आयकर अपीलीय अधिकरण पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं श्री अनिल चतुर्वेदी, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI ANIL CHATURVEDI, AM

आयकर अपील सं. / ITA No.1650/PUN/2017
निर्धारण वर्ष / Assessment Year : 2016-17

The Asst. Commissioner of Income Tax
(International Taxation)- Circle I, Pune. …. अपीलार्थी/Appellant

Vs.

Koso India Pvt. Ltd.,
H-33/J-1, MIDC Ambad,
Nashik – 422010 …. प्रत्यर्थी / Respondent

PAN: AACCK3621N

अपीलार्थी की ओर से / Appellant by : Shri Shashank Deogadkar
प्रत्यर्थी की ओर से / Respondent by : Shri Mehul Shah

सुनवाई की तारीख / **Date of Hearing : 05.08.2019**		घोषणा की तारीख / **Date of Pronouncement: 04.09.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by Revenue is against order of CIT(A)-3, Nashik, dated 20.03.2017 relating to assessment year 2016-17 against order passed under section 200A r.w.s. 154 of the Income-tax Act, 1961 (in short 'the Act').

2. The Revenue has raised the following grounds of appeal:-

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. The Revenue is in appeal against order of CIT(A) in directing the Assessing Officer to tax the receipts in the hands of assessee @ 10% as per provisions of DTAA and not @ 20% under the provisions of Income Tax Act.

4. Briefly, in the facts of the case, the assessee had paid technical fees of ₹ 88,66,667/- and ₹ 2,21,66,667/- on March, 16 to KEC Japan Company Ltd. The assessee had deducted tax at the applicable rates on the eligible payments in accordance with the provisions of Chapter XVII-B and has also deposited the amount. The CPC thereafter passed order u/s 200A r.w.s. 154 of the Act determining the amount payable for short deduction of tax ₹ 24,82,667/- and interest u/s 201(1A) of ₹ 2,23,434/- resulting in demand of ₹ 27,06,100/-.

5. In appeal, the assessee pointed out that it was obliged to deduct tax @ 10% only and it relied on various judgments including the Pune Bench of Tribunal in the case of Serum Institute of India Ltd. in ITA Nos.792/PN/2013, 1601 & 1604/PN/2014, wherein it was held that where the DTAAs provide for a tax lower than that prescribed in section 206AA of the Act, the provisions of DTAAs shall prevail and the provisions of section 206AA of the Act shall not be applicable. The CIT(A) held as under:-

"7…….
As the tax has been deducted on strength of beneficial provisions of DTAAs, the provisions of 206AA of the Act do not override provisions of section 90(2) of

the Act. The appellant has also obtained TRC which is one of the prerequisite for relaxation from deducting tax at higher rate as per Sub Sec (7)(ii) of 206AA r.w. notification dated 24.06.2016. Respectfully following the judgment of Honourable ITAT, Pune bench in the case of Serum Institute of India Limited, which has also been followed by ITAT Bangalore in the case of Infosys BPO Ltd. ITA No.1143/Bang/2014 and in the case of Wipro Ltd. ITA No.1544/2013, and as the appellant has obtained TRC and has deducted tax as per Article 12 of India and Japan DTAA @ 10%, there was no shortfall in deduction of tax at source in respect of payment to nonresident. The special bench of ITAT Hyderabad in the case of Nagarjuna Fertilizers [TS-67-ITAT-2017(HYD)] also held that section 206AA cannot over write beneficial DTAA rates. Therefore the tax demand relatable to difference between 20% and the actual tax rate on which the tax was deducted by the appellant in term of relevant DTAA is deleted."

6. The Revenue is in appeal against the order of CIT(A).

7. The learned Departmental Representative for the Revenue placed reliance on the provisions of the Act and the intimation issued.

8. The learned Authorized Representative for the assessee pointed out that the issue stands covered by the order of Tribunal in the case of DDIT Vs. Serum Institute of India Ltd. (2015) 170 TTJ 119 (Pune-Trib.), which has been applied by CIT(A) and further by Pune Bench of Tribunal in DCIT Vs. Calderys France (2017) 166 ITD 307 (Pune-Trib.), wherein the aforesaid proposition was applied.

9. We have heard the rival contentions and perused the record. The issue which arises before us is with regard to rate to be applied on the payments made by assessee to a non-resident company. In the facts of the case, the assessee had paid technical fees of ₹ 88,66,667/- and ₹ 2,21,66,667/- on March, 16 to KEC Japan Company Ltd. The assessee had deducted tax @ 10% as per provisions of DTAA and the Assessing Officer on the other hand, was of the view that tax @ 20% was to be deducted.

10. We find that similar issue arose before the Tribunal in DCIT Vs. Calderys France (supra), wherein it was held as under:-

> *"9. We have heard the rival contentions and perused the record. The limited issue which arises in the present appeal before us is against invoking of provisions of section 206AA r.w.s. 90 and 195 of the Act. The assessee during the year under consideration had received payment of Rs.8.12 crores towards management services and IT support services rendered. The assessee had offered the same for taxation purpose in its return of income. The Indian entity i.e. Calderys India Refractories Ltd. had withheld taxes @ 20% from the said payment made to the assessee. The tax was deducted @ 20% since the assessee company did not have any PAN number at the time of receipt of said payments. The total tax deducted was Rs.1,89,80,100/-. However, in the return of income, the assessee claimed that the same was taxable @ 10% being royalty / FTS, as per Article 13 of DTAA between India and France. Hence, the assessee in the return of income claimed refund of Rs.1,08,53,871/-*
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> *10. The issue which arises in the present appeal is with reference to applicability of tax rate on the said amount, wherein the taxability of the amount is not in dispute. The Assessing Officer was of the view that the Indian entity had to withhold taxes on such payments as per provisions of section 206AA of the Act and since the assessee had received PAN number on 14.08.2012, the tax on the date of payment was to be deducted at higher rates as per provisions of section 206AA of the Act. The assessee having obtained PAN number in the subsequent period would not entitle it to claim the tax deduction at a lower rate. The issue arising in the present appeal is squarely covered by the ratio laid down by the Pune Bench of Tribunal in DDIT Vs. Serum Institute of India Ltd. (supra), wherein it was held as under:-*
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> > *"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 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 Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706/ 132 Taxman 373 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 (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 v. Eli Lily & Co. [2009] 312 ITR 225/ 178 Taxman 505 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 Center (P.) Ltd. v. CIT [2010] 327 ITR 456/ 193 Taxman 234/7 taxmann.com 18 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 rate on which tax was deducted by the assessee in terms of the relevant DTAAs. As a consequence, Revenue fails in its appeals."

11. In view thereof, where the provisions of section 206AA of the Act cannot override the provisions of charging sections 4 and 5 of the Act and also where under section 90(2) of the Act, it is provided that DTAAs would override domestic law, in cases where the provisions of DTAAs are more beneficial to the assessee. Hence, the same would also override the charging sections 4 and 5 of the Act. Interpreting the provisions of the Act, therefore, where the tax has been deducted on the strength of beneficial provisions of DTAA, provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist that the tax deduction should be @ 20%. Accordingly, since the assessee had received PAN number, it was obliged to pay the taxes as per DTAA i.e. @ 10% of the payment received and if the payee had deducted the tax @ 20% under section 206AA of the Act but the provisions of DTAA being more beneficial had to be applied.

12. Similar view has been taken by the Special Bench of Hyderabad Tribunal in Nagarjuna Fertilizers & Chemicals Ltd. Vs. ACIT (supra), wherein it was held as under:-

"30. The ratio of the two decisions of the Hon'ble Supreme Court in the case of Ili Lilly And Co. (India) P. Limited (supra) and G.E. Technology Centre (P) Limited (supra) as discussed above clearly shows that the charging provisions control and override the machinery provisions dealing with tax deduction at source. Similarly, the provisions of DTAAs by virtue of section 90(2) to the extent more beneficial to the assessee override the provisions of Domestic Law as held, inter alia, by the Hon'ble Supreme Court in the case of Azadi Bachao Andolan & Another (supra) and P.V.A.L. Kulandagan Chettiar (supra). Since section 206AA falls in Chapter XVII-B dealing with tax deduction at source, it follows that the treaty provisions 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 non-obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of DTAAs, which are overriding being beneficial to the assessee.

31. There is one more basis to support the above conclusion. As rightly pointed out on behalf of the assessee, Chapter-XA containing the provision relating to General Anti-Avoidance Rule (GAAR) has been inserted in the Statute by the Finance Act, 2013 with effect from 1st April, 2016 and although the provisions contained in the said Chapter are given overriding effect by virtue of non-obstante clause contained in section 95, 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 XA of the Act shall apply to the assessee even if such provisions are not beneficial to him. As rightly pointed out on behalf of the assessee, no such provision, however, 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 DTAA which are beneficial to the assessee. In the case of Sanofi Pasteur Holding SA –vs.- Department of Revenue & Others (supra), the contention raised on behalf of the Revenue was that the relevant retrospective amendments made in the Income Tax Act, 1961 override the tax treaties and the same was rejected by the Hon'ble Andhra Pradesh High Court on the ground that the relevant amendments were not fortified by a non-obstante clause expressed to override Tax Treaties as was made in case of the GAAR provisions specifically by inserting sub-section (2A) in section 90 to enable application of Chapter X-A even if the same be not beneficial to the assessee thereby enacting an override effect over the provisions of section 90(2). In the case of Bharat Hari Singhania (supra), it was held by the Hon'ble Supreme Court that the scope and purport of the non-obstante clause has to be ascertained by reading it in the context of the relevant provisions and consistent with the scheme of the enactment. As explained by CBDT while inserting the provision of section 206AA vide Circular No. 5 of 2010, the intention of the said provision is mainly to strengthen PAN mechanism and keeping in view this limited function and purpose, we are of the view that non-obstante clause contained in the machinery provision of section 206AA is required to be assigned a restrictive meaning and the same cannot be read so as to override even the relevant beneficial provisions of the Treaties, which override even the charging provisions of the Income Tax Act by virtue of section 90(2). In our opinion, it, therefore, cannot be said that the provisions of section 206AA, despite the non-obstante clause contained therein, would override the provisions of DTAA to the extent they are more beneficial to the assessee and it is the beneficial provision of treaty that will override the machinery provisions of section 206AA."

11. In view of the settled position of the issue which is raised before us, we find no merit in the grounds of appeal raised by Revenue. Upholding the order of CIT(A), we dismiss the grounds of appeal raised by Revenue.

12. In the result, the appeal of Revenue is dismissed.

Order pronounced on this 4th day of September, 2019.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 4th September, 2019.

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-3, Nashik;
4. The CIT(TDS), Pune;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "बी" / DR 'B', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune