



Global Business Tax Alert Sharp Insights

Deduction of tax at source at 20% under 206AA not applicable when DTAA benefits are available – Intimation under section 200A on this ground is not valid

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Synopsis

The Bangalore Tribunal in the case of Infosys BPO Limited has held that there is no scope of deduction of tax at the rate of 20% as per section 206AA (when assessee does not have tax identification number – PAN) of the Income-tax Act, 1961 (“the Act”) when the benefit under Double Taxation Avoidance Agreement (“DTAA”) is available to the assessee.

The Tribunal also held the Assessing Officer has travelled beyond the jurisdiction of making an adjustment in accordance with the provisions of section 200A of the Act as the application of beneficial provisions as per relevant DTAA is a debatable issue and does not fall in the category of any arithmetical error or incorrect claim apparent from any information in the statement, as per the provisions of section 200A(1) of the Act.

Facts

- Infosys BPO Limited (‘the assessee’) is a company engaged in business of business process outsourcing (BPO).
- Assessee made payment to non-resident on account of royalty and fees for technical services and deducted tax at the rate of 10%/ 10.506% in accordance with the provisions of section 115(A)(1)(b) of the Act.
- The assessee filed statement of deduction of tax at source for various quarters of financial year 2010-11 and 2012-13 in respect of payments made to non-resident.
- The Assessing officer processed the said statement and issued Intimation under section 200A of the Act, stating short deduction of tax on the ground that assessee has not furnished PAN (i.e. tax identification number) of the non-resident and should have withheld tax at the rate of 20% under section 206AA. Further, interest was also charged on such short deduction.
- Aggrieved by the said Intimation, assessee filed an appeal before the Commissioner of Income-tax (Appeals).

The Commissioner of Income-tax (Appeals) rejected the objection regarding scope of 200A of the Act, however decided the matter in favour of the assessee by holding that non-resident recipient of the payment is eligible to the beneficial provisions of DTAA

and accordingly, withholding tax cannot be more than the tax liability as per DTAA

Issues before the Tribunal

The key issues before the Tribunal were as under:

- Whether section 206AA(1) of the Act will be applicable in cases where tax is to be deducted in accordance with the provisions of section 115A of the Act and under the DTAA?
- Whether higher rate of withholding tax as per section 206AA of the Act is warranted if the rates for income chargeable to tax are already prescribed under the Act or DTAA?

Ruling of the Bangalore Tribunal

Applicability of section 206AA when DTAA benefit is available

- The Bangalore Tribunal has held that the tax liability of the recipients could not be more than the rate prescribed under the DTAA or the Act, whichever is lower. The Tribunal in this regard has relied on the decisions of the Pune Tribunal in the case of M/s Serum Institute of India¹ Ltd and Bangalore Tribunal in the case of Bosch Ltd².
- The Tribunal also relied on the Karnataka High Court ruling in Bharti Airtel Ltd³ in which it is held that the obligation of deducting tax at source arises only when there is a sum chargeable under the Act. Withholding tax provisions have to be read with the machinery provisions for computing the tax liability.
- In view of the above, the Tribunal has held that there is no scope of deduction of tax at the rate of 20% as per section 206AA when the benefit under DTAA is available.

Processing of Intimation under section 200A of the Act and applying 20% rate

- The Tribunal has held that the issue of applying the rate of tax at 20% and ignoring the provisions of DTAA is a debatable issue and does not fall in the category of any arithmetical error or incorrect claim apparent from any information in the statement, as per the provisions of section 200A(1) of the Act.

¹ Deputy Director of Income-tax vs Serum Institute of India Ltd. IT Appeal Nos. 792 (Pune) OF 2013 & 1601 TO 1604 (Pune) of 2014

² Bosch Ltd vs ITO International taxation in ITA Nos. 552 to 558(B)/2011

³ M/s Bharti Airtel Ltd vs DCIT in ITA Nos. 158 to 163

- The Tribunal also noted that explanation below sub-section 1 of section 200A which clarifies that in respect of the deduction of tax at source where such rate is not in accordance with the provisions of the Act can be considered as an incorrect claim apparent from the statement. However, it is not a simple case of deduction of tax at source by applying the rate only as per provisions of the Act, when the benefit of DTAA is available to the recipient of the amount in question. Therefore, the question of applying the rate of 20% as provided under section 206AA of the Act requires a long drawn reasoning and finding. Thus, applying the rate of 20% without considering the provisions of DTAA and consequent adjustment while framing the intimation u/s 200A was beyond the scope of the said provision.
- Thus, the Tribunal held that the Assessing Officer has travelled beyond the jurisdiction of making an adjustment in accordance with the provisions of section 200A of the Act.

Comments

The Bangalore Tribunal's decision has held that where the non-resident is entitled for DTAA benefit and the withholding tax is to be done at the rate provided under the DTAA even though the non-resident does not furnish tax identification number (PAN) in India.

There are large number of foreign enterprises which earns royalty and fees for technical services income from India. After insertion of section 206AA, there have been deliberations amongst foreign MNCs around whether DTAA rates could be applied as withholding tax at the rate of 20% has significant impact on cash flows. The present ruling of Bangalore Tribunal (in addition to the Pune Tribunal ruling in case of Serum Institute) may be of help to foreign enterprises (after carrying out thorough analysis).

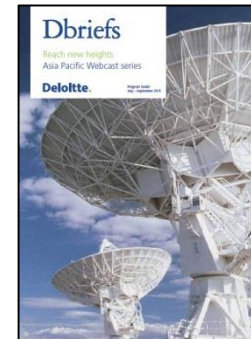
Source: ITAT Bangalore in the case of Deputy Commissioner of Income Tax (Intl taxation) vs M/s Infosys BPO Limited (IT (IT) A No.: 1143B/2013)

Upcoming Dbriefs - Register

India's Finance Act and Recent Developments: The Road Ahead

Tuesday, 28 July, 2:30 PM – 3:30 PM IST

The proposals of the Indian Finance Act 2015 are now in force and there are significant developments for foreign investors. In addition to the amendments in law by the Finance Act, there have been several other developments on the tax front. What are the amendments in law and recent developments you need to be aware of? Stay up to date with the latest international tax developments in India.



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