IN THE INCOME TAX APPELLATE TRIBUNAL, BANGALORE BENCH 'C'

BEFORE SHRI N.V VASUDEVAN, VICE-PRESIDENT AND SHRI B.R.BASKARAN, ACCOUNTANT MEMBER

IT(IT) A No.1074/Bang/2019
(Assessment year : 2010-11)

The Asst. Commissioner of Income-tax,
International Taxation, Circle-2(2),
BMTC Building, Koramangala,
Bangalore-560 095 — Appellant

Vs

M/s Wipro Limited,
76P & 80P, Doddakanelli,
Sarjapur Road,
Bangalore-560 035
Pan No.AAACW0387R — Respondent

Revenue by : Smt. R.Premi, JCIT
Assessee by : Shri P.V.Srinivasan, CA

Date of hearing : 09-03-2020
Date of pronouncement : 11-03-2020

O R D E R

PER SHRI N.V VASUDEVAN, VICE-PRESIDENT:

This is an appeal by the Revenue against the order dated 11-02-2019 of CIT(A)-12, Bangalore relating to assessment year 2010-11.

2. The assessee is a company registered under Companies Act, 1956 engaged in the business of export of computer software and providing IT enabled services. During the previous year relevant to assessment year 2010-11, the assessee made a payment to Gartner group of a sum of Rs.6,39,09,422/-. Since the aforesaid payment was a payment made to non-resident, the revenue was of the view that tax at source ought to have been

deducted before making payment to the non-resident as required u/s 195 of the Act. Since the assessee had not deducted tax at source the DCIT, International Taxation, Cirle-2(2), Bangalore initiated proceedings u/s 201(1) and 201(1A) of the Income Tax Act, 1961 (Act). **Section 201(1) & (1A) of the Act lays down consequences if tax is not deducted at source when there is a requirement to deduct tax at source laid down under any provisions of the Act and it reads thus:**

> ***"Section-201: Consequences for failure to deduct or pay.***
>
> *(1) Where any person, including the principal officer of a company,—*
>
> *(a) who is required to deduct any sum in accordance with the provisions of this Act; or*
>
> *(b) referred to in sub-section (1A) of section 192, being an employer,*
>
> *does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:*
>
> *……..*
>
> *(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,—*
>
> *(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and*
>
> *(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,*
>
> *and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200:]*
>
> ***……..."***

3. The DCIT passed an order under section 201(1) and section 201(1A) of the Act, holding that payments made to the non-resident would be in the nature of Royalty as provided under section 9(1) of the Act and also as per the provisions of the Treaty and consequently treating the Assessee as an `assessee-in-default' under the provisions of section 201(1) of the Act on account of alleged failure to withhold taxes in respect of the aforesaid payments.

4. There was also dispute was with regard to the rate of tax on FTS since the Non-resident to whom the Assessee made payments did not have Permanent Account Number (PAN) in India and in view of the provisions of Sec.206AA of the Act, the DCIT held that tax had to be deducted at source at the higher rate of tax at 20% in view of the provisions of Sec.206AA of the Act. The CIT(A) however held that the rate of tax deduction at source will be as provided under the DTAA between India and the country of which the non-resident is tax resident if such rate is lesser rate than provided in Sec.206AA of the Act. In coming to the aforesaid conclusion the CIT(A) placed reliance on decision of Hon'ble Delhi High Court in the case of Danisco India (P) Ltd. Vs. Union of India (2018) 90 taxmann.com 295 (Delhi).

5. Aggrieved by the order of the CIT(A), the Assessee is in appeal before the Tribunal. The issue regarding rate of tax at which TDS has to be deducted in the event of the non-resident payee not obtaining Income Tax PAN in India has been settled by a special Bench ITAT Hyderabad in the case of Nagarjuna Fertilizers & Chemicals and another Vs. ACIT (2017) 49 CCH 0053 Hyd-Trib. The Special Bench held that the non-obstante clause contained in machinery provision of section 206AA of the Act was required to be assigned restrictive meaning and same could not be read so as to override even relevant beneficial provisions of Treaties, which override even charging provisions of the Income Tax Act by virtue of section 90(2) of the Act. Therefore an Assessee could not be held liable to deduct tax at higher of 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 Permanent Account Numbers. There is therefore no merit in appeal by the revenue.

6. In the result, the appeal by the revenue is dismissed.

Order pronounced in the open court on 11th March, 2020

Sd/-	**Sd/-**
(B.R.BASKARAN)	**(N.V VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE-PRESIDENT**

Place : Bangalore
Dated : 11-3-2020.
*am
Copy to :

1. The Assessee
2. The Revenue
3. The CIT concerned.
4. The CIT(A) concerned.
5. DR
6. GF

By order

Asst. Registrar