**IN THE INCOME TAX APPELLATE TRIBUNAL**
**DELHI BENCH: "B'' NEW DELHI**

**BEFORE SHRI G.S. PANNU, VICE-PRESIDENT**
**&**
**SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA Nos. 4546 & 4547/Del/2016**
**Assessment Years: 2014-15 & 2015-16**

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| **Income-tax Officer(TDS), Noida.** | **vs.** | **Computer Science Corporation India Pvt. Ltd., Noida Towers, Sector-62, Noida. PAN- AABCC5820A** |
| **(Appellant)** | | **(Respondent)** |

**Revenue by:** Shri Satpal Gulati, CIT/DR
**Assessee by:** Shri Satyan Sethi, Advocate
Shri A.T. Panda, Advocate

**Date of Hearing: 04/03/2020**
**Date of Pronouncement: 06 /03/2020**

**ORDER**

**PER K. NARASIMHA CHARY, JM**

Challenging the orders dated 14/06/2016 passed in appeal Nos. 7 & 6/CIT(A)-2/2015-16 by learned Commissioner of Income Tax (Appeals)-2I, Noida ("Ld. CIT(A)"), in the cases of Computer Science Corporation India Pvt. Ltd. ("the assessee"), Revenue filed these appeals for assessment years 2014-15 and 2015-16.

2. Facts involved in these two appeals, insofar as the issue to be adjudicated are concerned, are identical and, therefore, we deem it just

and convenient to dispose of these two appeals by way of common order.

3. Brief facts of the case are that M/s computer sciences Corporation India (P) Ltd. is a company engaged in providing software development services and outsourcing services and has availed management services, which are in the nature of Fee for Technical Services (FTS), from computer sciences Inc USA and made certain payments for such services, by deducting TDS at the rate of 20% on such payments.

4. Learned Assessing Officer observed that as per the provisions of section 206AA of the Income Tax Act, 1961 (for short "the Act"), the rate of 25% would be the withholding tax rate being higher of the three, namely, 25% being the rates specified under section 115A of the Act for royalty/FTS income of non-residents, 15% at the rate or rates specified in DTAA and 20% as per section 206AA of the Act, passed the order dated 4/3/2015 under section 201(1) and 201(1-A) of the Act.

5. Challenging the order passed under section 201(1) and 201(1-A) of the Act, assessee preferred appeals before the Ld. CIT(A) and contended that though the applicable rate was 15% under the DTAA, it had deducted tax at higher rate of 20% on the payments made to the parent company at USA and therefore the action of the learned Assessing Officer in treating it as assessee in default was not proper.

6. Ld. CIT(A) by way of impugned order held that the action of the Assessing Officer in treating the assessee as assessee in default on the ground that instead of 20% it should have deducted tax at the rate of 25% was not justified and granted relief on that count, since the assessee

had withheld tax at source at the rate of 20% as per clause (iii) of section 206AA (1) of the Act. Ld. CIT(A) further held that the DTAA would prevail over the provisions of the Act while taking a view on applicability of clause (i) and clause (ii) of section 206AA (1) of the Act. According to the Ld. CIT(A) the prescribed rate for the year was 25% as far as deduction of tax at source on payments towards Fee for Technical Services (FTS) are concerned , but as per Article 12 of the India-USA DTAA the prescribed rate was 15% for such payments and, therefore, the tax could have been deducted at the rate of 15**%** being the lower one. It was further observed that in case there was no PAN, higher rate of 20% should be levied as prescribed under clause (iii) of section 206AA (1) of the Act which becomes the maximum prescribed rate under section 206AA of the Act. Ld. CIT(A), however, held that surcharge and education cess should also been levied.

7. Aggrieved by the finding of the Ld. CIT(A) in respect of the rate of tax withholding at 20% and contending that it must be at 15% entitling the assessee to seek refund of the excess 5%, and the levy of surcharge and education cess, assessee preferred appeal for the assessment year 2014-15 in ITA No. 4549/del/2016. By order dated 18/11/2016 a coordinate Bench of this Tribunal disposed of such an appeal refusing to grant refund to the assessee, but deleting the levy of surcharge and education cess on the amount of tax deducted at source under section 206AA (1) (iii) of the Act.

8. Revenue preferred this appealchallenging the grant of relief by the Ld. CIT(A) by holding that the assessee rightly deducted tax at source at 20%, contending that the provisions of section 206AA of the Act prevail

over any other provisions of the Income Tax Act, 1961 including section 90(2) of the Act which provides that in relation to the assessee to whom DTAA applies, the provisions of the Act shall apply to the extent they are more beneficial to the assessee.

9. It is contended by the Ld. DR that section 90(2) of the Act is in relation to any relief of tax, whereas section 206AA triplets for hire withholding of tax on non-furnishing of PAN and section 90 (2) does not in anyway alter the final tax liability or computation of the non-resident because the non-resident always has an option to his/her/its return and claim the refund of excess taxes withheld. Ld. DR also placed reliance on CBDT circular No. 333 to the effect that in the absence of any specific provision in the tax treaty the provisions of the Act shall prevail. According to the Ld. AR the intention of section 206AA of the Act is to strengthen the PAN mechanism and make the payees who are subject to tax in India to obtain a PAN and to streamline the process of processing of returns and granting of credit.

10. Per contra, it is the submission on behalf of the assessee that the issue involved in this matter has squarely been covered by the decision of the Hon'ble jurisdictional High Court in the case of Danisco India Private Limited vs. UOI (2018) 404 ITR 539 wherein it is held that section 206AA of the Act has to be read down to mean that where the overseas resident business concern conducts its operations from a territory, whose government has entered into a DTAA with India, the rate of taxation would be as dictated by the provisions of the DTAA.

11. We have gone through the record in the light of the submissions made on either side. From the narration of the above facts, it is clear that

the only issue involved in these two appeals is whether the rate of tax deductible on the payments made to the non-resident USA company in respect of Fee for Technical Services (FTS) was at 25% under section 260AA (1) (i) of the Act. According to the Revenue, sections 90 (2) of the Act and section 206AA (1) of the Act operating two different domains, inasmuch as the scope of section 90 (2) of the Act is in relation to any relief of tax, whereas the scope of section 206AA of the Act is to stipulate for hire withholding of tax on non-furnishing of PAN. Revenue wants to stress on the point that inasmuch as the intention of section 206AA of the Act is to strengthen the PAN mechanism and to make the plea who is subject to tax in India to obtain a PAN and streamline the processing of returns and grant of credit, has nothing to do with the option of the non-resident to claim refund of the excess taxes, if any, withheld.

12. This issue is no longer res Integra. In Dy. Director of Income Tax Vs. Serum Institute of India Ltd. (ITA 792/PN/2013, decided on 30.3.2015), this issue was discussed at length and the relevant observations of the Tribunal are that,-

> ".....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 Azadi BachaoAndolan and Others v. UOI, MANU/SC/1219/2003 : (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 BachaoAndolan 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 v. Eli Lily & Co., MANU/SC/0487/2009 : (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. v. CIT,MANU/SC/0688/2010 : (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 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.

13. Hon'ble jurisdictional High Court in the case of Danisco India Private Limited (supra) dealt with this aspect and while approving the decision of the Tribunal in the case ofSerum Institute of India Ltd. (supra) the Hon'ble High Court held that having regard to the position of law explained in Azadi BachaoAndolan (supra) and later followed in numerous decisions that a Double Taxation Avoidance Agreement acquires primacy in such cases, where reciprocating states mutually agree upon acceptable principles for tax treatment, the provision in Section 206AA (as it existed) has to be read down to mean that where the deductee i.e the overseas resident business concern conducts its operation from a territory, whose Government has entered into a Double

Taxation Avoidance Agreement with India, the rate of taxation would be as dictated by the provisions of the treaty.

14. Issue being covered squarely by the order of the Tribunal in the case of Serum Institute of India Ltd. (supra) and the decision of the Hon'ble High Court in the case of Danisco India Private Limited (supra), in the absence of any decision to the contrary, while respectfully following the same, we do not see anything illegality or irregularity in the findings of the Ld. CIT(A). Since the findings of the Ld. CIT(A) do not suffer any legal infirmity, we uphold the same and dismiss the grounds of appeal of the Revenue.

15. In the result, both the appeals of the Revenue or dismissed.

**Order pronounced in the Open Court on 6th March, 2020.**

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| Sd/- | Sd/- |
| **(G.S. PANNU)** | **(K. NARASIMHA CHARY)** |
| **VICE-PRESIDENT** | **JUDICIAL MEMBER** |

**Dated: 06/03/2020**