THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Ms. Annapurna Gupta, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

Sl. No.	Appeal ITA	A.Y.	Appellant	Respondent
1	321/Ahd/2021	2011-12 (Q 1)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
2	322/Ahd/2021	2011-12 (Q 2)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
3	323/Ahd/2021	2011-12 (Q 4)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
4	324/Ahd/2021	2012-13 (Q 1)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
5	325/Ahd/2021	2012-13 (Q 2)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
6	326/Ahd/2021	2012-13 (Q 3)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
7	327/Ahd/2021	2012-13 (Q 4)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
8	328/Ahd/2021	2013-14 (Q 1)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
9	329/Ahd/2021	2013-14 (Q 2)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
10	330/Ahd/2021	2013-14 (Q 4)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
11	331/Ahd/2021	2014-15 (Q 1)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
12	332/Ahd/2021	2014-15 (Q 2)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
13	333/Ahd/2021	2014-15 (Q 3)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
14	334/Ahd/2021	2014-15 (Q 4)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
15	335/Ahd/2021	2015-16	The DCIT, (Inta . Taxa)-I,	Adani Wilmar

		(Q 1)	Ahmedabad	Ltd. Ahmedabad
16	336/Ahd/2021	2015-16 (Q 2)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
17	337/Ahd/2021	2015-16 (Q 3)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad
18	338/Ahd/2021	2015-16 (Q 4)	The DCIT, (Inta . Taxa)-I, Ahmedabad	Adani Wilmar Ltd. Ahmedabad

PAN No. AABCA8056G

Assessee by: **Shri Biren Shah, A.R.**
Revenue by: **Shri Atul Pandey, Sr. D.R.**

Date of hearing : 18-01-2023
Date of pronouncement : 20-01-2023

आदेश/ORDER

PER BENCH:-

These are eighteen appeals filed by the Department against the order passed by National Faceless Appeal Centre, Delhi vide order dated 23-09-2021 for A.Y. 2011-12 for Quarters 1, 2 & 4, vide order dated 27-09-2021 for A.Y. 2012-13 Quarters 1, 2, 3 & 4, vide order dated 28-09-2021 for A.Y. 2013-14 Quarters 1, 2 & 4, vide order dated 29-09-2021 for A.Y. 2014-15 for Quarters 1, 2, 3 & 4 and vide order dated 29-09-2021 for A.Y. 2015-16 for Quarters 1, 2, 3 & 4.

2. Since common issues are involved for all the years (and the relevant quarters for each assessment year under consideration before us), all the appeals filed by the Department are taken up together.

3. We shall first start with assessment year 2011-12, Quarter-1 and the observations made by us shall equally apply to all the other assessment years (and relevant quarters) under consideration before us.

The Department has taken the following grounds of appeal for assessment year 2011-12, Quarter-1:

> *"1. The Ld. CIT(A) has erred in law and on facts of the case in coming to the conclusion that Sec. 206AA of the I.T. Act does not override the provisions of Section 90(2) of the Act, despite the fact that Section 206AA of the I. T. Act starts with a non-obstinate clause ?*
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> *2. The Ld. CIT(A) has erred in law and on the facts of the case in ignoring the memorandum explaining the provisions of the Finance (No.2) Bill, 2009 which clearly states that the Sec. 206AA of the I.T. Act applies to Non-Residents and also ignoring the Press Release of CBDT No.402/92/2006-MC (04 of 2010)1 dated 20/01/2010 which reiterates that Sec. 206AA of the I.T. Act will also apply' to all Non-Residents in respect of payments / remittances liable to TDS where PAN is not provided to the deductor ?*
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> *3. The Ld. CIT(A) has erred in law and on facts of the case in relying upon the decisions which were rendered before the introduction of Sec. 206AA of the IT. Act ?"*
>
> *4. Any other ground that may be urged at the time of hearing."*

4. The brief facts leading the present appeal are that in the intimation passed by learned AO dated the 03-08-2020, he has invoked section 206AA of the Act and held that the assessee company was under an obligation to deduct higher rate of TDS in case of non-availability of PAN of the non-resident payee. The assessee company, during the period under consideration had made payments to various non-resident parties and had deducted TDS as per the rate mentioned in the Treaty between India and respective countries or as per the rate mentioned in the Act, whichever is more beneficial to the

assessee. An intimation under section 154 of the Act for the first quarter of financial year 2010-11 (assessment year 2011-12) was issued by the Asst Commissioner of Income Tax, Centralised Processing Cell, TDS (AO) to the assessee on account of short deduction of TDS (and interest thereon) amounting to ₹ 36,39,590/- on the ground that in case of payments where PAN of the non—resident parties was not available, the assessee was required to deduct tax under section 206AA of the Act and there was short deduction of TDS in case where TDS was deducted at the rate applicable under the respective Tax Treaty.

5. The assessee preferred appeal before Ld. CIT(Appeals) against the aforesaid additions. In appeal, Ld. CIT(Appeals) decided the issue in favour the assessee on the ground that the assessee's own case, the Ahmedabad ITAT in ITA number 2642/Ahd/2017 dated 05-04-2018 for assessment year 2016-17 has adjudicated this issue in favour of the assessee. Further, Ld. CIT(Appeals)-8, Ahmedabad in appeal number CIT (A)-8/11363/16-17 dated 25-05-2018 has also passed order in favour of the assessee on this very issue. Accordingly, Ld. CIT(Appeals) decided the appeal in favour of the assessee with the following observations:

> *7. Ground no. 1 to 4 relates to the deduction of Rs. 36,39,590/- for short deduction of TDs and interest thereon. The appellant has relied upon the order of Hon'ble Ahmadabad ITAT Bench in ITA no. 2642/AHD/2017 dated, 05.04.2018 in his own case for A.Y. 2016-17 which is in appellant's favour.*

Moreover, appellant has relied upon the decision of ***Ld. CIT(A)-8, (Ahmadabad)*** *with relevant para is as under:*

> *"Considering the facts stated herein above and respectfully following the decision of the High Court of Delhi, Ahmadabad ITAT and my predecessor CIT(A) referred above, it is held that as per the provision of TDS are to be read along with DTAA for computing the tax liability on the sum in question and therefore when the recipient is eligible for benefit to DTAA the addition on the ground of short deduction of TDS applying the provision of 206AA is not correct. The assessing officer is directed to delete the on the basis of application of section 206AA. He is also directed to delete the interest which is consequential too the demand of short deduction. Accordingly the related grounds of appeal are allowed."*

8. Since, the facts are identical and it has also been held in various judicial pronouncement that provision under section 206AA cannot over ride beneficial provision of DTAA. Therefore, appellant is not liable for short deduction of TDS and interest thereon as levied by AO. Therefore, these grounds of appeal are allowed.

9. In the result, the appeal is allowed.

6. The Department is in appeal before us against the aforesaid additions deleted by Ld. CIT(Appeals). The issue for consideration before us is that in case of payments made by the assessee to non-residents, whether in the absence of PAN of the non-resident payees, the assessee is permitted to

deduct taxes at the rate mentioned in the Tax Treaty with the respective countries or is still under an obligation to deduct taxes under section 200AA of the Act at a higher rate of 20%. In our view, this issue has been conclusively settled in view of numerous decisions passed by High Courts and ITAT (including the jurisdictional Ahmedabad Tribunal) in favour of the assessee by holding that in such cases, the assessee is permitted to deduct taxes at the beneficial rates as prescribed under the respective Tax Treaty.

7. This issue was discussed at length by the ITAT in the case of **Serum Institute of India Ltd.[2015] 56 taxmann.com 1 (Pune - Trib.)**, wherein the ITAT held that TDS on payments made to non-residents who did not furnish their PAN can be deducted as per rate prescribed in DTAA and section 206AA cannot be invoked to insist on tax deduction at rate of 20 per cent. While passing the order, the ITAT made the following important observations:

> *7. We have carefully considered the rival submissions. Section 206AA of the Act has been included in Part B of Chapter XVII dealing with Collection and Recovery of Tax - Deduction at source. Section 206AA of the Act deals with requirements of furnishing PAN by any person, entitled to receive any sum or income on which tax is deductible under Chapter XVII-B, to the person responsible for deducting such tax. Shorn of other details, in so far as the present controversy is concerned, it would suffice to note that section 206AA of the Act prescribes that where PAN is not furnished to the person responsible for deducting tax at source then the tax deductor would be required to*

deduct tax at the higher of the following rates, namely, at the rate prescribed in the relevant provisions of this Act; or at the rate/rates in force; or at the rate of 20%. In the present case, assessee was responsible for deducting tax on payments made to non-residents on account of royalty and/or fee for technical services. The dispute before us relates to the payments made by the assessee to such non-residents who had not furnished their PANs to the assessee. 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 Union of India v. Azadi BachaoAndolan [2003] 263 ITR 706/132 Taxman 373 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 (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. [2009] 312 ITR 225/178 Taxman 505 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 Center (P.) Ltd. v. CIT [2010] 327 ITR 456/193 Taxman 234/7 taxmann.com 18 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.

7.1 In the case of **Danisco India (P.) Ltd.[2018] 90 taxmann.com 295 (Delhi)**, the Delhi High Court held that where assessee, an Indian remits payments to company located in Singapore which is not a tax assessee in India, and tax relationship between two countries is regulated in terms of Indo-Singapore DTAA, rate of taxation would be as dictated by provisions of treaty and not under section 206AA.

7.2 In the case of **Infosys Ltd. v DCIT [2022] 140 taxmann.com 600 (Bangalore - Trib.)**, the ITAT held that if rate of tax applicable under DTAA is lower than 20 per cent tax rate as prescribed under section 206AA, TDS has to be deducted at such lower rate even if non-resident deductee fails to furnish its PAN.

7.3 The Special Bench of the Tribunal in the case of **Nagarjuna Fertilizers & Chemicals Ltd. v. Asstt. CIT [2017] 78 taxmann.com 264**

(Hyd.) had held if rate of tax applicable under DTAA is lower than 20 per cent tax rate prescribed under section 206AA, TDS has to be deducted at such lower rate even if non-resident deductee fails to furnish its PAN. The Special Bench made the following pertinent observations while passing the order:

> *There were DTAA entered into by India with the respective countries of which the concerned non-resident entities are residents and the rates of income tax payable by such non-residents on the amounts in question paid by the assessee in the nature of fees for technical services were specified in the said DTAAs at 10 per cent, 10.56 per cent, 10.30 per cent and 15 per cent. The assessee accordingly deducted tax at source at the said rates from the corresponding amounts paid to the respective non-residents as required by the provisions of section 195 read with section 2(37A). It is thus clear that deduction of tax under section 195 from the payments made to the non-residents in the nature of fees for technical services was made by the assessee at the rate or rates of income tax specified in the relevant Double Taxation Avoidance Agreement, which were adopted as rates in force for the purpose of deduction of tax under section 195 in view of the specific provisions contained in sub-section (37A) of section 2. Therefore, there is no merit in the arguments raised by the department that the relevant treaties do not provide for deduction of tax at source at the rate which is lower than the rate applied by the Assessing Officer by invoking the provisions of section 206AA and that there is no question of abrogation of the relevant provisions of treaty in this*

regard. The arguments raised by the department that the role of the assessee as a payer of the sum is limited to deducting tax at source as per law and he has nothing to do with the determination of tax liability eventually in the hands of the payee, which is within the complete domain of the Assessing Officer, to be relevant in this context as the tax at source was deducted by the assessee from the sums paid to the non-residents as per the provisions of section 195(1) read with section 2(37A)

7.4 In the case of **CIT v. Air India Ltd. [2022] 142 taxmann.com 378 (Delhi)**, the Delhi High Court held that provisions of section 206AA cannot have overriding effect on DTAA and in case of payment made to non-resident, rates prescribed under DTAA are applicable.

7.5 In the case of **DCIT v. Infosys BPO Ltd.[2015] 60 taxmann.com 465 (Bangalore - Trib.)**, the ITAT held that where assessee made royalty payments to non-residents, since benefit of DTAA was available to said recipients, their TDS liability could not be more than rate prescribed under DTAA or Act whichever was lower. Further, where Assessing Officer while issuing intimation under section 200A, raised demand for TDS at higher rate ignoring provisions of DTAA, since there was no arithmetical error or incorrect claim apparent from any information in statement, impugned order travelled beyond jurisdiction of Assessing Officer as per provisions of section 200A.

7.6 In the case of**Wipro Ltd. [2017] 88 taxmann.com 435 (Bangalore - Trib.)**, the ITAT held that provisions of TDS should be read along with provisions of DTAA for computing tax liability of non-resident; when non-resident is eligible for benefit of DTAA on sum in question, there is no scope for deduction of tax at source at 20 per cent as provided under provisions of section 206AA.

7.7 In the case of **Uniphos Environtronic (P.) Ltd. v. DCIT [2017] 79 taxmann.com 75 (Ahmedabad - Trib.)**, the jurisdictional Ahmedabad ITAT held that where tax had been deducted on fee for legal services to a German company on strength of beneficial provisions of DTAA, provisions of section 206AA could not be invoked because section 90(2) provides that provisions of Act shall apply to the extent they are more beneficial to assessee.

7.8 In the case of **Jyoti Ltd. v. DCIT [2021] 127 taxmann.com 596 (Ahmedabad - Trib.)**, the Ahmedabad ITAT held that section 206AA does not override provision of section 90 and, thus, TDS had been rightly deducted by assessee on payment made to non-resident by applying tax rate prescribed under DTAA and not as per section 206AA.

7.9 In view of the various decisions passed by the High Court, the Special Bench of the ITAT and decisions passed by the Ahmedabad ITAT in various cases on this same issue and also the decision of ITAT Ahmedabad on this issue in favour of the assessee in the assessee's own case for assessment year 2016-17, we are of the considered view, that Ld. CIT(Appeals) has not

erred in facts and in law in holding that in case of payments made to non-residents, the assessee was entitled to deduct taxes at source at the rates applicable in the respective Tax Treaties in case PAN of non-resident payee is not available. In the instant facts, it is not the allegation of the Department that taxes have not been deducted at source by taking recourse to relevant clauses of the Tax Treaty enabling the assessee not to deduct tax at source in respect of payments made to non-resident payees. In the instant facts, the assessee has deducted taxes at the beneficial rate of 10% as applicable in the respective Tax Treaties in respect of all payments made to non-resident payees. In light of the above observations, the appeal of the Department is hereby dismissed.

8. In the result, the appeal of the Department is dismissed.

9. Since identical facts, issues for consideration and grounds of appeal are involved for all the assessment years under consideration i.e. assessment year 2011-12 (Quarters 1,2 and 4), assessment year 2012-13 (Quarters 1,2,3 and 4), assessment year 2013-14 (Quarters 1,2 and 4), assessment year 2014-15 (Quarters 1,2,3 and 4) and assessment year 2015-16 (Quarters 1,2,3 and 4), the decision and observations made by us for assessment year 2011-12 (Quarter 1) would also to apply to all other assessment years under consideration before us. We are not reproducing the Grounds of Appeal for each of the years under consideration since the same are identical.

10. We further observe that all appeals filed by the Department are time barred by 2 days. However, considering the miniscule period of delay, the delay in filing of appeal by the Department is hereby condoned.

11. In the combined result, all eighteen appeals filed by the Department are dismissed.

Order pronounced in the open court on 20 -01-2023

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 20/01/2023

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद