IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 514 of 2024
With
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R/TAX APPEAL NO. 522 of 2024
With
R/TAX APPEAL NO. 523 of 2024

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COMMISSIONER OF INCOME TAX (INTERNATIONAL TAXATION AND TRANSFER PRICING)

Versus

M/S ADANI WILMAR LTD.

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Appearance:
MS MAITHILI D MEHTA(3206) for the Appellant(s) No. 1
MR B S SOPARKAR(6851) for the Opponent(s) No. 1
MRS SWATI SOPARKAR(870) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE PRANAV TRIVEDI

Date : 10/06/2025

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned advocate Mr. Bandish S.

Soparkar for the appellant and learned advocate Ms. Maithili D. Mehta for the respondent.

2. These appeals are filed under section 260A of the Income Tax Act, 1961 (For short "the Act") wherein following substantial questions of law are proposed:

> "i) Whether the Hon'ble ITAT 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 obstante clause?
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> (ii) Whether the Hon'ble ITAT has erred in law and on 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) dated

20.01.2010 which reiterates that Sec. 206AA of the I.T. Act will also apply to all Non- Residents in respect of payment/remittances liable to TDS where PAN is not provided to the deductor?

(iii) Whether the Hon'ble ITAT has erred in law and on facts in concluding that Section 206AA of the I.T. Act, which provides a higher tax @20% in the event of foreign entity not obtaining the Permanent Account Number in India, cannot be pressed into service to impose obligation on the Non-residents to obtain PAN?"

3. Facts arising in this group of appeals are identical. The issue involved in this group of appeals pertains to alleged short deduction of TDS and raising demand by invoking provisions of section 206AA of the Act. The respondent has deducted TDS at the rate mentioned in DTAA treaty between India and respective countries or as per the rate mentioned in the Income Tax Act,1961 whichever is more beneficial

to the assessee and even in the cases where recipient of the payments who are non resident parties and did not furnish PAN. The appellant Revenue therefore by invoking section 206AA of the Act held the assessee liable for obligation to deduct TDS at higher rate on payment made to non residents, who did not have PAN, at the rate of 20%.

4. Learned CIT(Appeals) held that the assessee is not liable to deduct the tax at a higher rate in view of the provisions of section 90(2) of the Act.

5. Being aggrieved, the appellant Revenue preferred appeals before the Tribunal. The Tribunal by the impugned order has upheld the decision of CIT(Appeals) by dismissing

the appeals filed by the Revenue by observing as under:

> “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 todeduct 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 overthe 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 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 isthe 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) ofthe 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."

6. Having heard the learned advocates for the parties and having perused the documents on record, it appears that the Tribunal has followed the decision in case of **Danisco India (P) Ltd. v. Union of India** reported in 404 ITR 539 (Delhi) wherein it is 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 Hon'ble Supreme Court in the case of Azadi Bachao Andolan 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 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 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.

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 as dictated by the provisions of the treaty."

7. The Hon'ble Delhi High Court in case of **Commissioner of Income Tax,**

(International Taxation) v. Air India Ltd reported in 456 ITR 117 (Delhi) followed the decision in case of **Danisco India (P) Ltd** (supra) and held as under :

> "6. This Court is in agreement with the view of the Tribunal that the issues of law sought to be raised in the present appeal are squarely covered by the judgment of this Court in Danisco India (P.) Ltd. vs. Union of India [2018] 90 taxmann.com 295 (Delhi)…."

8. The Hon'ble Apex Court has dismissed the SLP arising out of order passed by Delhi High Court in case of **Commissioner of Income Tax (International Taxation) v. Air India Ltd** reported in 456 ITR 139(SC).

9. The Hon'ble Bombay High Court in case of the **Commissioner of Income Tax (International Taxation) Pune v. Serum Institute of India Ltd** (Order dated December 17, 2018 passed in Income Tax

appeal No. 548 of 2016 and allied matters) has followed the decision of Delhi High Court in case of **Danisco India (P) Ltd.** (supra) to hold that the assessee was not liable to deduct tax at the rate of 20% as per the provisions of section 206AA of the Act in view of DTAA read with section 90(2) of the Act.

10. Hon'ble Karnataka High Court in case of **Commissioner of Income Tax, International Taxation v. Wipro Ltd.** reported in (2023) 146 taxmann.com 129 (Karnataka) has also followed the decision in case of **Danisco India (P) Ltd.**(supra) and held that that as per DTAA, maximum deduction shall not exceed 10% which the assessee has deducted and any other interpretation to permit the taxing

authority to raise a demand beyond 10% would be incongruous.

11. In view of above dictum of law and considering the facts of the case, the respondent assessee has deducted the tax at source on payment made to non residents on account of royalty and/or fees for technical services at the rates prescribed in respective DTAAs between India and respective countries of non residents and such rate of tax being lower than rate of 20% as provided under section 206AA of the Act, CIT (Appeals) and the Tribunal have rightly arrived at concurrent findings to the effect that as per section 90(2) of the Act, the provisions of DTAA would override the provisions of the Domestic Act where the provisions of the DTAA are

more beneficial to the assessee. The Tribunal therefore, has rightly affirmed the conclusion arrived at by CIT(Appeals) in deleting the tax demand relatable to difference between 20% and the actual tax rate on which tax was deducted by the respondent assessee in terms of the relevant DTAAS.

12. In view of the foregoing reasons, the appeals fail and are accordingly dismissed. Questions of law are answered in favour of the assessee and against the Revenue. No order as to costs.

(BHARGAV D. KARIA, J)

(PRANAV TRIVEDI,J)

RAGHUNATH R NAIR