IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "A" BENCH, AHMEDABAD

[Coram: Pramod Kumar AM and Rajpal Yadav JM]

ITA No. 2642/Ahd/2017
Assessment Year: 2016-17

Dy. Commissioner of Income-tax **.....Appellant**
(International Taxation)-1, Ahmedabad

Vs.

Adani Wilmer Limited **.....Respondent**
2nd Floor, Fortune House,
Nr. Adani House,
Mithakhali Cross Road,
Navrangpura, Ahmedabad
[PAN : AABCA 8056 G]

Appearances by:

Saurabh Singh *for the Appellant*
PM Mehta *for the Respondent*

Date of concluding the hearing : 15.03.2018
Date of pronouncing the order : 05.04.2018

O R D E R

Per Bench :

1. The short issue that requires our adjudication in this appeal is whether the learned CIT(A) was justified in holding that section 206AA of the Income Tax Act, 1961 do not override the provisions of Double Taxation Avoidance Agreement entered into by the Government of India under section 90 of the Act. The grievances raised in this appeal are as follows:

> *"1. Whether the Ld.CIT(A) is correct in law and on facts in holding that the recipients are entitled to the benefit of treaty without deciding first whether the recipients satisfied conditions of the treaty and can be treated as resident of respective countries as per the DTAA.*
>
> *2. Without prejudice to the above,*
>
> *(i) whether the Ld. CIT(A) was right in law and on facts in coming to the conclusion that Section 206AA of the Act, does not override the provision of section of Section 90(2) of the Act, despite the fact that Sec.206AA starts with a non- obstante clause.*
>
> *(ii) whether the Ld. CIT(A) has erred in law and on facts of the case in ignoring the memorandum explaining the provision of the Finance (No.2) Bill, 2009 which clearly states that the Sec.206AA of Income Tax Act*

applies to Non-Residents and also ignoring the Press Release of CBDT No.402/92/2006-MC (04 of 2010) dated 20/1/2010 which reiterates that Sec.206AA of Income Tax Act will also apply to all Non-Residents in respect of payments/remittance liable to TDS where PAN is not provide to the deductor?

(iii) whether the Ld. CIT(A) has erred in law and on facts of the case in relying upon the decision which were rendered before the introduction of Sec.206AA of the I.T. Act?

3. Any other grounds that may be urged at the time of hearing."

2. At the time of hearing before us, learned representatives fairly agree that the issue in appeal is now covered, in favour of the assessee, by a large number of judicial precedents in favour of the assessee, even though learned Departmental Representative has, nevertheless, relied upon the stand taken in the grounds of appeal. Learned counsel for the assessee also invites our attention to a rather recent judgment of Hon'ble Delhi High Court in the case of Dansico India Pvt. Ltd. Vs. Union of India & Ors [judgment dated 5th February 2018 in WP(C) 5908 of 2015], and submits that, as is elementary, the provisions of a DTAA override the provisions of the Income Tax Act - except to the extent such statutory provisions are more beneficial to the assessee. In effect, thus, in a situation covered by the provisions of the DTAA, the statutory provisions of the Income Tax Act can never be put against the assessee.

3. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

4. We find that, in the case of DDIT Vs Serum Institute of India Pvt. Ltd. [(2015) 40 ITR Trib 684 (Pune)], a coordinate bench of the Tribunal has, inter alia, observed as follows:

"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."

5. The views so expressed by the coordinate bench now stand approved by Hon'ble Delhi High Court's judgment in the case of Dansico India Pvt. Ltd. (supra). No judicial precedent to the contrary has been brought to our notice. In this view of the matter, and respectfully following the binding judicial precedents, we approve the conclusions arrived at by the CIT(A) and decline to interfere in the matter.

6. In the result, the appeal is dismissed. Pronounced in the open court today on the 5th April, 2018

Sd/- Sd/-

Rajpal Yadav **Pramod Kumar**
(Judicial Member) (Accountant Member)

Ahmedabad, the 5th day of April, 2018
***bt*

Copies to: *(1)* *The appellant*
(2) *The respondent*
(3) *Commissioner*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

TRUE COPY

Assistant Registrar
Income Tax Appellate Tribunal
Ahmedabad benches, Ahmedabad