IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD '' I '' BENCH – AHMEDABAD

Before Shri R.P. Tolani, JM & Shri Manish Borad, AM.

ITA No.1204/Ahd/2014
Asst. Year: 2011-12

Quick Flight Limited, 5th Floor, Admin. Building, Alembic Road, Baroda.	Vs.	ITO (International Taxation), Baroda.
Appellant		Respondent
PAN AAA-CQ 1611N		

Appellant by	Smt. Urvashi Shodhan, AR
Respondent by	Shri Rakesh Jha, Jr. DR

Date of hearing: 04/01/2017
Date of pronouncement: 04/01/2017

O R D E R

PER Manish Borad, Accountant Member.

This appeal of the assessee is directed against the order of ld. CIT(A), Gandhinagar, Ahmedabad, dated 21/01/2014 vide appeal No.CIT(A)/GNR/26/Intl.Taxn/2012-13 arising out of intimation u/s 200A of the Act dated 4.11.2011 passed by ITO (Intl.Taxn), Baroda, relating to deduction of withholding tax u/s 195 of the IT Act, 1961 (in short the Act) at lower rate on payment made to non-resident for quarter 1st of Asst. Year 2001-12. Assessee has raised following grounds of appeal :-

1. Re: Deduction of withholding tax u/s 195 on payments to Non Residents:

1.1 On the facts and in the circumstances of the case and in law, the learned Commissioner of Income Tax (Appeals) [hereinafter referred to as 'the learned CIT (A)] erred in upholding the action of the Assessing officer applying the rate of 20 per cent without appreciating that the agreement with Honeywell falls under the industrial policy and hence the rates of S.115A(l)(b) should be applicable.

2. Re: Levy of Interest u/s 201(1A)

2.1 On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in levying interest u/s. 201(1 A) on the alleged IDS default of the Appellant.

3. The Appellant craves leave to add to, alter, amend or delete any ground of appeal.

2. Briefly stated facts of the case are that the assessee is a limited company engaged in the business of chartering, hiring and leasing aircraft. During the year payment was made to a non-resident namely M/s Honeywell, USA not having PAN. Tax was deducted at source @ 10% + surcharge and education cess on the payment of fees for technical services as per provisions of section 115A of the Act. However, ld. Assessing Officer alleged that tax was required to be deducted @ 20% in view of the provisions of section 206AA of the Act as the assessee was not having PAN and accordingly raised demand of Rs.30,250/- towards short deduction and Rs.5750/- towards interest on short deduction.

3. Aggrieved, assessee went in appeal before ld. CIT(A) giving detailed submissions in order to convince ld. CIT(A) that the payment made towards fees for technical services was u/s 115A(BB) of the Act and assessee has rightly deducted TDS @ 11.33% and provisions of sec.206A(1) of the Act cannot be applied to the assessee. However, ld. CIT(A) was not convinced and confirmed the order of Assessing Officer by observing as under :-

5. I have gone through the facts of the case and the submissions ; made by appellant in this behalf. The AO has raised a demand vide intimation issued under section 200A of the Act. The appellant has made payment to Honeywell, a company incorporated in USA for the rendering of the technical services in the nature of maintenance of aircraft. The above payment, as per appellant, is taxable as "fees for technical services' under explanation 2 to section 9(l)(vii) of the Income Tax Act, 1961 ('the Act')- Further the appellant submitted that according to section 115A (BB), tax is chargeable on fees for technical services is 11.33% (inclusive of surcharge and cess). The AO on the contrary has raised demand by invoking section 206AA of the Act holding that the tax should have been withheld at the rates of 20 per cent.

I have also considered the submission made by the appellant and reproduced in paragraph above and I agree with the contentions of the appellant that section 206AA and section 139A operates in different fields Requirement for obtaining PAN arc dealt with' in the provisions of section 139A, whereas section 206AA deals with the consequences on failure to furnish PAN in case tax is required to be deducted under chapter XVII-B of the Act. Section 20GAA does not cast a new obligation on the appellant to obtain a PAN if the same is not required by virtue of section 139A. The argument also gets credence from the facts that by virtue of power vested under section 139A(8) CBDT can exempt certain class of people who are not required to obtain PAN. In exercise of its powers vested u/s. 139A(8) the CBDT has inserted Rule 114C(1) by Income-tax (16th Amendment) Rules, 1998 with effect from 1-11-1998. Rule 114C (1) lists out persons to whom S. 139A shall not apply. Clause (b) 'of this rule exempts nonresidents referred in S. 2(30) from the application of S. 139A. Accordingly the vigor of sections 206AA cannot compel the non-resident to obtain a PAN in India. 139A being a special provisions will override section 206AA which is general in nature.

Further the rates prescribed in section 115A are special rates and does overrides thus are applicable against the section 206AA which is general in nature. However the rates prescribed in section 1.15A are only when the agreement pertains to a matter included in Industrial Policy as subsection (1) clause of (b). No such evidences have been produced before by the appellant i.e. agreement with the Honeywell falls under Industrial policy, it is inconceivable that the until and unless the matter pertains to industrial policy the rates of section 115A (l)(b) would be applicable and hence the action of the AO applying the rate of 20 per cent is confirmed. Accordingly ground nos. 1 and 2 are dismissed.

4. Aggrieved, assessee is now in appeal before the Tribunal.

5. At the outset ld. AR submitted that the issue raised in this appeal is squarely covered in favour of assessee by the decision of the Tribunal in the case of Alembic Ltd. vs. ITO in ITA No.1202/Ahd/2014 and others.

6. On the other hand, ld. DR supported the orders of lower authorities.

7. We have heard the rival contentions and perused the material placed before us. Through this appeal a limited issue raised by assessee is against the order of ld. CIT(A) confirming the action of ld. Assessing Officer for applying TDS deduction @ 20% as per provisions of section 206A of the Act as against TDS deducted by assessee @ 11.33% covered u/s 115A(10(b) of the Act. We observe that similar issue as almost identical facts came up before the Co-ordinate Bench in the case of Alembic Ltd. vs. ITO (supra) wherein the Co-ordinate Bench allowed assessee's appeal by observing as follows :-

"26. We have heard the rival contentions and perused the record placed before us. From going through the grounds and brief facts as stated above, we observe that the common issue emanates from the fact that assessee made payments towards technical services & royalty to various non-resident deductees having no permanent establishment in India and holding no PAN. There is no dispute to the fact that assessee has deducted tax at source against all these payments. The only difference of opinion between the assessee and the Revenue lies within a narrow campus wherein assessee contended that tax has been rightly deducted at source at the rates provided u/s 115A of the Act or as per the rates with reference to

DTAA r.w.s. 90C(2) of the Act, whereas Revenue created demand against the assessee by observing that as the deductees do not hold PAN provisions of section 206AA of the Act comes into effect as per which tax was required to be deducted @ 20%.

27. We consider that in order to adjudicate the issue following provisions of the Act would be relevant to go through, as they are being discussed regularly in these appeals:-

Section: 115A

115A. [(1) Where the total income of—

(*a*) ……..

(*b*) [a non-resident (not being a company) or a foreign company, includes any income by way of royalty or fees for technical services other than income referred to in sub-section (1) of section 44DA] received from Government or an Indian concern in pursuance of an agreement made by the foreign company with Government or the Indian concern after the 31st day of March, 1976, and where such agreement is with an Indian concern, the agreement is approved by the Central Government or where it relates to a matter included in the industrial policy, for the time being in force, of the Government of India, the agreement is in accordance with that policy, then, subject to the provisions of sub-sections (1A) and (2), the income-tax payable shall be the aggregate of,—

[*(*A*) the amount of income-tax calculated on the income by way of royalty, if any, included in the total income, at the rate of ten per cent*;

*(*B*) the amount of income-tax calculated on the income by way of fees for technical services, if any, included in the total income, at the rate of ten per cent; and*]

(*C*) the amount of income-tax with which it would have been chargeable had its total income been reduced by the amount of income by way of royalty and fees for technical services.

Explanation.—For the purposes of this section,—

(*a*) "fees for technical services" shall have the same meaning as in *Explanation 2* to clause (*vii*) of sub-section (1) of section 9 ;

(*b*) "foreign currency" shall have the same meaning as in the *Explanation* below item (*g*) of sub-clause (*iv*) of clause (*15*) of section 10 ;

Sec. 206AA.

69. After section 206A of the Income-tax Act, the following section shall be inserted with effect from the 1st day of April, 2010, namely:—

"206AA. *Requirement to furnish Permanent Account Number.*—(1) Notwithstanding anything contained in any other provisions of this Act, any person entitled to receive any sum or income or amount, on which tax is deductible under Chapter XVIIB (hereafter referred to as deductee) shall furnish his Permanent Account Number to the person responsible for deducting such tax (hereafter referred to as deductor), failing which tax shall be deducted at the higher of the following rates, namely:—

(*i*) at the rate specified in the relevant provision of this Act; or

(*ii*) at the rate or rates in force; or

(*iii*) at the rate of twenty per cent.

(2) No declaration under sub-section (1) or sub-section (1A) or sub-section (1C) of section 197A shall be valid unless the person furnishes his Permanent Account Number in such declaration.

(3) In case any declaration becomes invalid under sub-section (2), the deductor shall deduct the tax at source in accordance with the provisions of sub-section (1).

(4) No certificate under section 197 shall be granted unless the application made under that section contains the Permanent Account Number of the applicant.

(5) The deductee shall furnish his Permanent Account Number to the deductor and both shall indicate the same in all the correspondence, bills, vouchers and other documents which are sent to each other.

(6) Where the Permanent Account Number provided to the deductor is invalid or does not belong to the deductee, it shall be deemed that the deductee has not furnished his Permanent Account Number to the deductor and the provisions of sub-section (1) shall apply accordingly.".

Sec.90

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) [***]

28. From going through above 3 provisions we observe that section 206AA of the Act refers to rate of TDS where deductee does not possesses PAN, section 115A(b) refers to tax applicable to payments made to non-resident by way of royalty and technical services in pursuance to agreement approved by Central Government or it relates to a matter included in industrial policy. Section 90(2) of the Act refers to DTAA entered into by Central Government with the Government of any other country for granting of relief.

29. Further from going through the decisions of ld. CIT(A) Gandhinagar, Ahmedabad and ld. CIT(A) Baroda we observe that both of them have taken different views in deciding the issue. Ld. CIT(A) Gandhinagar in his appellate order dated 15.1.2014 has not objected to the fact that separate rates u/s 115A of the Act/DTAA agreement are provided for the deductees but has not allowed the assessees claim either due to absence of material evidence on the part of the assessee in order to prove that there existed an agreement pertaining to industrial policy or in the alternative has directed the Assessing Officer to check the treaty rates. In totality ld. CIT(A), Gandhinagar is in consensus with the TDS rates applied by assessee but has objected only for want of verification.

30. On the other hand, ld. CIT(A), Baroda has completely scratched down the modus operandi adopted by the assessee for deducting tax at source at lower rates than 20% in the absence of PAN of the deductees by confirming application of provisions of section 206AA of the Act and was of the view that no such provisions was brought before him by the assessees which bars the application of sec.206AA of the Act over the persons covered under DTAA.

31. Now summarizing the decisions of ld. CIT(A)s we come across following two questions which need adjudication:-

(1) As to whether provisions of section 206AA are applicable on payments made to non-residents having no permanent establishment in India and no PAN and are covered under the provisions of section 115A(1)(b) of the Act or covered by sec.90(2) r.w. DTAA rates ?

(2) As to whether ld. CIT(A) erred in rejecting the claim of assessee for want of verification of agreement or verification of DTAA rates ?

32. Taking up the first issue of applicability of section 206AA of the Act on the persons covered u/s 115A(1)(b) of the Act or covered under DTAA, we observe that the issue is squarely covered by the decisions of Co-ordinate Bench, Pune and Ahmedabad wherein the matter has been discussed elaborately and has been decided in favour of assessee. In the case of DCIT vs. Serum Institute of India Ltd. (supra), Co-ordinate Bench Pune has observed as under :-

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 lax 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 al 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 o! 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 Andoian 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 revisions 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 on 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.

33. Similarly, Co-ordinate Bench, Ahmedabad in the case of Uniphos Envirotronic Private Ltd. vs. DCIT also confirmed the view taken by Pune Bench of the Tribunal as per their decision in ITA No.1974/Ahd/2015 for Asst. Year 2014-15 which reads as under -

[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] It is only elementary that, under the scheme of the Income Tax Act 1961- as set out under section 90(2) of the Act, the provisions of the applicable tax treaties override the provisions of the Income Tax Act 1961- except when the provisions of the Act are more beneficial to the assessee. The. .provisions of the applicable tax treaty, in the present case, prescribe the tax rate @ 10%. This rate of 10% is applicable on the related income whether or not the assessee has obtained the permanent account number. In effect, therefore, even when a foreign entity does not obtain PAN in India, the applicable tax rate is 10% in this case. Section 206AA, which provides a higher tax burden- i.e. taxability @ 20% in the event of foreign entity not obtaining the permanent account number in India, therefore, cannot be pressed into service, as has been done in the course of processing of return under section 200A. To that extent, short deduction of tax at source demand, raised in the course of processing of TDS return under section 200A, is unsustainable in law. We quash this short deduction of tax at source demand. The grievance of the assessee is indeed justified, merits acceptance and is hereby upheld.

34. Respectfully following the above decisions of Co-ordinate Benches, following the judicial consistency and observing that the facts of the cases are squarely covered by these decisions, we are of the view that in case where payments have been made to the deductees on the strength of the beneficial provisions of section 115A(1)(b) of the Act or as per DTAA rates r.w.s. 90(2) of the Act, then provisions of section 206AA cannot be invoked by the Assessing Officer insisting to deduct tax @ 20% for non-availability of PAN.

35. Now taking up the second question wherein ld. CIT(A) Gandhinagar sustained some portions of demand for want of verification of agreement relating to industrial policy as well as in case of some payment for verifying the treaty rates, we observe that during the course of hearing ld. AR has affirmed that such type of payments by assessee are being regularly made to the deductees which have been dealt by ld. CIT(A) in appeal before the Tribunal. Ld. AR has also submitted that all the payments have been made through banking channels and automatic route of RBI with due certification of the nature of payment, details of payees, rates of taxes deducted at source. We are, therefore, of the view that as assessee is making such payments consistently to the payees for various types of services relating to produce registration, marketing and professional royalty and other technical services, and looking to the fact that there is no dispute to the residential status of payees, assessees have rightly deducted TDS as per rates provided in section 115A(1)(b) of the Act as well as per rates provided in DTAA with respect to countries to which the payees belong to. Accordingly, ground no.1 of all the seven appeals is allowed."

8. Respectfully following the decision of Co-ordinate Bench in the case of Alembic Ltd. vs. ITO (supra) and analyzing the facts of the case before us, in the light of the above decision, we find that in the case of assessee also payment was made towards fees for technical services to non-resident M/s Honeywell, USA not having PAN through banking channel as approved by RBI and the payment is well covered under the provisions of section 115A(1)(b) of the Act and therefore, special rate of TDS i.e. 11.33% was applicable and was rightly deducted and deposited by the assessee and the provisions of section 206AA of the Act cannot be made applicable to this payment. We, therefore, set aside the order of ld. CIT(A), delete the claim of Rs.30,250/- towards short deduction and allow ground no.1 of assessee.

8. Ground no.2 relating to levying of interest of Rs.5,750/- u/s 201(1A) of the Act is consequential in nature.

9. Ground no.3 is general in nature, which need no adjudication.

10. In the result, appeal of the assessee is allowed.

Order pronounced in the open Court on 4th January, 2017

Sd/-	sd/-
(R.P. Tolani)	(Manish Borad)
Judicial Member	Accountant Member

Dated 04/01/2017

Mahata/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Asst. Registrar, ITAT, Ahmedabad

1. Date of dictation: 04/01/2017
2. Date on which the typed draft is placed before the Dictating Member: 04/01/2017 other Member:
3. Date on which approved draft comes to the Sr. P. S./P.S.:
4. Date on which the fair order is placed before the Dictating Member for pronouncement: _____
5. Date on which the fair order comes back to the Sr. P.S./P.S.:
6. Date on which the file goes to the Bench Clerk: 6.1.17
7. Date on which the file goes to the Head Clerk:
8. The date on which the file goes to the Assistant Registrar for signature on the order:
9. Date of Despatch of the Order: