IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT
AND
SHRI B. RAMAKOTAIAH, ACCOUNTANT MEMBER

ITA No.	Asst. Year	Appellant	Respondent
843/Hyd/14	2011-12	The DCIT(IT)-I, HYDERABAD	Aurobindo Pharma Limited, HYDERABAD **[PAN: AABCA7366H]**
844/Hyd/14	2012-13		

For Revenue : Smt U. Minichandran, DR
For Assessee : Shri C.P. Ramaswami, AR

Date of Hearing : 22-05-2017
Date of Pronouncement : 26-05-2017

O R D E R

PER B. RAMAKOTAIAH, A.M. :

These two appeals are by Revenue against the common order of the Commissioner of Income Tax (Appeals)-V, Hyderabad, dated 07-11-2013 for the AYs. 2011-12 & 2012-13 on the issue of short deduction of TDS, invoking the provisions of Section 206AA of the Income Tax Act [Act].

2. Briefly stated facts are that assessee had paid certain amounts to non-residents and TDS has been made u/s. 195 of the Act at 10% of the amount invoking the provisions of Double Taxation Avoidance Agreement [DTAA] with respect to countries to which non-residents belong. Assessee filed the returns of TDS in form No. 27Q for all the four quarters in respective assessment

years. AO applied 20% of deduction rate u/s. 195, since no Permanent Account Number of the deductees were available in the relevant columns of the returns. Assessing Officer (AO) accordingly arrived at a short deduction of tax and interest on such payments aggregating to Rs. 1,04,94,160/- for AY. 2011-12 and Rs. 68,18,600/- for AY. 2012-13. After preferring the appeals before CIT(A), assessee, however, filed revised form No. 27Q mentioning the PAN numbers to the extent it could obtain from the non-resident deductees and those revised forms have been accepted and the demands have been reduced to Rs. 10,94,301/- and Rs. 28,33,577/- for the AYs. 2011-12 and 2012-13 respectively.

3. Before the CIT(A), it was submitted by assessee that they had deducted tax at source from the payments made to the non-residents at the rates prescribed under DTAAs with the respective countries, in accordance with the provisions of Section 90(2) of the Act. Assessee accordingly enclosed the lists of such deductees for both the assessment years, their country, nature of services rendered by these non-residents and claimed that the short deduction worked out in the intimation u/s. 200A goes against the DTAAs in force with these countries. It was further submitted that DTAA provisions prevail over the provisions of the I.T. Act, 1961 and placed reliance on the decision of the Hon'ble Apex Court in the case of CIT Vs. P.V.A.L. Kulandagan Chettiar (Dead) Through LRs [267 ITR 654] (SC) and the Hon'ble AP High Court judgment in the case of CIT Vs. Visakhapatnam Port Trust [144 ITR 146] (AP). Further, assessee also relied on the Board Circular No. 333 dt. 02-04-1991 and 621 dt. 19-09-1991, wherein it was pointed out that

if the provisions of DTAA are more concessional, the benefit of such concession should be granted to assessee.

4. Ld.CIT(A) after considering the facts and law involved, has decided the issue in favour of assessee by stating as under:

"6.3 I have gone through the intimations, submissions of the appellant and the recent default status after processing the revised returns on 22.09.2013 and 02.11.2013. Before adjudicating on the overall submissions of the appellant, I feel that with the revised processing results, the effective adjudication has come down to the adoptable rate of deduction of tax on the amounts paid to the deductees without PAN, since where PAN was made available by the appellant in the revised returns, the short deduction was reduced in the revised processing. Now coming to the rest of the claim of the appellant, it is settled law that the provisions of DTAA prevail over the provisions of the Income Tax Act, 1961. In the case on hand, the appellant deducted tax at source at 10% of the payments made u/s 195 to the non residents relying on DTAAs prevailing with the countries in which the deductees are residing. While processing these returns, as the PAN of such deductees was not mentioned in the returns, higher rate of tax, i.e., 20% was applied, as per provisions of section 206AA. At the same time, there cannot be any doubt over the claim of the appellant that provisions of DTAA override the provisions of Income Tax Act, 1961. However, it appears that there is no channel available to the appellant to put this stand before the Assessing Officer while processing the TDS return. As seen from the list of deductees and the PANs now made available for both the assessment years, the deductees are mostly from USA, China, Korea, Finland and Italy. DTAAs are available with all these five countries.

6.4 In view of the above, the AO is directed to verify the deductions made in respect of the payments made to the above parties where DTAA is applicable and if the deductions are in accordance with the rates specified in the respective DTAAs agreement, the AO is directed to reduce the demand in respect of the above parties by adopting the rate as applicable in the respective DTAA agreements".

5. Revenue has raised the following grounds which are common in both the years:

"(1) The order of the Ld. CIT(A) is erroneous on facts and in law.

(2) The Ld. CIT(A) erred in law in holding that the provisions of Sec.206AA cannot be applied to the cases of payments made to non-residents without PAN who are residents in the countries with which India has Double Taxation Avoidance Agreement (DTAA) on the grounds that the provisions of DTAA prevail over the provisions of I.T.Act.

(3) The Ld. CIT(A) ought to have appreciated that Sec.206AA starts with a non-obstante clause on account of which the provisions of the said section override all other provisions of the I.T.Act including the provisions of Sec.90(2), which provide that the provisions of the Act shall apply to the extent they are more beneficial to the assessee to whom any agreement for avoidance of double taxation is applicable.

(4) The Ld.CIT(A) ought to have held that due to overriding nature of Sec.206AA, the beneficial provisions of DTAA will not be applicable to a non-resident as per Sec.90(2) in a case where he does not have PAN and TDS is required to be made at 20% in such cases as per Sec.206AA.

(5) The Ld. CIT(A) ought to have relied on the decision of the ITAT, Bangalore in the case of Bosch Ltd vs ITO (2013) 141 ITD 0038 wherein it was held that the provisions of Sec.206AA clearly override the other provisions of the Act.

(6) The Ld. CIT(A) erred in directing that the PANs of various non-residents made available now should be taken into consideration and the demand should be reduced in respect of such parties by adopting the rate of TDS as applicable in the respective DTAAs as the said direction is based on presumption of the fact of availability of PAN for the non-residents as on the date of crediting the income to the account of the non-residents/date of payment to the nonresidents. Without prejudice to the above grounds, the Ld.CIT(A) ought to have directed that the PANs made available now should be considered only if such PANs were allotted/available at the point of time when deduction was required to be made as per Sec.195.

(7) Any other ground that may be urged at the time of hearing".

Ground Nos. 1 & 7 are general in nature.

6. Ld.DR reiterated the contentions as raised in the grounds of appeal, whereas Ld. Counsel relied on the Special Bench decision in the case of Nagarjuna Fertilizers and Chemicals Ltd., Vs. ACIT [55 ITR (Trib) 1], Hyderabad (Special Bench) for the proposition that the provisions of DTAA override the provisions of TDS.

7. We have considered the rival contentions and perused the orders on record. Admittedly, Ld.CIT(A) followed the principles laid down by the Hon'ble Supreme Court in the case of CIT Vs. P.V.A.L. Kulandagan Chettiar (Dead) Through LRs [267 ITR 654] (SC) where it is clearly reiterated that the provisions of DTAA prevail over the provisions of I.T. Act, 1961. Even though the Revenue in its grounds relied on the decision of the Co-ordinate Bench at ITAT, Bangalore in the case of Bosch Ltd., Vs. ITO [141 ITD 38], there is a contrary decision of ITAT, Pune Bench in the case of DDIT Vs. Serum Institute of India Ltd., [40 ITR (Trib) 684] (Pune). Due to contrary decisions of the Co-ordinate Benches, the matter was referred to Special Bench and the Special Bench in the case of Nagarjuna Fertilizers and Chemicals Ltd., Vs. ACIT [55 ITR (Trib) 1], Hyderabad (Special Bench) has considered and held as under:

"The assessee made certain payments in the nature of fees for technical services to non-residents. Some of such non-residents were residents of countries with which India did not have any Double Taxation Avoidance Agreements and in their cases, tax at the higher rate of 20 per cent was deducted by the assessee where the payees failed to furnish valid permanent account numbers according to the provisions of section 206AA of the Income-tax Act, 1961. In the case of other non-residents, who were residents of countries with which India did have Agreements, tax at the lower rate as prescribed in the relevant articles of the Agreements was deducted by the assessee even in case of payees, who did not furnish valid permanent account numbers. While processing the returns of tax deducted at source filed by the assessee for both the years 2011-12 and 2012-13 by the automatic system, the assessee was held to be liable to deduct tax at source at the higher rate of 20 per cent. in such cases for want of permanent account numbers of the non-resident payees according to the provisions of section 206AA. Accordingly, intimations under section 200A along with the demand notices under section 156 were issued by the Department treating the assessee as in default for short deduction of tax and liable to tax with interest payable thereon for both the years 2011-12 and 2012-13. According to the Commissioner (Appeals) section 206AA inserted in the Act with effect from April 1, 2010 was an overriding provision and there was alternative for the assessee except to quote the deductee's permanent account numbers or to deduct

tax at source at 20 per cent. The intimations issued under section 200A by the Assessing Officer treating the assessee to be in default for short deduction of tax at source, accordingly, were upheld and confirmed by him for both the years 2011-12 and 2012-13. Both the appeals filed by the assessee were initially fixed for hearing before the Division Bench and keeping in view the conflicting decisions of the Benches of the Tribunal as well as other reasons given in its referral order, a reference was made by the Division Bench to the President to constitute a Special Bench to decide the issue and resolve the controversy.

Held, allowing the appeal, (i) that deduction of tax under section 195 from the payments made to non-residents in the nature of fees for technical services was made by the assessee at the rate or rates of income-tax specified in the relevant Agreement, which were adopted as rates in force for the purpose deduction of tax under section 195 in view of the specific provisions contained in sub-section (37A) of section 2. The Department's contention that relevant Agreements do not provide for deduction of tax at source at a rate lower than the rate applied by the Assessing Officer by invoking the provisions of section 206AA and that there was no question of abrogation of the relevant provisions of the Agreement in this regard were not tenable. Equally untenable was its contention that the role of the assessee as a payer of the sum was limited to deducting tax at source according to law and he had nothing to do with the determination of tax liability eventually in the hands of the payee, which was within the complete domain of the Assessing Officer.

(ii) That nan-resident payees were not obliged to obtain permanent account numbers in view of section 139A(8) read with rule 114C of the Income-tax Rules, 1962. Therefore there was a clear contradiction between section 206AA and section 139A(8) read with rule 114C. The assessee's contention that the provisions of section 206AA are required to be read down so as to make them inapplicable in cases of non-residents payees who were not under an obligation to obtain the permanent account numbers was proper.

SMT. A. KOWSALlA BAI V. UNION OF INDIA [2012] 346 ITR 156 (Karn) followed.

(iii) That the charging provisions control and override the machinery provisions dealing with tax deduction at source. Similarly the provisions of the Agreement by virtue of section 90(2) to the extent more beneficial to the assessee override the provisions of domestic law. Since section 206AA falls in Chapter XVIl-B dealing with tax deduction at source, it follows that the provisions of the Agreement which override even the charging provision of the domestic law by virtue of section 90(2) would also override the machinery provisions of section 206AA irrespective of the non obstante clause contained therein. The clause was to be restricted to that extent

and read down to give effect to the relevant provisions of the Agreements which were overriding being beneficial to the assessee. Therefore section 206AA could not override the provisions of section 90(2) and the provisions of the Agreement to the extent they were beneficial to the assessee would override section 206AA by virtue of section 90(2). Therefore the assessee could not be held liable to deduct tax at the higher of the rates prescribed in section 206AA in case of payments made to non-resident persons having taxable income in India in spite of their failure to furnish the permanent account numbers for the assessment years 2011-12 and 2012-13.

DEPUTY DIT (INTERNATIONAL TAXATION-II) V. SERUM INSTITUTE OF INDIA LTD. [2015] 40 ITR (Trib) 684 (Pune) approved.

BOSCH LTD. V. ITO, INTERNATIONAL TAXATION [2013] 115 TTJ (Bang) 354 disapproved.

Chapter X-A containing provisions relating to General Anti-Avoidance Rules has been inserted in the statute by the Finance Act, 2013 with effect from April 1, 2016 and although the provisions contained in the Chapter are given overriding effect by virtue of the non obstante clause contained in section 195, a separate provision has been inserted simultaneously in the form of sub-section (2A) in section 90 providing specifically that notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A shall apply to the assessee even if such provisions are not beneficial to him. However no such provision is made separately and specifically in section 90 to give overriding effect to section 206AA over section 90(2) which clearly shows that the intention of the Legislature is not to give overriding effect to section 206AA over the provisions of the relevant Agreements which are beneficial to the assessee".

7.1. In view of the judgment of the Special Bench of the ITAT, we do not see any reason to interfere with the order of the CIT(A) which is in tune with the principles laid down therein.

8. It is also to be noted that when assessee has furnished the PAN numbers of some of the deductees, AO has accepted them as can be seen from the order of the CIT(A). In view of the above fact, the grounds raised in Ground No. 6 does not have any validity and

accordingly, the ground is treated as infructuous. All the grounds are considered dismissed.

9. In the result, both the appeals of Revenue are dismissed.

Order pronounced in the open court on 26th May, 2017

Sd/-	Sd/-
(D. MANMOHAN)	**(B. RAMAKOTAIAH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Hyderabad, Dated 26th May, 2017

TNMM

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3. CIT (Appeals)-V, Hyderabad.

4. DIT (IT & TP), Hyderabad.

5. D.R. ITAT, Hyderabad.

6. Guard File.