

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'C' BENCH, KOLKATA**

(Before Sri J. Sudhakar Reddy, Accountant Member & Sri S.S. Godara, Judicial Member)

I.T.A No. 916/Kol/2016

Assessment Year: 2011-12

I.T.A No. 917/Kol/2016

Assessment Year: 2012-13

Sarat Chatterjee & Co. (VSP) P. Ltd.....Appellant

C/o. Somnath Ghosh & Associates, Advocates

Seben Brothers' Lodge

P.O. Buroshibtala

P.S. Chinsurah

Dist. Hooghly

PIN- 712 105

[PAN: AADCS 6139 A]

Income Tax Officer, (Intl. Tax) Ward-2 (1), Kolkata.....Respondent

Appearances by:

Shri Somnath Ghosh, Advocate, appeared on behalf of the assessee.

Shri N.B. Som, Addl. CIT, Sr. D/R, appearing on behalf of the Revenue.

Date of concluding the hearing : December 3rd, 2018

Date of pronouncing the order : December 12th, 2018

ORDER

Per J. Sudhakar Reddy, AM :-

Both these appeals filed by the assessee are directed against the identical orders of the Learned Commissioner of Income Tax (Appeals)-22, Kolkata, (hereinafter the "ld.CIT(A)"), passed u/s. 250 of the Income Tax Act, 1961 (the 'Act'), dt. 04/01/2016, for the Assessment Years 2011-12 & 2012-13.

2. As the issues arising in both these appeals are identical, for the sake of convenience they are heard together and disposed off by the way of this common order.

3. The assessee is a private limited company. During the year it had made remittances in the nature of interest to M/s. Lienherr-Werk Nenzing, GMBH, Dr. Hans Liebherr Strasse-1, A-6710, Nenzing, Austria, which is a resident company of Austria. The assessee applied the provisions of Article 11 of DTAA between Government of India and Government of Austria and deducted tax at source on the interest remitted @ 10%. As the payee had not PAN, the Income-tax Officer applied the provisions of Section 206AA of the Act and held that tax should have been deducted @ 20% of the interest

remitted. Accordingly, the demand has been raised. The assessee contended that the provisions of Section 90(2) of the Act, applies. The Assessing Officer as well as the Id. CIT(A) were of the opinion that the provisions of Section 206AA of the Act, overrides the provision of Section 90(2) of the Act. A view was taken that tax should have been deducted @ 20% of the remittances made.

4. Aggrieved the assessee is in appeal before us.

5. We have heard rival contentions. On careful consideration of the facts and circumstances of the case, perusal of the papers on record, orders of the authorities below as well as case law cited, we hold as follows:-

5.1. We find that this issue is squarely covered in the favour of the assessee and against the revenue by the decision of the Special Bench of the Hyderabad Tribunal in the case of *Nagarjuna Fertilizers & Chemicals Ltd. vs. ACIT (2017) 55 ITR (Trib.) 1 (Hyd) (SB)* and the judgment of the Hon'ble Delhi High Court in the case of *Danisco India Private Limited vs. U.O.I. (W.P. No. 5908/2015) (Del)*.

The Id. D/R argued that the issue, whether the recipient company is a resident of Austria, was not proved by the assessee and merely giving postal address does not prove residence and consequentially the provisions of the treaty between Indian and Austria cannot be applied. He further submits that the provisions of the Section 206AA of the Act, overrides other provisions of the Act, as it was brought into the statute at a later point of time than Section 90(2) of the Act, and the legislature was fully aware of its obligations under the treaty while bringing this amendment which starts with a non-obstinate clause. He relied on the decision of the Bangalore Bench of the Tribunal in the case of *Bosch Ltd. v. ITO (2013) 141 ITD 38/155 TTJ 354 (Bang.) (Trib.)* and the decision of the Hon'ble Bombay High Court in the case of *Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd. 1997 89 Comp Cas 547*. A detailed written submission was also made by the Id. D/R.

6. We find that the Special Bench of the Tribunal in the case of *Nagarjuna Fertilizers & Chemicals Ltd. (supra)* had held as follows:-

“Section [206AA](#), read with sections [90](#) and [195](#), of the Income-tax Act, 1961 and article 12 of OECD Model Convention - Deduction of tax at source - Permanent Account Number, requirement to furnish (Rate of tax under DTAA)

- Assessment years 2011-12 and 2012-13 - Whether provisions of section 206AA, which provides for higher rate of TDS at 20 per cent for non-production of PAN, despite non-obstante clause contained therein, would not override provisions of DTAA to extent they are more beneficial to assessee - Held, yes - Whether, thus, if rate of tax applicable under DTAA is lower than 20 per cent tax rate prescribed under section 206AA, TDS would have to be deducted at such lower rate even if non-resident deductee fails to furnish his PAN - Held, yes [Para 31] [In favour of assessee]"

The Hon'ble Delhi High Court in the case of *Danisco India Private Limited (supra)* approved the decision of the Pune Bench of the ITAT in the case of *Dy. DIT v. Serum Institute of India Ltd. [2015] 68 SOT 254/56 taxmann.com 1 (Pune - Trib.)*, which was followed by the Special Bench of the Tribunal in the case of *Nagarjuna Fertilizers & Chemicals Ltd. (supra)*.

7. Respectfully following the same, we uphold the contentions of the assessee.

8. Coming to the submissions of the ld. D/R, we find that there is no dispute to the fact that the company receiving the remittances is a resident of Austria. When neither the Assessing Officer nor the ld. CIT(A) disputes this claim, the ld. D/R cannot raise this issue without any evidence or information. Reliance placed by the ld. D/R on the order of Bangalore Bench of the ITAT in the case of *Bosch Ltd. v. ITO (supra)* does not come to the rescue of the Department, as the Special Bench has disapproved of the view taken in the case. The other arguments raised by the ld. D/R have been dealt with by the Special Bench in its order.

9. In view of the above discussion, we uphold the contention of the assessee and hold that tax need be deducted tax at source only @ 10% to the interest remitted to M/s. Lienherr-Werk Nenzing, GMBH, Dr. Hans Liebherr Strasse-1, A-6710, Nenzing, Austria.

8. In the result, both the appeals of the assessee are allowed.

Kolkata, the 12th day of December, 2018

Sd/-
[S.S.Godara]
 Judicial Member

Dated : 12.12.2018
 {SC SPS}

Sd/-
[J. Sudhakar Reddy]
 Accountant Member

Copy of the order forwarded to:

1. Sarat Chatterjee & Co. (VSP) P. Ltd
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2. Income Tax Officer, (Intl. Tax) Ward-2 (1), Kolkata

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy
By order

Assistant Registrar
ITAT, Kolkata Benches