$~26

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ ITA 233/2022

COMMISSIONER OF INCOME TAX INTERNATIONAL TAXATION-1, NEW DELHI ..... Appellant

Through: Mr.Puneet Rai, Sr.Standing Counsel.

versus

AIR INDIA LTD. ..... Respondent

Through: None

% Date of Decision: 28th July, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMOHAN, J (Oral):

1. Present Income Tax Appeal has been filed challenging the Order dated 23rd April, 2021 passed by the Income Tax Appellate Tribunal (ITAT) in ITA No. 2260/ DEL/2018, ITA No. 2261/DEL/2018 and ITA No. 2262/DEL/2018 for the Assessment Year 2013-14.

2. Learned counsel for the Appellant states that the ITAT has erred in holding that the provisions of Section 206AA of the Income Tax Act, 1961 ('the Act') cannot override the provisions of the Double Tax Avoidance Agreement without appreciating the fact that the provisions of Section 206AA are *non obstante* provisions and therefore these

provisions override the provisions of other Sections of the Act including Section 90(2) of the Act under which the assessee can avail benefit of the DTAA.

3. He states that the ITAT has erred in holding that the rate of deduction of tax in the case of a non-resident who does not have a PAN and whose case does not lie in the exceptions laid down in Sub-Section 7 of Section 206AA of the Act shall be the rate prescribed in the DTAA if such rate is lower than the rate specified in the relevant provisions of the Act and not as per the provisions of Section 206AA of the Act.

4. He also states that the ITAT has erred in not appreciating that Section 206AA of the Act is in respect of deduction of tax at source in specified circumstances and not in respect of charge of tax and that it is with respect to charge of tax that rates in the DTAA, if more beneficial to the assessee, then the rate specified in the relevant provision of the Act, shall apply. He submits that ITAT has erred in not appreciating that Section 206AA read with Section 2(37A)(iii) of the Act provides that, for deduction of tax in circumstances covered in that Section, the highest of the three rates as given in sub-Section (1) of Section 206AA of the Act shall apply, even where the rate prescribed in DTAA, i.e. "the rate or rates in force" is not such highest rate.

5. A perusal of the paper book reveals that in the present case the ITAT has held that it is not in dispute that the engine is a part of aircraft and cannot be said to be an aircraft and the payment being made for rent of engine can be covered under equipment as per Article 12(4) of the DTAA between India and Netherlands. The ITAT has also held that the ELFC, the lessor, is a foreign company having no permanent

establishment and was a tax resident of Netherland. It is not in dispute that assessee has not deducted this TDS from the payment but has deposited from their own account and has absorbed it as cost. It is also not in dispute that since payee, ELFC, being a foreign company having no PAN, the assessee reported the transaction without PAN in the quarterly TDS statements. The relevant portion of the ITAT judgment is reproduced hereinbelow:-

> *7. "Undisputedly, the dispute in the instant appeals is qua applying the TDS rate at 20.12% or 10% on transfer between ELFC and the assessee for taking an engine on lease under an Agreement. It is also not in dispute that ELFC, the lessor is a foreign company having no Permanent Establishment (PE) and was a tax resident of Netherland. It is also not in dispute that under Article 7 of Double Taxation Avoidance Agreement (DTAA) between Indian and Netherland, the profits of enterprise of a contracting state shall be taxable only in that state unless the enterprise carries on business in the other contracting state through a "permanent establishment" situated therein. It is also not in dispute that engine is a part of aircraft and cannot be said to be an aircraft and the payment being made for rent of engine can be covered under equipment as per section 12(4) of the DTAA between India and Neitherland. It is also not in dispute that assessee has not deducted this TDS from the payment but has deposited from their own account and has absorbed it as cost. It is also not in dispute that since payee, ELFC, being a foreign company having no PAN, the assessee reported the transaction without PAN in the quarterly TDS statements.*
>
> *xxx xxx xxx*
>
> *13.Keeping in view the facts inter alia that engine is a part of aircraft and cannot be said to be an aircraft and payment made for rent of engine are covered under equipment as per Article 12(4) of the DTAA between India and Netherland; that under Article 12(4) of the DTAA between India and Netherland, the term "royalty" does not cover use of, or the right to use equipment itself; that rental of aircraft engine is neither a copyright nor a payment of any*

information; that under Article 12(6) of the DTAA, fee for technical services also does not include the amount paid for services that are ancillary and subsidiary to the rental of ships, aircrafts, containers or other equipment used in connection with the operation of ships or aircrafts in international traffic, the assessee is entitled for beneficial provisions of DTAA.

14.So, following the order passed by the coordinate Bench of the Tribunal in cases of DDIT (IT-II), Pune vs. Serum Institute of India Ltd., DCIT vs. M/S Infosys BPO Ltd. and the judgment of Hon'ble Delhi High Court in case of Danisco India Pvt. Ltd. vs. UOI, we are of the considered view that ld. CIT(A) has erred in holding that in this case, provisions contained u/s 206AA overrides beneficial provisions of DTAA between India and Netherland. Consequently, assessee has rightly deducted the tax @ 10% as per provisions contained under DTAA as section 206AA cannot have overriding effect on DTAA, hence no demand is payable by the assessee. Hence, question framed is decided in favour of the assesee. So, additions made by the AO and confirmed by the ld. CIT(A) to the tune of Rs.73,00,719.77, Rs.80,82,662.74 & Rs.57,05,582.11 for second quarter, third quarter and fourth quarter of FY 2012-13 respectively is ordered to be deleted. Consequently, all the appeals filed by the assessee are allowed."

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)***, wherein it has been 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. Consequently, this Court is of the view that no substantial question of law arises for consideration in the present appeal. Accordingly, the same is dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

JULY 28, 2022
KA