IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'B' BENCH, NEW DELHI

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI K.N. CHARY, JUDICIAL MEMBER

ITA No. 5632/DEL/2016
[Assessment Year: 2014-15]
&
ITA No. 5633/DEL/2016
[Assessment Year: 2015-16]

The I.T.O [TDS] International Taxation Noida	Vs.	Continental India Ltd NH 58, Meerut Roorke Road Modipuram, Meerut PAN: AAFCM 5366 B
[Appellant]		[Respondent]

Date of Hearing : 14.05.2019
Date of Pronouncement : 17.05.2019

Assessee by : Shri Rohit Jain, Adv.
Shri Deepak Jain, Adv

Revenue by : Shri Abhiskek Kumar, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

The above two captioned separate appeals by the Revenue are preferred against the two separate orders of the Commissioner of

Income Tax [Appeals] 2, Noida dated 26.08.2016 pertaining to assessment years 2014-15 and 2015-16.

2. The common grievances raised by the Revenue read as under:

(i) *Whether on the facts and in law, the C1T(A) has erred in holding that the provisions of DTAA shall prevail over the provisions of' section 206AA(1) of the Income tax Act 1961, even when the provision of section 206AA(1) are overriding in nature containing a clear non-obstante clause.*

(ii) *Whether the CIT(A) has erred on facts and in law in overlooking the fact that the intention of section 206AAof the Act is to strengthen the PAN and TDS mechanism and that the provisions of section 206AA do not have a bearing on the ultimate tax liability of the assessee.*

(iii) *Whether the CIT(A) has erred on facts and in law in giving precedence to the DTAA over the overriding provisions of Section 206AA(1) even when the DTAA does not deal with the rates of TDS, while section 206AA(I) deals exclusively with the rates of TDS.*

3. At the very outset, the ld. AR stated that the impugned issue is squarely covered in favour of the assessee and against the revenue by the decision of the co-ordinate bench in the case of Emmsons International Ltd Vs. DCIT 171 ITD 140.

4. The ld. DR, other than supporting the findings of the Assessing Officer, could not bring any distinguishing decision in favour of the revenue.

5. We have given a thoughtful consideration to the orders of the authorities below. We find force in the contention of the ld. AR. Similar issue was considered by the co-ordinate bench [supra]. The relevant findings of the same read as under:

> *"5. We have gone through the record in the light of the submissions on either side. At the outset it is the submission of the Ld. AR that the issue that is substantially involved in this appeal is this whether Section 206AA of the Act override the provisions of Section 90(2) of the Act and whether in cases of the payments made to non-residents, what is the rate of tax to*

be applied, whether it is as per Section 206AA or as per the provisions of DTAA. He submitted that in a number of decisions of the tribunal this issue has been decided in favour of the assessee and recently in Danisco India Private Limited Vs. Union Of India WP(C) 5908/2015 decided on 05/02/2018, the Hon'ble jurisdictional High Court noted the order of the Pune tribunal in DCIT Vs Serum Institute of India Limited, ITA Nos.1601 to 1604/PN/2014 (Assessment Year : 2011-12) to hold that section 206AA of the Act does not override the provisions of Section 90(2) of the Act and that in the cases of payments made to non-residents, the rate of tax to be applied is as prescribed under the DTAA and not as per Section 206AA of the Act because the provisions of the DTAA are more beneficial.

6. The Hon'ble jurisdictional High Court extracted the following observations of the Tribunal in Serum Institute of India Limited (supra) with approval: –

"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 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."

7. It is therefore, clear that that section 206AA of the Act does not override the provisions of Section 90(2) of the Act and that in the cases of payments made to non-residents, assessee correctly applied the rate of tax prescribed under the DTAAs and not as per Section 206 AA of the Act because the

provisions of the DTAAs were more beneficial. In view of the settled position of law, we find it difficult to sustain the orders of the authorities below. With this view of the matter, we find that the orders of the authorities below are liable to be quashed and accordingly they are quashed. Thus, we hereby direct the deletion of 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. Appeals are allowed accordingly."

3. On the issue whether the treaty overrides the Act, the quarrel is settled by the decision of the Hon'ble High Court of Delhi in the case of Danisco India Pvt Ltd 404 ITR 539. The relevant findings read as under:

"6. After hearing the counsel for the parties, it is quite apparent that the issue urged has been rendered largely academic on account of corrective amendment made by the Parliament-which substituted preexisting Sub-section (7) with the present Section 206AA (7). The amendment is mitigating to a large extent, the rigors of the preexisting laws. The law, as it existed, went beyond the provisions of W.P.(C) 5908/2015 Page 8 of 11 DTAA which in most cases mandates a 10% cap on the rate of tax applicable to the state parties. Section 206AA (prior to its amendment) resulted in a situation, where, over and

above the mandated 10%, a recovery of an additional 10%, in the event, the non- resident payee, did not possess PAN.

7. In this context, the ITAT in Serum Institute of India (Supra) discussed this very issue in some detail and stated, as follows:

> ".....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 v. UOI, MANU/SC/1219/2003 : (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 W.P.(C) 5908/2015 Page 9 of 11 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 scop W.P.(C) 5908/2015 Page 10 of 11 context of section 195 of the Act also, the Hon'ble Supreme Court in the case of CIT v. Eli Lily & Co., MANU/SC/0487/2009 : (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. v. CIT,MANU/SC/0688/2010 : (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 W.P.(C) 5908/2015 Page 11 of 11 rate on which tax was deducted by the assessee in terms of the relevant DTAAs. As a consequence, Revenue fails in its appeals.

8. Having regard to the position of law explained in Azadi Bachao Andolan (supra) and later followed in numerous decisions that a Double Taxation Avoidance Agreement acquires primacy in such cases, where reciprocating states mutually agree upon acceptable principles for tax treatment, the provision in Section 206AA (as it existed) has to be read down to mean that where the deductee i.e the overseas resident business concern conducts its operation from a territory, whose Government has entered into a Double Taxation Avoidance Agreement with India, the rate of taxation would be as dictated by the provisions of the treaty.

The writ petition is partly allowed in the above terms."

4. Respectfully following the findings of the co-ordinate bench and the Hon'ble High Court [supra], both these appeals of the revenue are dismissed.

5. In the result, the appeals filed by the in ITA Nos. 5632 & 5633/DEL/2016 stand dismissed.

The order is pronounced in the open court on 17.05.2019.

Sd/- **sd/-**

[K.N. CHARY] **[N.K. BILLAIYA]**
JUDICIAL MEMBER **ACCOUNTANT MEMBER**

Dated: 17th May, 2019.

VL/

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar
ITAT, New Delhi
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