. However, the case of the Revenue is that the tax deduction at source was required to be made at 20% in the absence of furnishing of PAN by the recipient non-residents, having regard to section 206AA of the Act. In our considered opinion, it would be quite incorrect to say that though the charging section 4 of the Act and section 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B

governing tax deduction at source are not subordinate to section 90(2) of the Act. Notably, section 206AA of the Act which is the centre of controversy before us is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. The provisions of section 195 of the Act which casts a duty on the assessee to deduct tax at source on payments to a non-resident cannot be looked upon as a charging provision. In-fact, in the context of section 195 of the Act also, the Hon'ble Supreme Court in the case of CIT vs. Eli Lily & Co., (2009) 312 ITR 225 (SC) observed that the provisions of tax withholding i.e. section 195 of the Act would apply only to sums which are otherwise chargeable to tax under the Act. The Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd. vs. CIT, (2010) 327 ITR 456 (SC) held that the provisions of DTAAs along with the sections 4, 5, 9, 90 & 91 of the Act are relevant while applying the provisions of tax deduction at source. Therefore, in view of the aforesaid schematic interpretation of the Act, section 206AA of the Act cannot be understood to override the charging sections 4 and 5 of the Act. Thus, where section 90(2) of the Act provides that DTAAs override domestic law in cases where the provisions of DTAAs are more beneficial to the assessee and the same also overrides the charging sections 4 and 5 of the Act which, in turn, override the DTAAs provisions especially section 206AA of the Act which is the controversy before us. Therefore, in our view, where the tax has been deducted on the strength of the beneficial provisions of section DTAAs, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act. The CIT(A), in our view, correctly inferred that section 206AA of the Act does not override the provisions of section 90(2) of the Act and that in the impugned cases of payments made to non-residents, assessee correctly applied the rate of tax prescribed under the DTAAs and not as per section 206AA of the Act because the

provisions of the DTAAs was more beneficial. Thus, we hereby affirm the ultimate conclusion of the CIT(A) in deleting the tax demand relatable to difference between 20% and the actual tax rate on which tax was deducted by the assessee in terms of the relevant DTAAs. AS a consequence, revenue fails in its appeals.

8. A similar view has been taken by the Co-ordinate Bench of this Tribunal in case of Bosch Vs ITO Supra, in para-22 & 23 as under;

"22. As regards the grossing up u/s 195A of the Income tax Act is concerned, we find that the provision reads as under;

"In a case other than that referred to in subsection (1A) of sec.192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then for the purposes of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payables under such agreement or arrangement".

23. Thus, it can be seen that the income shall be increased to such amount as would after deduction of tax thereto at the rate in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement. A literal reading of sec. implies that the tax is to be withheld by the assessee. The Hon'ble Apex Court in the case of GE India Technology

Center (P) Ltd (cited Supra) has held that the meaning and effect has to be given to the expression used in the section and while interpreting a section, one has to give weightage to every word used in that section. In view of the same, we are of the opinion that the grossing up of the amount is to be done at the rats in force for the financial year in which such income is payable and not at 20% as specified u/s 206AA of the Act".

9. It is pertinent to note the obligation of deducting tax at source arises only when there is a sum chargeable under the Act. The Hon'ble jurisdictional High Court in the case of M/s Bharti Airtel Ltd Vs DCIT Supra, has observed in para-39 as under;

"39. The provisions for deduction of TAS(tax at source) which are in Chapter XVII dealing with collection of taxes and the charging provisions of the Income-tax from one single integral, inseparable Code. Therefore, the provisions relating to TDS apply only to those sums which are "Chargeable to tax" under the Income-tax Act. While interpreting the provisions of the Income-tax Act one cannot read the charging sections of that Act de hors the machinery sections. The Act is to be read as an integral Code. In order to deduct tax at source the amount being paid out must necessarily be ascertainable as income chargeable to tax in the hands of the payee. TDS is a vicarious liability and it presupposes existence of primary liability. Therefore, the TDS provisions have to be read in conformity with the charging provisions i.e section 4.5 and 9".

Thus, the provisions of TDS has to be read alongwith the machinery provisions of computing the tax liability on the sum in question. Following the decisions of Co-ordinate Benches Supra, as well as the judgment of Hon'ble jurisdictional High Court in the case of M/s Bharti Airtel Ltd Supra, we do not find any error or illegality in the order of the CIT(A) that there is no scope for deduction of tax at the rate of 20% as provided under the provisions of Section 206AA of the IT Act when the benefit of DTAA is available.

10. In the cross objection the assessee has raised the following grounds;

> *"1. The ld.CIT(A)-IV< Bangalore has erred in dismissing the appeal filed against intimation passed under section 200A as not maintainable. On facts and in the circumstances of the case and the law applicable, the appeal filed against intimation passed under section 200A is maintainable under section 246A before the CIT(A) without prejudice.*
>
> *2. The ld.CIT(A)-IV, Bangalore has erred in upholding the validity of intimation passed by the learned Income tax Officer, International Taxation, Ward-2(1), Bangalore under section 200A of the IT Act. On facts and in the ci8rcumstandfes of the case and law applicable, the intimation so passed is without jurisdiction, invalid, bad in law and liable to be quashed.*

3. Even otherwise, in the absence of any arithmetical error in the statement or an incorrect claim, apparent from any information in the statement, the intimation passed by the learned Income tax Officer, International Taxation, Ward-2(1), Bangalore does not satisfy the requirements of section 200A and consequently, the said intimation passed in invalid, bad in law and liable to be quashed without prejudice.

4. The ld.CIT(A)-IV, Bangalore has erred in concluding that section 206AA will be applicable whether or not the non-resident deductees are required to obtain PAN under section 139A. On the facts and circumstances of the case and law applicable and considering the fact that there was no requirement under law for the non-resident deductees to obtain PAN, the higher rate of TDS under section 206AA is not applicable.

5. In view of the above other grounds to be adduced at the time of hearing, the respondent (cross objector) prays that the order passed by the learned CIT(A) to the extent it is prejudicial to the respondent be quashed or in the alternative

i) Appeal filed with CIT(A) against intimation passed under section 200A be held as mainatainable

ii) Intimation passed under section 200A be held as without jurisdiction invalid and bad in law.

iii) Section 206AA be held as inapplicable in view of the fact that non-resident deductees were not required under law to obtain PAN".

11. We have heard the learned AR as well as learned DR and considered the relevant material available on record. As we have discussed the facts while deciding the issue involved in the revenue's appeal that the AO has made the adjustment while issuing the intimation u/s 200A of the IT Act, by applying the rate of tax at 20%. The assessee has challenged jurisdiction of the AO u/s 200A of the Act, for making such adjustment and raising the consequential demand, because the issue of applying the rate of tax is not arithmetical error in the statement or an incorrect claim apparent from any information in the statement. Thus, the learned AR contended that the exercise undertaken by the AO to adopt the rate of tax at 20% and consequently making the adjustment and demand of tax is beyond the jurisdiction of the AO u/s 200A of the IT Act, 1961.

12. On the other hand, learned DR has submitted that the assessee had made an incorrect claim in the statement, because the assessee has deducted tax at the rate of 10% whereas as per the provisions of Section 206AA of the Act, the rate of tax applicable in the case of the assessee is 20%. Therefore, the AO was well within his powers to make the adjustment in respect of the TDS statement furnished by the assessee u/s 200A of the II Act, 1961.

13. Having considered the rival submission as well as the relevant material available on record, we note that while making the adjustment

the AO has ignored the provisions of DTAA which are applicable on the payment in question. There is no dispute that the beneficial provisions under the Act as well as the DTAA are applicable for the non-resident assessee. The payment in question was made to the non-resident and the provisions of DTAA are applicable, as the same has not been disputed by the AO before us. Thus, the issue of applying the rate of tax at 20% and ignoring the provisions of DTAA is a debatable issue and does not fall in the category of any arithmetical error or incorrect claim apparent from any information in the statement, as per the provisions of section 200A (1) of the IT Act, 1961. For ready reference, we quote the provisions of section 200A of the IT Act, 1961 as under;

200A. Processing of statements of tax deducted at source.- (1) Where a statement of tax deduction at source has been made by a person deducting any sum (hereafter referred to in this section as deductor) under section 200, such statement shall be processed in the following manner, namely:—

(a) the sums deductible under this Chapter shall be computed after making the following adjustments, namely:—

(i) any arithmetical error in the statement; or

(ii) an incorrect claim, apparent from any information in the statement;

(b) the interest, if any, shall be computed on the basis of the sums deductible as computed in the statement;

(c) the sum payable by, or the amount of refund due to, the deductor shall be determined after adjustment of amount computed under clause (b) against any amount paid under section 200 and section 201, and any amount paid otherwise by way of tax or interest;

(d) an intimation shall be prepared or generated and sent to the deductor specifying the sum determined to be payable by, or the amount of refund due to, him under clause (c); and

(e) the amount of refund due to the deductor in pursuance of the determination under clause (c) shall be granted to the deductor :

Provided that no intimation under this sub-section shall be sent after the expiry of one year

from the end of the financial year in which the statement is filed.

Explanation.—For the purposes of this sub-section, "an incorrect claim apparent from any information in the statement" shall mean a claim, on the basis of an entry, in the statement—

(i) of an item, which is inconsistent with another entry of the same or some other item in such statement;

(ii) in respect of rate of deduction of tax at source, where such rate is not in accordance with the provisions of this Act.

(2) For the purposes of processing of statements under sub-section (1), the Board may make a scheme for centralised processing of statements of tax deducted at source to expeditiously determine the tax payable by, or the refund due to, the deductor as required under the said sub-section.

14. As it is clear the explanation below sub-section-1 of Section 200A of the IT Act, which clarifies that in respect of deduction of tax at source where such rate is not in accordance with provisions of this Act can be considered as an incorrect claim apparent from the statement. However, in the case in hand, it is not a simple case of deduction of tax at source by applying the rate only as per the provisions of Act, when the benefit of DTAA is available to the recipient of the amount in question. Therefore, the question of applying the rate of 20% as provided u/s 206AA of the IT Act is a issue which requires a long drawn reasoning and finding. Hence, we are of the considered opinion, that applying the rate of 20% without considering the provisions of DTAA and consequent adjustment while framing the intimation u/s 200A is beyond the scope of the said provision. Thus, the AO has travelled beyond the jurisdiction of making the adjustment as per the provisions of Section 200A of the IT Act, 1961.

In view of the above discussion, as well as the facts and circumstances of the case, we decide this issue in favour of the assessee and consequently the cross objection of the assessee is allowed.

15. In the result, all the appeals of the revenue and the cross objections of the assessee in C.O. No.83(B)/14 are dismissed and the cross objection of the assessee in C.O.No.84(B)/14 is allowed.

Pronounced in the open Court on the 29th June, 2015.

Sd/- Sd/-

(JASON P BOAZ) **(VIJAY PAL RAO)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

D a t e d : 29-06-2015
Place: Bangalore
am*
Copy to :

1 Appellant
2 Respondent
3 CIT(A)-II Bangalore
4 CIT
5 DR, ITAT, Bangalore.
6 Guard file

By order

AR, ITAT, Bangalore