

## **DEPUTY DIRECTOR OF INCOME TAX (INTERNATIONAL TAXATION) VS. SERUM INSTITUTE OF INDIA LIMITED**

ITAT, PUNE TRIBUNAL (B)

G.S. PANNU, AM & SUSHMA CHOWLA, JM.

ITA No. 792/PN/2013 & 1601 to 1604/PN/2014

30th March, 2015

(2015) 43 CCH 0327 PuneTrib

(2015) 170 TTJ 0119 (Pune) : (2015) 68 SOT 0254 (Pune) : (2015) 40 ITR (Trib) 0684 (Pune)

### Legislation Referred to

Section 4, 5, 90(2), 206AA, 139A(8)

### Case pertains to

Asst. Year 2011-12

### Case referred to

[Azadi Bachao Andolan and Others vs. UOI, \(2003\) 263 ITR 706 \(SC\)](#)

[CIT vs. Eli Lily & Co., \(2009\) 312 ITR 225 \(SC\)](#)

[GE India Technology Centre Pvt. Ltd. vs. CIT, \(2010\) 327 ITR 456 \(SC\)](#)

### Counsel appeared:

B. C. Malakar for the Department.: Rajan Vora for the Assessee

## **ORDER**

### **G. S. PANNU, AM. :**

1. ITA Nos.1601 to 1604/PN/2014 are four appeals by the Revenue directed against a consolidated order of the Commissioner of Income Tax (Appeals)-IT/TP, Pune dated 28.01.2013 which, in turn, has arisen from four separate orders passed by the Assessing Officer u/s 200A of the Income-tax Act, 1961 (in short "the Act") for Quarter 1 to Quarter 4 of assessment year 2011-12. Initially, Revenue had filed a single appeal vide ITA No.792/PN/2013 assailing the combined order of the CIT(A) passed in relation to four orders passed by the Assessing Officer u/s 200A of the Act. Subsequently, Revenue has rectified and filed four separate appeals in ITA Nos.1601 to 1604/PN/2014 and accordingly the initial appeal vide ITA No.792/PN/2013 is rendered infructuous.

2. In all the appeals i.e. ITA Nos.1601 to 1604/PN/2014, Revenue has raised common Grounds of Appeal which read as under :-

"1) The CIT(A) erred in law in concluding that sec 206AA is not applicable in case of non-residents as the DTAA overrides the Act as per section 90(2).

2) The decision of the CIT(A) is not according to the law and erred in ignoring the memorandum explaining the provisions of the Finance (No.2) Bill, 2009 which clearly states that the sec. 206AA applies to non-residents and also Press Release of CBDT No.402/92/2006-MC (04 of 2010) dated 20.01.2010 which reiterates that sec. 206AA will also apply to all non-residents in respect of payments/remittances liable to TDS.

3) The CIT(A) is erred in ignoring the decision of the ITAT Bangalore in the case of Bosch Ltd. vs ITO, ITA No.552 to 558 (Bang.) of 2011 dated 11.10.2012, in which it was held that if the recipient has not furnished the PAN to the deductor, the deductor is liable to withhold tax at the higher rates prescribed u/s. 206AA."

3. Briefly put, the relevant facts are as follows. The respondent-assessee is a company incorporated under the provisions of the Companies Act, 1956 and is, inter-alia, engaged in the business of manufacture and sale of vaccines, and it is a major exporter of the vaccines. In the course of its business activities, assessee made payments to non-residents on account of interest, royalty and fee for technical services during the financial year 2010-11 relevant to the assessment year under consideration. The aforesaid payments were subject to withholding tax u/s 195 of the Act. The respondent-assessee deducted tax at source on such payment in accordance with the tax rates provided in the Double Taxation Avoidance Agreements (DTAAs) with the respective countries. The tax rate so provided in the DTAAs was lower than the rate prescribed under the Act and therefore in terms of the provisions of section 90(2) of the Act, the tax was deducted at source by applying the beneficial rate prescribed under the relevant DTAAs. It was noted by the Revenue that on account of payment of royalty and fee for technical services in case of some of the non-residents, the recipients did not have Permanent Account Numbers (PANs). As a consequence, Revenue treated such payments, as cases of 'short deduction' of tax in terms of the provisions of section 206AA of the Act. Notably, section 206AA prescribes that if the recipient of any sum or income fails to furnish his PAN to the person responsible for deduction tax at source, the tax shall be deductible at the rate specified in the relevant provisions of the Act or at the rates in force or at the rate of 20%. On the strength of section 206AA of the Act, Revenue treated payments to those non-residents who did not furnish the PAN as cases of 'short deduction' being difference between 20% and the actual tax rate on which tax was deducted in terms of the relevant DTAAs. As a consequence, demands were raised on the assessee for the short deduction of tax and also for interest u/s 201(1A) of the Act. The aforesaid dispute was carried by the assessee in appeal before the CIT(A).

4. In appeal before the CIT(A), assessee raised varied arguments. Assessee submitted that the provisions of section 206AA are not applicable to payments made to non-residents. In support, assessee pointed out that provisions of section 139A(8) of the Act r.w. rule 114C(1) of the Income Tax Rules, 1962 (in short "the Rules") prescribe that non-residents are not required to apply for PAN. According to the assessee, section 206AA of the Act prescribed that the recipient shall furnish the PAN and such furnishing would be possible only where the recipient is required to obtain PAN under the relevant provisions. Thus, where the non-residents are not obliged to obtain a PAN, the requirement of furnishing the same in terms of section 206AA of the Act does not arise. Secondly, assessee also pointed out that the tax rate applicable in terms of section 206AA of the Act cannot prevail over the tax rate prescribed in the relevant DTAAs, as the rates prescribed in the DTAAs were beneficial. In support of such a stand, assessee relied upon the provisions of section 90(2) of the Act, which prescribe that provisions of the Act are applicable to the extent that they are more beneficial to the assessee and since section 206AA of the Act prescribed higher rate of withholding tax, it would not be beneficial to the assessee vis-à-vis the rates prescribed in the DTAAs. The CIT(A) did not agree with the assessee on the point that the non-residents recipient are not required to obtain PAN. So however, with respect to the second plea of the assessee, CIT(A) concurred with the assessee and held that section 206AA of the Act would override other

provisions of the Act but not the provisions of section 90(2) of the Act. Therefore, according to the CIT(A), where the DTAA provides for a tax rate lower than that prescribed in section 206AA of the Act, the provisions of the DTAA shall prevail and the provisions of section 206AA of the Act would not be applicable. Therefore, he deleted the tax demand raised by the Revenue relating to the difference between 20% and the actual tax rate provided by the DTAA. Aggrieved with the aforesaid decision of the CIT(A), Revenue is in appeal before us.

5. In the above background, the rival counsels have been heard. The Ld. Departmental Representative submitted that the CIT(A) erred in holding that section 206AA of the Act was not applicable in cases which are governed by the DTAA. According to him, section 206AA of the Act would override section 90(2) of the Act and therefore the tax deduction was liable to be made @ 20% in absence of furnishing of PANs by the recipient non-residents. According to the Ld. Departmental Representative, the CIT(A) had himself concluded that section 206AA of the Act required even the non-resident recipients of income to obtain and furnish PAN to the deductors of the tax at source, being the assessee in the present case.

6. On the other hand, the Ld. Representative for the respondent-assessee has defended the ultimate conclusion of the CIT(A) that section 206AA of the Act would not override the provisions contained in section 90(2) of the Act.

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 DTAA 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 DTAA would override the provisions of the domestic Act in cases where the provisions of DTAA 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 DTAA 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 DTAA 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 DTAA 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 made to the non-residents is concerned, no fault can be found with the rate of taxation invoked by the assessee based on the DTAA, 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 Lilly & 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 DTAA 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 DTAA override domestic law in cases where the provisions of DTAA 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 DTAA 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 DTAA, 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 DTAA and not as per section 206AA of the Act because the provisions of the DTAA was more beneficial. Thus, we hereby affirm the ultimate conclusion of the CIT(A) in deleting the tax demand relating to difference between 20% and the actual tax rate on which tax was deducted by the assessee in terms of the relevant DTAA. As a consequence, Revenue fails in its appeals.

8. Resultantly, the captioned appeals of the Revenue are dismissed, as above.

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