IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH 'C' NEW DLEHI

BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER

I.T.A. Nos.5124 to 5127/Del/2015
Assessment Year: 2013-14

M/s Emmsons International Ltd. **101, South Delhi House,** **Zamrudpur Community Centre,** **Kailash Colony, New Delhi.** **(PAN:AAACE0442K)**	**vs**	**DCIT CPC -TDS,** **Ghaziabad.**
(Appellant)		(Respondent)

Appellant by: Shri Suresh Kumar Gupta, CA
Respondent by: Shri S.R. Senapati, Sr. DR

Date of hearing: 27.03.2018
Date of Pronouncement: 02.04.2018

ORDER

PER K. NARASIMHA CHARY, JM

Challenging the order dated 12/06/2015 in Appeal Nos .93 to 96/14-15 passed by the learned Commissioner of Income-tax (Appeals)-41, New Delhi {for short "ld.CIT(A)} for Asstt. Year 2013-14, assessee preferred these appeals.

2. Fact in brief are that the assessee is a limited company engaged in the business of import and export of merchandise, and they have filed their statement of deduction of tax at source for all the quarters of the AY 2013-14, but the assessing officer (DCIT, central processing TDS cell) has computed the short

deduction and interest thereon. According to the assessee they have deducted the TDS at the rates applicable under the double taxation avoidance agreement (DTAA) with respective countries whereas the CPC mechanically applied the rate of deduction in such cases to be 20% as prescribed under section 206AA of the Income tax Act, 1961("the Act") as such payees do not hold PAN in India. Contention of the assessee is that they have correctly deducted the withholding tax based on the rates of tax payable by such payees on the income of interest earned in India. The request of the assessee for rectification of the said order was rejected.

3. Assessee carried the matter in appeal and Ld. CITA by way of impugned order rejected the contentions of the assessee stating that Section 206 AA of the Act was inserted w.e.f. 01/04/2010 and it laid down that if PAN of the deductee is not available, tax will be deducted at the rates prescribed under the Act or at the rate of 20% , which is higher. Hence the assessee is before us in this appeal.

4. It is argued on behalf of the assessee that the assessee has correctly deducted the withholding tax under section 195 of the Act for each of the quarters of the financial year under reference at the rates applicable to the non-resident in India as per the provisions of the DTAA and Section 206AA of the Act cannot override section 90(2) of the Act. He placed reliance on the decisions reported in Azadi Bachao Andolan vs UOI (2003) 263 ITR 706 (SC), and CIT versus Ely Lily and company (2009) 312 ITR 225 (SC). Ld. DR placed reliance on the orders of the authorities below.

5. We have gone through the record in the light of the submissions on either side. At the outset it is the submission of the Ld. AR that the issue that is

substantially involved in this appeal is this whether Section 206AA of the Act override the provisions of Section 90(2) of the Act and whether in cases of the payments made to non-residents, what is the rate of tax to be applied, whether it is as per Section 206AA or as per the provisions of DTAA. He submitted that in a number of decisions of the tribunal this issue has been decided in favour of the assessee and recently in Danisco India Private Limited Vs. Union Of India WP(C) 5908/2015 decided on 05/02/2018, the Hon'ble jurisdictional High Court noted the order of the Pune tribunal in DCIT Vs Serum Institute of India Limited, ITA Nos.1601 to 1604/PN/2014 (Assessment Year : 2011-12) to hold that section 206AA of the Act does not override the provisions of Section 90(2) of the Act and that in the cases of payments made to non-residents, the rate of tax to be applied is as prescribed under the DTAA and not as per Section 206AA of the Act because the provisions of the DTAA are more beneficial.

6. The Hon'ble jurisdictional High Court extracted the following observations of the Tribunal in Serum Institute of India Limited (supra) with approval: –

> *"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 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 Andolan 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 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."

7. It is therefore, clear that that section 206AA of the Act does not override the provisions of Section 90(2) of the Act and that in the cases of payments made to non-residents, assessee correctly applied the rate of tax prescribed under the DTAAs and not as per Section 206 AA of the Act because the provisions of the DTAAs were more beneficial. In view of the settled position of law, we find it difficult to sustain the orders of the authorities below. With this view of the matter, we find that the orders of the authorities below are liable to be quashed and accordingly they are quashed. Thus, we hereby direct the deletion of 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. Appeals are allowed accordingly.

8. In the result, all the appeals of the assessee are allowed.

Order pronounced in the Open Court on 2nd April, 2018.

Sd/- Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Dated: 2nd April, 2018
'VJ'

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By order

Asstt. Registrar, ITAT