IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH : BANGALORE

BEFORE SHRI N. V. VASUDEVAN, VICE PRESIDENT AND
SHRI JASON P. BOAZ, ACCOUNTANT MEMBER

IT(IT)A No.1398/Bang/2018
Assessment year : 2011-12

The Deputy Commissioner of Income Tax, International Taxation, Circle – 1(1), Room No.441, 4th Floor, BMTC Building, 80 Feet Road, Koramangala, 6th Block, Bangalore – 560 095.	Vs.	M/s. BEML Ltd., Belavadi Post, Mysore – 570 018. **PAN : BLRBO 2644 F**
APPELLANT		RESPONDENT

C. O. No.116/Bang/2018
Assessment year : 2011-12

M/s. BEML Ltd., Belavadi Post, Mysore – 570 018. **PAN : BLRBO 2644 F**	Vs.	The Assistant Commissioner of Income Tax (TDS), Circle - 1(1), Bangalore.
APPELLANT		RESPONDENT

Revenue by	:	Shri. R. N. Siddappaji, Addl. CIT
Assessee by	:	Shri. R. E. Balasubramanyam, CA

Date of hearing	:	16.04.2019
Date of Pronouncement	:	30.04.2019

O R D E R

Per Jason P. Boaz, Accountant Member

This appeal by Revenue is directed against the order of CIT(A)-13, Bangalore, dated 23.02.2018 for Assessment Year 2011-12. The assessee has also preferred Cross Objections (C.O.) in respect of the impugned order.

2. Briefly stated, the facts relevant for disposal of this appeal are as under:-

2.1 The assessee is a public sector undertaking, engaged in the manufacture of earth moving equipment, rail products and defence products. The assessee had entered into a memorandum of Agreement with M/s. Tatra Sipox, UK, for transfer of technology for manufacture of TATRA Engines. In pursuance thereof, the tax of remittance was borne by the assessee and a sum of US $ 15,00,000/- equivalent to Rs.6,87,60,000/- was paid to M/s. Tatra Sipox as part payment and the amount to be remitted was grossed up for the purpose of withholding tax at Rs.8,08,94,122/- under section 195 of the Income Tax Act, 1961 (in short 'the Act') @ 15% thereof, amounting to Rs.1,21,34,118/- was deducted in accordance with Article 13 of DTAA between India and the United Kingdom. The Assessing Officer (AO), on examination thereof sent an intimation under section 200A of the Act dated 28.03.2013 for not deducting tax at the higher rate as prescribed in section 206AA of the Act since the non-resident payee does not have Permanent Account Number (PAN).

2.2 Being aggrieved by the aforesaid order, the assessee carried the matter in appeal before the CIT(A)-13, Bangalore. The CIT(A) allowed the assessee's appeal vide the impugned order dated 23.02.2018, *inter alia,* following the decision of the Hon'ble Delhi High Court in the case of Danisco India (P) Ltd., reported in (2018) 404 ITR 539 (Delhi).

Revenue's appeal in IT(IT)A No.1398/Bang/2018 (Assessment Year 2011-12)

3.1 Revenue, being aggrieved by the order of the CIT(A)-13, Bangalore, dated 23.02.2018, has preferred this appeal before the Tribunal, wherein it has raised the following grounds:-

1. *The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assesseeon the issue of applicability of section 206AA of the Income-tax Act, 1961, in respect of payments made to non-resident entities.*

2. *The learned Commissioner of Income Tax (Appeals) erred in law as well as on facts in holding that there is no scope for deduction of tax at the rate of20%, as provided under the provisions of Section 206AA when the benefit of DTAA is available, despite the overriding effect of Section 206AA of the Income-tax Act, 1961 due to the presence of a non-obstante clause in the Section and a plain reading of the section indicates that it overrides other provisions of the Act including Section 90(2).*

3. *The learned Commissioner of Income Tax (Appeals), erred in relying on the decisions of the Delhi High Court in the case of **Danisco India Pvt. Ltd** and ITAT, Pune Bench in the case of **Serum Institute of India Ltd.,** which are not binding on the authorities working in Karnataka.*

4. *The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of of **Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011 dated 10/11/2012** has actually upheld the applicability of section 206AA of the Income-tax Act in favour of revenue, hence has erred in allowing the appeal of the assessee.*

5. *The learned Commissioner of Income Tax (Appeals)ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case of DCIT Vs Infosys BPO [ITA No.1143(B) and 8 & 9(B)/2014 has misinterpreted its own earlier decision in the case of **Bosch Ltd Vs ITO, International Taxation in ITA Nos.552 to 558/B/2011** and has allowed the assessee's appeal without distinguishing its own decision. Hence, the CIT(A) has erred in relying on the decision of the Hon'ble ITAT in the case of DCIT Vs Infosys BPO ltd and allowing relief to the assessee.*

6. *The learned Commissioner of Income Tax (Appeals), erred in not considering the decision of the jurisdictional ITAT in the case of* ***Bosch Ltd Vs ITO, International Taxation*** *on the applicability of section 206AA to the assessee's case.*

7. *For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the AO be restored and that of the CIT(A) be cancelled.*

The learned DR for Revenue was heard in support of the grounds raised (supra) and he relied on the order of the AO in the matter and the judicial pronouncements cited in the grounds raised.

3.2 Per contra, the learned AR for the assessee contended that there was no error in the impugned order of the CIT(A). It is argued that there is no merit in the grounds raised by Revenue as the issue was covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in the case of Danisco India (P) Ltd., Vs. UOI (2018) 404 ITR 539 (Delhi).

3.3.1 We have heard / considered the rival contentions / submissions and carefully perused the material on record; including the judicial pronouncements cited. The facts of the matter, as borne out from the record and narrated at para 2.1 of this order (supra) is that the assessee, in terms of its agreements, deducted tax @ 15% i.e., Rs.1,21,34,118/- out of the grossed up amount for repatriation of Rs.6,87,60,000/- to M/s. Tatra Sipox, UK in accordance to Article 13 of he India – UK, DTAA. The AO was of the view that the assessee ought to have deducted tax at source on the said remittances at the higher rate as per Section 206AA of the Act and passed orders accordingly raising demand of Rs.40,44,710/-. On appeal, the CIT(A) reversed the AO's order, following, *inter alia,* the decision of the Hon'ble Delhi High Court in the case of Danisco India (P) Ltd., Vs. UOI (supra).

3.3.2 After having heard the parties and perused and considered the material on record; including the judicial precedents cited, we are of the view that the issue for consideration before us is squarely covered in favour of the assessee by the decision of the Hon'ble Delhi High Court in the case of Danisco India (P) Ltd., Vs. UOI (2018) 404 ITR 539 (Delhi). The Hon'ble Delhi High Court in its aforesaid order (supra) at paras 6 to 8 thereof, has held as under:-

> *"6. After hearing the counsel for the parties, it is quite apparent that the issue urged has been rendered largely academic on account of corrective amendment made by the Parliament-which substituted pre-existing Sub-section (7) with the present Section 206AA (7). The amendment is mitigating to a large extent, the rigors of the pre-existing laws. The law, as it existed, went beyond the provisions of DTAA which in most cases mandates a 10% cap on the rate of tax applicable to the state parties. Section 206AA (prior to its amendment) resulted in a situation, where, over and above the mandated 10%, a recovery of an additional 10%, in the event, the non.- resident payee, did not possess PAN.*
>
> *7. In this context, the ITAT in Serum Institute of India (Supra) discussed this very issue in some detail and stated, as follows:*
>
> > *"……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 Honble Supreme Court in the case of Azadi Bachao Andolan v. Union of India, [(2003) 263 ITR 706 SC] = [1"S-5-SC-2003-0] 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 Honble 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 nonresidents, 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-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:c the Act would apply only to sums which are otherwise chargeable to tax under the Act. The Hon'ble Supreme Cow in the case of GE India Technology Centre Pvt. Ltd. v. CIT, [(2010) 327 ITR 456 SC) = [TS-201-SC-2010-01 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, it our view, where the tax has been deducted on the strength of the beneficial provisions of section DTAA 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.

8. Having regard to the position of law explained in Azadi Bachao Andolan (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-a dictated by the provisions of the treaty."

Respectfully following the decision of the Hon'ble Delhi High Court in the case of Danisco India (P) Ltd., (2018) 404-ITR 539 (Delhi), we uphold the findings rendered by the CIT(A) in the impugned order. Consequently, the grounds raised by Revenue are dismissed.

4. In the result, Revenue's appeal for Assessment Year 2011-12 is dismissed.

C.O. No.116/Bang/2018 for Assessment Year 2011-12

5.1 The grounds raised in the assessee's cross objections are as under:-

1. *The Ld. CIT(A) ought to have considered ground number 1 before the CIT(A) questioning the validity of notice is as much as the notice passed by the AO suffers from legal infirmity since it was sent beyond the period of limitation provided under section 200A.*

2. *Without prejudice to ground 1, the Assessee further submits that the relief allowed by the Ld. CIT(A) in respect of issues under section 206AA is proper and in accordance with law and do not require any reversal.*

5.2 A perusal of the grounds raised in the C.O. by the assessee (supra) indicates that it is supportive of the impugned order of the CIT(A) dated 23.02.2018 for Assessment Year 2011-12. In view of our order dismissing Revenue's appeal in IT(IT)A No.398/Bang/2018 (supra) in the earlier part of this order, the grounds of the assessee's C.O. are rendered infructuous and accordingly dismissed.

6. In the result, the assessee's Cross Objections for Assessment Year 2011-12 are dismissed.

7. To sum up, both Revenue's appeal and the assessee's Cross Objections for Assessment Year 2011-12 are dismissed.

Pronounced in the open court on 30th April, 2019.

Sd/-	Sd/-
(N. V. VASUDEVAN)	**(JASON P. BOAZ)**
Vice President	**Accountant Member**

Bangalore.
Dated: 30th April, 2019.
/NS/*

Copy to:

1. Appellants
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.