IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'D' : NEW DELHI)

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER

(THROUGH VIDEO CONFERENCE)

ITA No.2260/Del./2017
(ASSESSMENT YEAR : 2013-14)
(2nd Quarter of Form 27Q of FY 2012-13)

ITA No.2261/Del./2017
(ASSESSMENT YEAR : 2013-14)
(3rd Quarter of Form 27Q of FY 2012-13)

ITA No.2262/Del./2017
(ASSESSMENT YEAR : 2013-14)
(4th Quarter of Form 27Q of FY 2012-13)

Air India Limited, 113, Airlines House, Gurudwara Rakab Ganj Road, New Delhi – 110 001.	vs.	ITO, TDS Ward 1(1)(1), International Taxation, New Delhi.

(PAN : AACCN6194P)

(APPELLANT) (RESPONDENT)

ASSESSEE BY : Shri Rajiv Pal Puri, CA
REVENUE BY : Dr. Shiv Swaroop Singh, Senior DR

Date of Hearing : 05.04.2021
Date of Order : 23.04.2021

O R D E R

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in the aforesaid appeals, the same are being disposed off by way of composite order to avoid repetition of discussion.

2. Appellant, M/s. Air India Limited (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned orders all dated 31.01.2017 passed by the Commissioner of Income-tax (Appeals)-42, New Delhi qua the assessment year 2013-14 (2nd Quarter of Form 27Q of FY 2012-13), (3rd Quarter of Form 27Q of FY 2012-13) & (4th Quarter of Form 27Q of FY 2012-13) on the identical grounds except the difference in the amount of addition inter alia that :-

> ***"Your honour, may as an act of kindness, in the interest of justice and as appropriate to the facts and circumstances of this case, be pleased to :-***
>
> ***1. Delete the demand of Rs.73,00,719/-, Rs.80,82,662/- & Rs.57,05,582/- raised on account of short deduction of tax for second quarter, third quarter and fourth quarter of FY 2012-13 respectively.***
>
> ***2. Delete the demand of Rs.15,28,222/-, Rs.13,78,108/- &Rs.8,07,085/- raised on account of interest on short deduction demand of Rs.73,00,719/-, Rs.80,82,662/- & Rs.57,05,582/- for second quarter, third quarter and fourth quarter of FY 2012-13 respectively.***
>
> ***3. Issue such directions or pass such orders as your honour may deem fit and proper."***

3. Briefly stated the facts necessary for adjudication of the controversy at hand are : M/s. Air India Ltd., the assessee is a Government owned company, which is into transportation of

goods, passengers and parcels etc. in domestic and international sector through aircrafts and as such, is a national carrier of India. The assessee has been regularly filing their TDS return by depositing taxes in time in accordance with the Income-tax Rules, 1962. The assessee filed TDS return for second quarter, third quarter and fourth quarter of FY 2012-13 on 30.08.2013 vide acknowledgement nos.070462000344842, 070462000344853 & 070462000344864 respectively. Accordingly, an order under section 200A of the Income-tax Act, 1961 (for short "the Act") was passed and thereafter an order u/s 154 of the Act was received by the assessee on 04.03.2014 for second quarter, third quarter and fourth quarter of FY 2012-13.

4. It is also intimated by way of notice u/s 154 of the Act that there is demand of short deduction of Rs73,00,719.77, Rs.80,82,662.74 & Rs.57,05,582.11 for second quarter, third quarter and fourth quarter of FY 2012-13 respectively on account of non-provision of PAN in case of Engine Lease Finance B.V. (ELFC), a non-resident company, taxed resident in Neitherland, which was not mentioned at the time of return as the foreign company did not have PAN. Assessee claimed to have taken an engine on lease under an Agreement from Engine Lease Finance B.V. and by mistake unknowingly deposited the tax at 2.31% on

various payments made to them during the year under consideration by treating the same as an Indian company, whereas taxes liable to be deducted are to be absorbed by the lessee. So, the assessee has not deducted the TDS from the payment but has deposited from their account and absorbed it as cost.

5. Assessee carried the matter before the ld. CIT (A) by way of filing the appeals who has confirmed the demands by dismissing the appeals. Feeling aggrieved by the order passed by the ld. CIT (A), the assessee has come up before the Tribunal by way of filing the present appeals.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. Undisputedly, the dispute in the instant appeals is qua applying the TDS rate at 20.12% or 10% on transfer between ELFC and the assessee for taking an engine on lease under an Agreement. It is also not in dispute that ELFC, the lessor is a foreign company having no Permanent Establishment (PE) and was a tax resident of Neitherland. It is also not in dispute that under Article 7 of Double Taxation Avoidance Agreement (DTAA) between India and Neitherland, the profits of enterprise of a

contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a "permanent establishment" situated therein. It is also not in dispute that engine is a part of aircraft and cannot be said to be an aircraft and the payment being made for rent of engine can be covered under equipment as per section 12(4) of the DTAA between India and Neitherland. It is also not in dispute that assessee has not deducted this TDS from the payment but has deposited from their own account and has absorbed it as cost. It is also not in dispute that since payee, ELFC, being a foreign company having no PAN, the assessee reported the transaction without PAN in the quarterly TDS statements.

8. In the backdrop of the aforesaid undisputed facts and circumstances of the case, the arguments addressed and case law relied upon by the ld. Authorised Representatives of the parties to the appeals, the sole question arises for determination in this case is :-

> ***as to whether assessee was required to deduct the tax at source at the higher rate of 20% in case of payee without PAN under the provisions contained u/s 206AA of the Act, which is a non-obstante clause or assessee is entitled for beneficial provisions of DTAA by deducting the tax at source @ 10%?***

9. When we examine paras 7.3 & 7.4 of the impugned order passed by the ld. CIT (A), we observed that ld. CIT (A) has

proceeded to take the view that since the assessee has suo moto deducted the tax considering it to be chargeable to tax, it is not entitled for beneficial provisions of DTAA and secondly, DTAA overrides domestic law in case of taxpayer only and not in case of the deductor as in the instant case.

10. In reply to the aforesaid view taken by the ld. CIT (A), the ld. AR for the assessee relied upon the orders passed by the **coordinate Bench of the Tribunal in case of DDIT (IT-II), Pune vs. Serum Institute of India Ltd. in ITA Nos792/PN/2013 & ITA Nos.1601 to 1604//PN/2014 order dated 30.03.2015, DCIT vs. M/s. Infosys BPO Ltd. in ITA Nos.1333/Bang/2014 order dated 27.09.2019** and **the judgment of Hon'ble Delhi High Court in case of Danisco India Pvt. Ltd. vs. UOI (2018) 404 ITR 539 (Delhi).**

11. Coordinate Bench of the Tribunal in case of **Serum Institute of India Ltd.** (supra) decided the identical issue as to non-applicability of section 206AA in case of non-resident as DTAA overrides the Act as per Section 90(2) by returning following findings :-

> ***"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 ITA Nos.1601 to 1604/PN/2014 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 ITA Nos.1601 to 1604/PN/2014 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 ITA Nos.1601 to 1604/PN/2014 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."

12. Aforesaid view taken by the Tribunal that second 206AA of the Act does not override the provisions of section 90(2) of the Act and in case of payment made to non-resident, rates as prescribed under DTAA are applicable has been affirmed by Hon'ble Delhi High Court in case of Danisco India Pvt. Ltd. (supra) by returning following findings :-

> ***"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."***

13. Keeping in view the facts inter alia that engine is a part of aircraft and cannot be said to be an aircraft and payment made for rent of engine are covered under equipment as per Article 12 (4) of the DTAA between India and Neitherland; that under Article 12(4) of the DTAA between India and Neitherland, the term "royalty" does not cover use of, or the right to use equipment itself; that rental of aircraft engine is neither a copyright nor a payment of any information; that under Article 12(6) of the DTAA, fee for technical services also does not include the amount paid for services that are ancillary and subsidiary to the rental of ships, aircrafts, containers or other equipment used in connection with the operation of ships or aircrafts in international traffic; the assessee is entitled for beneficial provisions of DTAA.

14. So, following the order passed by the coordinate Bench of the Tribunal in cases of **DDIT (IT-II), Pune vs. Serum Institute of India Ltd., DCIT vs. M/s. Infosys BPO Ltd.** and **the judgment of Hon'ble Delhi High Court in case of Danisco India**

Pvt. Ltd. vs. UOI, we are of the considered view that ld. CIT (A) has erred in holding that in this case, provisions contained u/s 206AA overrides beneficial provisions of DTAA between India and Neitherland. Consequently, assessee has rightly deducted the tax @ 10% as per provisions contained under DTAA as section 206AA cannot have overriding effect on DTAA, hence no demand is payable by the assessee. Hence, question framed is decided in favour of the assessee. So, additions made by the AO and confirmed by the ld. CIT (A) to the tune of Rs.73,00,719.77, Rs.80,82,662.74 & Rs.57,05,582.11 for second quarter, third quarter and fourth quarter of FY 2012-13 respectively is ordered to be deleted. Consequently, all the appeals filed by the assessee are allowed.

Order pronounced in open court on this 23rd day of April, 2021.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated the 23rd day of April, 2021
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Copy forwarded to:

1.Appellant
2.Respondent
3.CIT
4.CIT(A)-42, New Delhi.
5.CIT(ITAT), New Delhi.

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NEW DELHI.