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

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

IT(IT)A No. 1360/Bang/2019
Assessment year : 2011-12

The Deputy Commissioner of Income Tax, International Taxation, Circle 1(1), Bengaluru – 560 0-95.	Vs.	M/s. Bharath Fritz Werner Ltd., No.14, HMT Factory Main Road, Peenya, Yeshwanthpur Post, Bangalore – 560 022. **PAN: AAAC 5723A** **TAN: BLRB 00311 D**
APPELLANT		RESPONDENT

Appellant by	:	Shri Priyadarshi Mishra, Jt.CIT(DR)(ITAT), Bengaluru.
Respondent by	:	Shri S. Ramasubramanian, CA

Date of hearing	:	24.06.2020
Date of Pronouncement	:	26.06.2020

O R D E R

Per N.V. Vasudevan, Vice President

This appeal by the revenue is against the order dated 11.03.2019 of the CIT(Appeals)-12, Bengaluru relating to assessment year 2011-12.

2. The grounds of appeal raised by the revenue are as follows:-

> "1. The learned Commissioner of Income Tax (Appeals) has erred in law and facts of the case in allowing the appeal of the assessee on 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 of 30%, 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 Hon'ble ITAT Bangalore in ITA No. 143/(6)/2013 in the case of Infosys BPO and Delhi High Court in the case of Danisco Indict Pvt. Ltd (WP(C) 5908/2015 dated 5.2.2015.

4. The learned Commissioner of Income Tax (Appeals) ought to have appreciated the fact that the Hon'ble ITAT, Bangalore in the case 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&8/2014 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 MIT 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."

3. The assessee is a company engaged in the business of manufacturing metal cutting grinding machines, spares, accessories and related services. The DCIT, Intl. Taxation, Circle 1(1), Bangalore [DCIT] received information from the ACIT, TDS Circle 1(1), Bangalore that as per the Tax Audit Report in Form 3CD, it has been mentioned that the assessee had not deducted tax at source on a payment of Rs.2,63,08,939 towards design charges and Rs.29,11,816 on payment of exhibition fees, both payments had been made to the non-residents (Tax residents of Germany) and therefore the DCIT passed an order u/s. 201(1) & 201(1A) of the Income-tax Act, 1961 [the Act] dated 31.03.2018 holding the assessee to be an assessee in default for non-deduction of tax at source. The rate of tax was also applied by the DCIT @ 21.115% in terms of section 206AA of the Act at a higher rate because of the provisions of Sec.206AA of the Act. Section 206AA was introduced from FY 2010-11. Section 206AA requires every taxpayer who receives taxable income to furnish their PAN to the payer of such income. This applies to both the resident as well as non-resident recipients. The payments in case of residents would include salary, rent, professional receipts, contractual receipts and so on. In the case of non-resident, these would include all receipts that are taxable in India. A recipient of taxable income should furnish PAN to comply with the provisions of TDS under the Income Tax Act. Upon furnishing of the PAN, payments made to the recipient would be taxed at the rate of TDS specified under the various TDS provisions of the Act. A recipient who does not furnish PAN would suffer TDS at the higher rates specified in Section 206AA. The recipient is also required to furnish his PAN to the payer and both of them are required to indicate the same in all correspondence, bills, vouchers and other documents which are sent to each other. A recipient who fails to furnish PAN to the person making a payment would suffer TDS at the higher of the rates mentioned below:

- At the rate specified in the relevant provision of the Act;
- At the rate or rates in force, i.e., the rate prescribed in the Finance Act.;
- At the rate of 20%

4. In an appeal against the aforesaid order, the assessee contended before the CIT(Appeals) that the rate of tax at which TDS should be made by the assessee is 10% in accordance with the Treaty for Avoidance of Double Taxation between India and Germany (DTAA) and not at the higher rate of tax @ 20% by invoking the provisions of section 206AA of the Act. This submission was accepted by the CIT(A) and on the basis of the decision of the Pune Bench of the ITAT in the case of *Serum Institute of India Ltd. in ITA No.792/PN/2013.* Aggrieved by the aforesaid part of the order of the CIT(Appeals) allowing relief to the assessee, the revenue has preferred the present appeal before the Tribunal.

5. We have heard the rival submissions. At the time of hearing it was not disputed that the issue raised by the revenue in its appeals are already decided by a Special Bench of ITAT, Hyderabad. The issue regarding the applicability of provisions of section 206AA of the Act, in cases of tax to be deducted at source, when the income is exigible to tax under DTAA and the payees are unable to provide valid Permanent Account Numbers, came up for consideration before the Special Bench, ITAT Hyderabad in the case of *Nagarjuna Fertilizers & Chemicals Ltd. Vs. AC IT (2017) 78 taxmann.com 264 (Hyderabad-Tribunal) (SB)*. The question before the special bench was whether the provisions of section 206AA had overriding effect for all other provisions of the Act, whether the assessee has to deduct tax at source at the rates prescribed in section 206AA in case the payees are unable to furnish their PANs, even in cases where tax liability arises out of the treaty. The DTAA provides for a rate of 10% whereas as per the provisions of Sec.206AA of the Act, the rate of tax deduction at source is 20%.

6. The plea of the revenue was that section 206AA starts with a non-obstante clause and therefore it overrides all other provisions of the Act including 90(2), 115A and 139A. The plea of the Assessee was that DTAA was supreme and in this regard reliance was placed on the Hon'ble Supreme Court decision in the case of *Azadi Bachao Andolan (2003) 263 ITR 706 (SC)*, whereby it was held that DTAA, even if inconsistent, will prevail over the Act. Reliance was also placed on the decisions of the Hon'ble Andhra Pradesh High Court in the case of Sanofi Pasteur (2013) 354 ITR 316 (AP) wherein it was observed that DTAA being a sovereign matter, the machinery provisions cannot override or control that. Reliance was also placed on the decision of the Hon'ble Karnataka High Court in the case of *Kaushallaya Bai and others (2012) 346 ITR 156 (Kar)* wherein it has held that the provisions of section 206AA are to be read down.

7. The Special Bench held that DTAA overrides the Act, even if it is inconsistent with the Act. DTAAs are entered into between two nations in good faith and are supposed to be interpreted in good faith. Otherwise it would amount to the breach of Article 253 of the constitution.

8. The Hon'ble Delhi High Court in the case of *Danisco India Private Limited Vs. Union Of India & Ors. (Delhi High Court) in* W.P.(C) 5908/2015 Judgement/Order dated 05/02/2018 held that 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.

9. In view of the aforesaid decisions on the issue, we are of the view that there is no merit in the appeals of the Revenue.

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

Pronounced in the open court on this 26th day of June, 2020.

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

Bangalore,
Dated, the 26th June, 2020.

/*Desai S Murthy /*

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.