



INCOME TAX ALERT

# N. A. SHAH BULLETIN

March 2017

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### **EXECUTIVE SUMMARY**

- Whenever there is a conflict between the provisions of the Treaty and the provisions of the Domestic Law, the provisions of Treaty will prevail and override even the charging provisions of the Domestic Law.
- If the rate of tax applicable under DTAA is lower than the 20% tax rate prescribed under section 206AA, tax would have to be deducted at such lower rate even if the non-resident payee fails to furnish his PAN.

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**Special Bench of Hyderabad Tribunal in the case of Nagarjuna Fertilizers & Chemicals Ltd v ACIT (ITA No. 1187, 188/ Hyd/ 2014)**

**Facts:**

- i. The assessee company during the A.Y. 2011-12 and A.Y. 2012-13 has made certain payments in the nature of fees for technical services to non-residents.
- ii. Some non-residents were residents of countries with whom India did not have any Double Taxation Avoidance Agreement ("DTAA") and tax at the higher rate of 20% was deducted by the assessee where the payee failed to furnish Permanent Account Number ("PAN") as per provision of section 206AA of the Act.
- iii. Some non-residents were residents of countries with whom India did have DTAA, tax at the lower rate as prescribed in the DTAA was deducted by the assessee even in case the payee did not furnish PAN.
- iv. TDS returns were processed and intimations u/s 200A of the Act and notice of demand u/s 156 of the Act was issued by the Assessing Officer ("AO") treating the assessee as in default for short deduction of tax while making payment to non-residents (who failed to furnish PAN) with whom India has DTAA.
- v. Against the intimations, the assessee made the appeals before the CIT(A).
- vi. The CIT(A) rejected the appeal of the assessee and held that section 206AA starts with a non-obstante clause which overrides all other sections including section 90(2) of the Act. Relying on the decision of Bangalore ITAT in case of Bosch Limited v ITO, CIT(A) held that in the absence of PAN, the assessee was liable to withhold tax at higher rates (i.e. 20%) prescribed u/s 206AA of the Act while making payment to non-residents.
- vii. Aggrieved, the assessee filed an appeal before ITAT.

**Issue:**

Whether provisions of section 206AA of the Act have the overriding effect over all other provisions of the Act including section 90(2) of the Act, and in that case, whether assessee is required to deduct tax at the higher rate

prescribed therein while making payment to non-residents, who do not furnish their PAN?

**Tribunal's Ruling:**

- i. Any person responsible for paying to a non-resident any sum chargeable under the Act, should deduct tax under chapter VII-B as per the rates in force if the payee furnishes his PAN. However, in absence of PAN tax needs to be deducted higher of (i) the rates specified in the relevant provision of the Act; or (ii) the rate or rates in force; or (iii) the rate of @ 20% in accordance with the provision of section 206AA of the Act.
- ii. In case, non-resident belongs to the country with whom India has DTAA, the provisions of the Act to the extent more beneficial to the assessee shall apply.
- iii. Whenever there is a conflict between the provisions of the Treaty and the provisions of the Domestic Law, the provisions of Treaty will prevail and override even the charging provisions of the Domestic Law. In this regard, ITAT relied on the decisions of Hon'ble Supreme Court in the cases of Azadi Bachao Andolan and P.V.A.L. Kalandigan Chettiar as further explained and clarified by Andhra Pradesh High Court in the case of Sanofi Pasteur Holding SA v. Department of Revenue.
- iv. Charging provisions control and override the machinery provisions dealing with tax deduction at source. Similarly, the provisions of DTAA's by virtue of section 90(2) of the Act, to the extent more beneficial to the assessee, override the provisions of Domestic Law. In this regard, ITAT relied on Hon'ble Supreme Court decision in the case of Eli Lilly And Co. (India) P. Limited and G.E. Technology Centre (P) Limited.
- v. In view of the above, ITAT held that the assessee cannot be held liable to deduct tax at higher rates prescribed u/s 206AA (i.e. 20%) while making payment to non-residents of country with whom India has DTAA, in spite of their failure to furnish PAN since the same is more beneficial to the assessee.
- vi. Accordingly, appeals of the assessee were allowed.

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