IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA

Before: **Shri J. Sudhakar Reddy, Accountant Member** and
Shri S.S. Viswanethra Ravi, Judicial Member

I.T.A No. 384/Kol/2016
A.Y: 2011-12

Srei Alternative Investment Managers Ltd. PAN: AAGCS 5232F	**Vs.**	**Income Tax Officer (IT),Ward-2(1), Kolkata**
[Appellant]		[Respondent]

I.T.A No. 385/Kol/2016
A.Y: 2011-12

Srei Infrastructure Finance Ltd. PAN: AAACS1425L	**Vs.**	**Income Tax Officer (International Taxation) Ward-2(1), Kolkata**
[Appellant]		[Respondent]

I.T.A Nos. 386 to 389/Kol/2016
A.Ys: 2011-12 & 2012-13

Srei Infrastructure Finance Ltd. PAN: AAACS1425L	**Vs.**	**Income Tax Officer (IT),Ward-2(1), Kolkata**
[Appellant]		[Respondent]

For the Appellant : Shri Vinod Kumar Dubey, FCA, ld.AR
For the Respondent : Shri N.B. Som, Addl. CIT, ld. Sr.DR

Date of hearing : 15-06-2017
Date of pronouncement : 13-09-2017

ORDER

Shri S.S.Viswanethra Ravi, JM:

All these six appeals by the Assessee are directed against the separate orders of the Commissioner of Income Tax (Appeals), 22, Kolkata all dt. 25-11-2015 for the A.Ys 2011-12 & 2012-13, wherein he confirmed the action of the AO in issuing an intimation of demand along with charging of interest raised u/s. 200A/201(1A) of the Act for short deduction of TDS for the A.Ys 2011-12 & 2012-13.

2. Since all these issues raised in respective appeals as above are identical and similar to each other involving one assessee, therefore, all the issues heard together as one issue and dispose of the same by this common order for the sake of convenience.

3. The only effective issue involved is to be decided as to whether the CIT-A justified in confirming the issuance of intimation for short deduction of TDS ignoring the settled provision of DTAA overrides the provisions of the I.T Act in the facts and circumstances of the case.

4. We shall take up ITA No. 384/Kol/2016 of assessee.

5. The ld.AR submits that the assessee filed its statement of deduction of tax in Form 27Q in respect of payment made to non-resident for the quarter of F.Y 2010-11 relating to A.Y 2011-12. The assessee has deducted the TDS @ 10% amounting to Rs.1,70,901/- in respect of payment of Rs. 17,09,099/-.

6. The said deduction of tax rate of 10% is under force by Double Tax Avoidance Agreement (DTAA). The AO raised a demand of Rs.2,06,800/- on account of short deduction of tax (Rs.3,41,820-Rs.1,70,910) vide intimation dt. 19-11-2012.

7. The assessee challenged the same before the CIT-A. Before the CIT-A the assessee contended that the said payment was made to Mr. Daniel Yul Sinn Yeung of Singapore towards consultancy services in respect of developing fund management initiatives and mobilizing funds. The said payment was made as per article 12(4) of the Indo-Singapore of DTAA under the head " fees for technical services". The assessee further contended that the said services does not fall within the definition of term 'fees for included services' as defined in Indo-Singapore DTAA as the said person did not make available any technical know-how to the assessee and does not have any fixed day in India nor he stays in India exceeded in aggregate 90 days in the

relevant F.Y. But by mistake out of ignorance the assessee has deducted tax @10% in respect of said payments made to said person.

8. Basing on the submissions of assessee the CIT-A formulated the issue that as to whether the consultancy fees paid to Mr. Daniel of Singapore as per Indo-Singapore DTAA is taxable in India or not. The CIT-A read down article 12(4) of Indo-Singapore DTAA and held that the said person provided consultancy services to the assessee for developing fund & management initiatives and mobilisation of funds and the assessee applied the said services in its business and said services is directly fall under the definition of fees for technical services and it is taxable in India.

9. Further, the CIT-A held that the said person being non resident to whom the assessee paid the said amount has to obtain PAN (Permanent account Number) and for non submission of such PAN the AO was justified in raising the demand. Relevant portion of finding is reproduced herein below:-

> *7.3 In the present case there is no dispute that the deductee is entitled to receive certain sum whose income is taxable in India and tax is required to be deducted from such income under Chapter XVIIB. The reliance placed by appellant on the decision of Hon'ble ITAT in the case of Serum Institute may not be helpful as the Hon'ble ITAT has not considered the decision of the ITAT Bangalore Bench 'C' in the case of Bosch Ltd. v. Income- tax Officer, International Taxation, Bangalore [2012] 28 taxmann.com 228 (Bangalore - Trib.) wherein it was held that.-*
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> *The provisions of sec. 206AA clearly overrides the other provisions of the Act. Therefore, a non resident whose income is chargeable to tax in India has to obtain PAN No. and provide the same to the assessee deductor. The only exemption given is that non- resident whose income is not chargeable to tax in India are not required to apply and obtain PAN No. However, where the income is chargeable to tax irrespective of the residential status of the recipients, every assessee is required to obtain the PAN No. and this provision is brought in to ensure that there is no evasion of tax by the foreign entities. In the instant case, the recipients are non-residents and admittedly the income exceeds the taxable limit prescribed by the relevant Finance Act. In the circumstances, the recipients are bound and are under an obligation to obtain the PAN and furnish the same to the assessee. For failure to do so, the assessee is liable to withhold tax at the higher of rates prescribed under section 206AA i.e. 20% and the Commissioner (Appeals) has rightly held that the provision of section 206AA are applicable to the assessee". [Para 21)*
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> *7.4 The reliance of the assessee on the Hon'ble Supreme Court in the case of Azadi Bachao Andolan is also not helpful as the Hon'ble Court while deciding that the DTAAs would override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, created a caveat i.e., It to the extent of inconsistency with the terms of the DTAA". The Hon'ble Court makes it abundantly clear that there should exist inconsistency between the Income Tax Act and the DTAA for the provisions of the DTAA to override the provisions of the Income Tax Act. In the present case there is no inconsistency existing between the provisions of*

section 206AA of the Income tax Act and the DTAA between the India and South Africa. Nowhere in the DTAA it is provided that if the party in any of the contracting state violate the domestic law even then they are eligible to claim the benefit of lower taxation as per the Treaty. In the present case, the non-resident party were explicitly obliged to obtain PAN because they were persons entitle to receive any sum or income or amount and their income is chargeable to tax. In the event the non-resident recipient who have not obtained PAN, have the option of claiming refund of taxes paid in excess of the rate prescribed by the DTAA, by subsequently filing a return in India. Therefore there is not prejudice caused to the non resident

7.5 The section 206AA was introduced to penalise those who do not obtain and furnish their PAN details to the deductor and it overrides other provisions of the ITA for it begins with a non obstante clause "Notwithstanding anything contained in the any other provisions in this Act". The Hon'ble Supreme Court in the case of ChandavarkarSitaRatnaRao v. Ashalata S. Guram reported in [1986] 4 SCC 447, explained the scope of non-obstante clause in the following words:

"A clause beginning with the expression "notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract" is more often than not appended to a section in the beginning It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned the enactment following it will have its full operation or that the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment".

Thus, it is clear that the tax treaty benefit would be available to the appellant on compliance with the provision of section 206AA of the ITA. Further, if the view adopted by the hon'ble Pune ITAT is followed then the provisions of Section 206AA would become completely redundant and would not apply to non-residents from those countries which have tax treaties. This however, was never the intention of law and hence is not the correct principle of law. In fact, the memorandum explaining the provisions of section 206AA read with Rule 114 of the Income Tax Rules suggest that any person, including non-residents, who is entitled to receive any sum or income or amount, on which tax is deductible -in any financial year is required to obtain a PAN, Memorandum explaining the provisions of the Finance (No, 2) Bill, 2009 and the circular no 5 issued by CBDT clarifying the provisions of the Finance (No 2) Act 2009 is extracted below:

"Statutory provisions mandating quoting of Permanent Account Number (PAN) of deductees in Tax Deduction at Source (TDS) statements exist since 2001 duly backed by penal provisions. The process of allotment of PAN has been streamlined so that over 75 lakh PANs are being allotted every year. Publicity campaigns for quoting PAN are being run since the last three years. The average time of allotment of PAN has come down to 10 calendar days. Therefore, non-availability of PAN has ceased to be an impediment. In a number of cases, the non-quoting of PAN's by deductees is creating problems in the processing of return of income and in granting credit for tax deducted at source, leading to delays in issue of refunds.

In order to strengthen the PAN mechanism, it is proposed to make amendments in the Income-tax Act to provide that any person whose receipts are subject to deduction of tax at source i.e the deductee, shall mandatorily furnish his PAN to the deductor, failing which the deductor shall deduct tax at source at higher of the following rates:

(i) the rate prescribed in the Act;

(ii) <u>at the rate in force, i.e the rate mentioned in the Finance Act; or at the rate of 20 per cent."</u>

7.6 Section 206AA should thus be considered as an anti-avoidance provision. The International law (Including DECD and UN commentaries) recognize the fact that anti-avoidance provisions are specifically enacted to prevent misuse of Treaty benefits and that the same shall override the Treaty. The legislature has incorporated the recognition made by OECD and UN commentary by inserting section 90(2A) in the IT Act with effect from A.Y 2016-17 which overrules section 90(2) of the Act. The Supreme Court of India in the case of Basawaraj & Anr. Versus The Spl. Land Acquisition Officer reported in (2013) 14 SCC 81 1 had held that "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. " The statutory provision may cause hardship or inconvenience to a particular party but the Court has

no choice but to enforce it giving full effect to the same. The legal maxim "dura lex sed lex" which means "the law is hard but it is the law", stands attracted in such a situation. It has consistently been held that "inconvenience is not" a decisive factor to be considered while interpreting a statute".

10. The ld.AR of the assessee submits that the issue in hand is squarely covered by the order of the Hon'ble Special Bench (ITAT Hyderabad) in the case of Nagarguna Fertilizers & Chemicals Ltd Vs. ACCIT, Cir-15(1), Hyderabd reported in (2017) 78 Taxmann. Com 264(Hyd-Trib)(SB) and submits that the Special Bench held that the provisions of section 206AA of the Act despite the non-obstante clause contained therein cannot override the provisions of DTAA to the extent they are more beneficial to the assessee. He further submits that the Hon'ble Special Bench in the case of *supra* held that the assessee cannot be held liable to deduct tax at higher rates prescribed u/s. 206AA of the Act in the case of payments made to non-resident person(s) having taxable income in India for non submissions of PAN and referred to paras 30 to 33 of the said order and prayed that the grounds raised by the assessee may be allowed.

11. On the other hand, the ld. DR relied on the orders of the authorities below. He also submits that no PAN was furnished and the provisions of section 206AA is corrective provision and non resident also required to furnish PAN and prayed to dismiss the grounds of appeal.

12. Heard rival submissions and perused the material on record. We find as referred by the ld.AR regarding the decision of the Hon'ble Special Bench at Hyderabad decided the similar issue arising out of conflicting decisions of Bangalore Bench in the case of Bosch Ltd and Pune Bench in the case of Serum Institute of India Limited *supra.* The Special Bench formulated the question as under:-

"Whether in the facts and circumstances of the case the provisions of section 206AA of the Act have an override effect for all other provisions of the Act and the assessee is required to deduct tax therein in the case of person(s) having taxable income in India, including non-resident, who does not furnish their PAN ?

13. The Special Bench observed that section 206AA falls in Chapter XVII-B of the Act dealing with tax deduction at source, it follows that the treaty provisions which override even the charging provision by virtue of section 90(2) of the Act would also override the provisions of section 206AA irrespective of non-obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of DTAA, which are overriding being beneficial to the assessee. The Special Bench opined and held that the provisions of Section 206AA of the Act will not have overriding effect for all other provisions of the Act and the provisions of the Treaty to which extent they are more beneficial to the assessee. Relevant findings of the Special Bench in the case of *supra* held as under:-

> *30. The ratio of the two decisions of the Hon'ble Supreme Court in the case of Hi Lilly And Co. (India) P. Limited (supra) and G.E. Technology Centre (P) Limited (supra) as discussed above clearly shows that the charging provisions control and override the machinery provisions dealing with tax deduction at source. Similarly, the provisions of DTAAs by virtue of section 90(2) to the extent more beneficial to the assessee override the provisions of Domestic Law as held inter alia, by the Hon'ble Supreme Court in the case of Azadi Bachao Andolan & Another (.supra) and P.V.A.L., Kulandagan Chettiar (supra). Since section 206AA falls in Chapter XVII-B dealing with tax deduction at source, it follows that the" treaty provisions which override even the charging provision of the Domestic Law by virtue of section 90(2) would also override the machinery provisions of section 206AA irrespective of non-obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of DTAs, which are overriding being beneficial to the assessee.*
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> *31. There is one more basis to support the above conclusion. As rightly pointed out on behalf of the assessee, Chapter-XA containing the provision relating to General Anti-Avoidance Rule (GAAR) has been inserted in the Statute by the Finance Act, 2013 with effect from 1st April, 2016 and although the provisions contained in the said Chapter are given overriding effect by virtue of non-obstante clause contained in section 95, a separate provision has been inserted simultaneously in the form of sub-section (2A) in section 90 providing specifically that notwithstanding anything contained in sub-section (2), the provisions of Chapter XA of the Act shall apply to the assessee even if such provisions are not beneficial to him. As rightly pointed out on behalf of the assessee, no such provision, however, is made separately and specifically in section 90 to give overriding effect to section 2-06AA over-section 90(2), which clearly shows that the intention of the legislature is not to give overriding effect to section 206AA over the provisions of the relevant DTAA which are beneficial to the assessee. In the case of Sanofi Pasteur Holding SA v. Department of Revenue & Others (supra), the contention raised on behalf of the Revenue was that the relevant retrospective amendments made in the Income Tax Act, 1961 override the tax treaties and the same was rejected by the Hon'ble Andhra Pradesh High Court on the ground that the relevant amendments were not fortified by a non-obstante clause expressed to override Tax Treaties as was made in case of the GAAR provisions specifically by inserting sub section (2A) in section 90 to enable application of Chapter X-A even if the same be not beneficial to the assessee thereby enacting an override effect over the provisions of section 90(2). In the case of Bharat Hari Singhania (supra), it was held by the Hon'ble Supreme Court that the scope and purport of the non-obstante clause has to be ascertained by reading it in the context of the relevant provisions and consistent with the scheme of the enactment. As explained by CBDT while inserting the provision of section 206AA vide Circular No. 5 of 2010, the intention of the said provision is mainly to strengthen PAN mechanism and keeping in view this limited function and purpose, we are of the view that non-obstante clause contained in the machinery provision of section 206AA is required to be assigned a restrictive meaning and the same cannot be read so as to override even the relevant*

beneficial provisions of the Treaties, which override even the charging provisions of the Income Tax Act by virtue of section 90(2). In our opinion, it, therefore, cannot be said that the provisions of section 206AA, despite the non-obstante clause contained therein, would override the provisions of DTAA to the extent they are more beneficial to the assessee and it is the beneficial provision of treaty that will override the machinery provisions of section 206AA.

32. In the case of Bosch Limited (supra) relied upon by the Id. CIT(D.R.) in support of the revenue's case, the issue relating to the applicability of section 206AA had come up for consideration before the Bangalore Bench of this Tribunal in two contexts. First, it was considered in the context of grossing up and while deciding the same, it was held by the Tribunal that the very nature of relevant income being business income not chargeable to tax in the hands of the non-resident recipients having no permanent establishment in India, the payments did not require withholding of tax at source under section 195 of the Act and the assessee was not under an obligation to withhold tax even as per the provisions of section 206AA at higher rate of 20%. In other context the amount paid to the non-resident was found by the Tribunal to be in the nature of fees for technical services chargeable to tax in the hands of the non-resident in India and since there was a failure on the part of the concerned non-resident to furnish PAN to the assessee, the assessee was held to be liable to withhold tax at higher of rates prescribed in section 206AA by the Tribunal. It, however, appears that all the relevant aspects as discussed above, such as overriding effect of the Treaty provisions as per section 90(2), the limited effect of non-obstante clause contained in the machinery provision of section 206AA etc. were not argued before the Tribunal on behalf of the assessee and the Tribunal, therefore, had no occasion to consider the same while deciding this issue. On the other hand, Pune Bench of ITAT in the case of serum Institute of India Limited (supra) has considered some of these relevant aspects and after considering the propositions propounded by the Hon'ble Supreme Court in the case of Azadi Bachao Andolan & Another (supra), Eli Lilly And Co. (India) P. Limited (supra) and G.E. Technology Centre (P) Limited (supra), it was held by the Tribunal, and in our opinion, rightly so, that section 206AA of the Act cannot override the provisions of section 90(2) of the Act.

33. In view of the above discussion, we are of the view that the provisions of section 206AA of the Act will not have a overriding effect for all other provisions of the Act and the provisions of the Treaty to the extent they are beneficial to the assessee will override section 206AA by virtue of section 90(2). In our opinion, the assessee therefore cannot be held liable to deduct tax at higher of the rates prescribed in section 206AA in case of payments made to non-resident persons having taxable income in India in spite of their failure to furnish the Permanent Account Numbers. We, accordingly, answer the question referred to this Special Bench in the negative and in favour of the assessee and allow both the appeals of the assessee for A.Ys. 2011-12 and 2012-13."

14. In the present case, we find that the assessee initially deducted tax at Rs.1,70,910/- i.e @ 10% of total payment of Rs.17,09,099/- made to Mr. Daniel Yul Sinn Yeung under the head 'consultancy fees' in pursuance to article 12(4) of Indo-Singapore DTAA. The ITO raised a dispute of short deduction of tax and raised a demand by applying higher rates of tax at 20% as contemplated U/Sec. 206AA of the Act, which was challenged before the CIT-A contending that the services offered by the non-resident does not fall under the head " fees for technical services" and by mistake the assessee deducted the TDS @ 10% and claimed DTAA provision shall have overriding effect on the provisions of section 206AA of the Act. We find that the facts in the present case are similar to the facts of the case before Special Bench *supra* and the principle laid down therein is applicable to the present

facts and circumstances of the case. Therefore, the Intimation dt. 19-11-2012 issued u/s. 200A of the by the AO and confirmed the CIT-A is set aside.

15. Coming to other appeals i.e ITA Nos. 385, 386, 387, 388 & 389/Kol/2016, we find that the issues raised therein are similar to the issues raised in ITA No. 384/Kol/2016 except in variance of short deduction of amounts and relevant financial quarters. In view of our view in the aforementioned appeal, we adopt the same view in the rest of the appeals of the assessee. Therefore, the grounds raised by the assessee in all the appeals for the A.Ys under consideration therein are allowed.

16. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open court on 13-09-2017

Sd/-	Sd/-
J. Sudhakar Reddy	**S.S. Viswanethra Ravi**
Accountant Member	**Judicial Member**

Dated : 13-09-2017

PP(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant/Assessee: M/s. Srei Alternative Investment Managers Limited (Formerly Srei Ventrue Capital Limited),M/s. SREI Infrastructure Finance Limited,86C, Viswakarma, Topsia Road (South), Topsia, Kolkata-46.
2. Respondent/Department: Income Tax Officer (International Taxation), Ward 2(1), Room No. 215, 2nd Floor, Aaykar Bhavan Poorva, 110 Shantipally, Kolkata-700107.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy, By order,

Sr.PS/H.O.O
ITAT Kolkata