



Global Business Tax Alert

Sharp Insights

The Special Bench of the Hyderabad Tribunal in the case of Nagarjuna Fertilizers and Chemicals Limited (78 taxmann.com 264) has held that the provisions of the Double Taxation Avoidance Agreement, to the extent they are beneficial to the taxpayer, will override the machinery provisions of section 206AA by virtue of section 90(2) of the Income-tax Act, 1961.

Issue no: GBTA/17/2017

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Background

- Nagarjuna Fertilizers and Chemicals Limited ('the taxpayer'), a Public Limited Company, had made certain payments in the nature of fees for technical services to non-residents during the assessment years 2011-12 and 2012-13.
 - Some payments were made to non-residents in jurisdictions with which India did not have any Double Taxation Avoidance Agreement ('DTAA'). In such cases, the taxpayer deducted tax at source @ 20% under section 206AA as the non-residents did not furnish Permanent Account Number ('PAN').
 - Some payments were made to non-residents in jurisdictions with which India had DTAA. In such cases, even though the non-residents did not furnish PAN, tax was deducted at the lower rates prescribed under the DTAA.
- The TDS returns were processed and the taxpayer was held to be liable to deduct tax at source @ 20% in cases where PAN of the payees were not furnished. Accordingly, intimations under section 200A and demand notices under section 156 of the Income-tax Act, 1961 ('Act') were issued to the taxpayer.
- Against the said intimations, the taxpayer filed an appeal before the Commissioner of Income-tax (Appeals) ['CIT(A)'].
- The CIT(A) relying on the decision of the Bangalore Tribunal in the case of Bosch Limited (115 TTJ 354) held that section 206AA of the Act, starting with a non-obstante clause, will override all other sections of the Act and therefore, the taxpayer either has to obtain and furnish PAN of the deductee or deduct tax at source at the higher rate of 20%.
- There were conflicting decisions of the Bangalore Tribunal in the case of Bosch Limited (supra) and the Pune Tribunal in the case of Serum Institute of India Limited (68 SOT 254) and certain other reasons given in the referral order, a Special Bench was constituted to decide the issue.

Ruling of the Special Bench of the Tribunal

- The Tribunal rejected the argument of the tax department that DTAA does not provide rates for deduction of tax at source and hence the rates under the Act needs to be considered for deduction of tax at source. It held that as per the provisions of section 195(1) read with section 2(37A) of the Act rates in force includes the rate of tax specified in the relevant DTAA.
- Relying on the decision of the Hon'ble Karnataka High Court in the case of Smt. A. Kowsalya Bai (346 ITR 156), the Tribunal held that the provisions of section 206AA are required to be read down so as to make them inapplicable in the cases of concerned non-resident payees who were not under an obligation to obtain the PAN.
- The Tribunal relying on the following decisions held that the legal position is abundantly clear that whenever there is a conflict between the provisions of the DTAA and the Act, the provisions of DTAA will prevail and override even the charging provisions under the Act:
 - Azadi Bachao Andolan (Supreme Court) (263 ITR 706)
 - P.V.A.L. Kulandagan Chettiar (Supreme Court) (267 ITR 654)
 - Sanofi Pasteur Holdings SA (Andhra Pradesh) (354 ITR 316)

- Relying on the Supreme Court decisions in the case of Eli Lilly & Co. (India) (P.) Ltd. (312 ITR 225) and GE India Technology Cen. (P.) Ltd. (327 ITR 456), the machinery provisions dealing with tax deduction at source have to be read in conformity with the charging provisions. The provisions for deduction of tax at source and the charging provisions of the Act form one single integral inseparable code and, therefore, the provisions of TDS cannot be independent of the charging provisions.
- Accordingly, it was held that the DTAA provisions which override the charging provisions of the Act by virtue of section 90(2) would also override the machinery provisions of section 206AA irrespective of non-obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of the DTAA.
- The Tribunal also accepted the contention of the taxpayer that if the statute wanted the provisions of section 206AA to override the provisions of DTAA then it would have specifically amended section 90 by inserting a provision to that effect. The basis for the said argument was that in spite of the provisions of General Anti-Avoidance Rule ('GAAR') having a non-obstante clause, section 90 was amended to provide specifically that notwithstanding the provisions of section 90(2), provisions of GAAR shall apply even if such provisions are not beneficial to the taxpayer.
- The Tribunal rejected the reliance place by the tax department on the Bangalore Tribunal decision of Bosch Limited (115 TTJ 354) stating that the said decision has not discussed the above aspects such as overriding effect of the DTAA provisions or the limited effect of the non-obstante clause contained in section 206AA, etc.
- The Tribunal affirms the rulings of the Pune Tribunal in the case of Serum Institute of India Limited (68 SOT 254) and thus, provides that section 206AA of the Act cannot override the provisions of section 90(2) of the Act.

Conclusion

- The Special Bench of Tribunal after in-depth discussion of various Supreme Court and High Court rulings, concluded that the provisions of the DTAA which are beneficial to the taxpayer shall override the provisions of section 206AA by virtue of section 90(2) of the Act.
- The provisions of section 206AA have been amended with effect from 1 June 2016 and it does not apply to non-residents subject to furnishing of prescribed information to the payer. The above Special Bench ruling will still be relevant for payments made prior to the amendment of section 206AA.
- The Special Bench ruling once again laid down an important principle which has been upheld by various Courts that in case of a conflict between the provisions of the Act and the provisions of DTAA, the provisions of DTAA shall prevail. This is because the Act is a unilateral law whereas the provisions of the DTAA are expressions of sovereign policy of more than one sovereign state, negotiated and entered into a political or diplomatic level and have several explicit, subliminal and unarticulated considerations as their basis.

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