

Bharath Fritz Werner Ltd (IT(IT)A No. 1360/Bang/2019)

Summary:

One of the truly settled points as far as international taxation is concerned is that, where there is an eligible Double Taxation Avoidance Agreements, between two countries, such DTAA will determine taxability, attribution and rate of taxation for transactions between residents of such treaties and not the local law.

However, some sections such as 206AA have created uncertainties by imposing higher tax rates for situations where payees do not have a permanent Account Number in India.

The caselaw referred to in this newsletter is by the Bangalore Tribunal of the ITAT and reaffirms the principle that:

- As long as there is a Tax Residency Certificate
- and the Assessee wishes to apply the DTAA
- 206AA shall be inoperative and the taxability / withholding provisions of the DTAA will be applicable

Facts of the case:

- During the assessment year ('AY') 2011-12, Bharath Fritz Werner Ltd ("the Company") had accrued expenses towards payment to non-residents.
- Taxes were **not** withheld on the above payments.
- Tax deduction at source ("TDS") proceedings under the provisions¹ of the Income tax Act, 1961 ("the Act") was initiated.
- In the absence of a Permanent account number ("PAN"), the demand was raised at 21.115%².

- On appeal, the Commissioner, held the matter in favour of the taxpayer and hence the Department is on an appeal before the Tribunal.

Tribunal Ruling:

Relying on the special bench decision in the case of Nagarjuna Fertilizers & Chemicals Ltd. Vs. ACIT 78 taxmann.com 264 (Hyderabad-Tribunal) (SB), the Bangalore Tribunal held that **the provisions of Act³ cannot override the tax treaty.**

Our comments:

- This is an additional caselaw which helps the taxpayer in taking the lower rate as per the tax treaty when the non-resident does not have a PAN in India.
- It may be noted that the Government had also relaxed the provisions of the Act⁴ for withholding at a higher rate for certain payments⁵ if the non-resident provides the following information⁶:
 - Name, e-mail ID, contact number, address
 - Tax residency certificate ('TRC')
 - Tax identification number in country or specified territory of his residence
- TRC is compulsory for claiming treaty benefits.
- For payments other than interest, royalty, fees for technical services and payments on transfer of any capital asset also with the TRC, even if there is no PAN, the lower withholding rate as per the treaty can be applied.

¹ Section 201 of the Act

² Section 206AA of the Act

³ Section 206AA of the Act

⁴ Section 206AA of the Act

⁵ interest, royalty, fees for technical services and payments on transfer of any capital asset

⁶ Rule 37BC