IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI

BEFORE SH. R. K. PANDA, ACCOUNTANT MEMBER

ITA No.747/Del/2018
Assessment Year: 2013-14

Avdesh Kumar H. No.-941, Krishna Nagar, Bagu, Ghaziabad PAN AURPK6861G	Vs	DCIT, Circle-1 Ghaziabad
(APPELLANT)		**(RESPONDENT)**

Appellant by	Sh.Vipin Garg, CA Sh Akhilesh Kumar, Advocate
Respondent by	Sh. S.L. Anuragi, Sr. DR

Date of hearing:	19/07/2018
Date of Pronouncement:	30/07/2018

ORDER

PER R.K. PANDA, AM:

1. This appeal filed by the assessee is directed against the order dated 25.10.2017 of the CIT(Appeals), Ghaziabad relating to A. Y. 2013-14.

2. Facts of the case, in brief, are that the assessee is an individual and derives income from salary. He filed his return of income on 21.07.2013 declaring total income of Rs.12,03,582/-. During the course of assessment proceedings the Assessing Officer observed from the bank extract furnished by the assessee that the assessee has received salary outside India (Korea) which has not been declared in the return of income and the assessee has also not claimed any relief U/s 90 of the Income Tax Act. The amount of such salary in Korean currency was 2,27,29,050/-. The above salary of

Korea has been converted into Indian currency, keeping in view of 26AS wherein it was found statement that his employer has deducted TDS on entire income i.e. salary received in India as well as in Korea. The total TDS deducted was Rs.7,68,829/-. However, the Assessing Officer noted that the assessee has shown income from salary of Rs.12,48,198/- and claimed refund of Rs.4,95,702/-. The income corresponding to refund of Rs.4,95,937/-/- was not disclosed in the return of income which was calculated at Rs.17,09.702/-. The Assessing Officer, therefore, added back the salary income of Rs.17,09,702/- earned in Korea as income of the assessee from the impugned assessment year.

3. In appeal the Ld. CIT (A) upheld the action of the Assessing Officer by observing as under :-

> *"5.2 Ground nos. 2 and 4: The appellant has challenged the addition of Rs.17,09,702/- made by the Assessing Officer on account salary received by the appellant in Korea without claiming the benefit section 90 of the IT Act. During the course of appellate proceedings appellant has claimed that for the purpose of employment he had shifted to Korea and during the period relevant the AY 2013-14 he was non-resident in accordance to the provisions of section 6 of the IT Act. Examination of facts reveals that appellant filed ITR for the said assessment year declaring him to be a resident. The appellant neither revised the ITR nor claimed the change of residential status during assessment proceedings. Even the employer of the appellant had deducted TDS on salary paid to the appellant during his stay in Korea which appellant did not declare in his ITR. The copy of passport filed during appellate proceedings as additional evidence does not substantiate the non resident status of the appellant. According to the appellant during the year appellant had stayed out of India for 247 days i.e. more than 182 days. Thus appellant had stayed in India for a period of 91 days during the year, however no details of stay in India during previous 4 years has been given by the appellant in accordance to the provisions of section 6 of IT Act. In view of above facts the contention of the appellant cannot be accepted and the action of the AO in making the above said addition of Rs. 17,09,702/- is upheld, thus these grounds of appeal are dismissed."*

4. Aggrieved with such order Assessing Officer, the assessee is in appeal before the Tribunal.

5. The Ld. Counsel for the assessee submitted that when a citizen of India leaves the country for employment and stays outside India for 182 days or more he becomes a non-resident and income received from services rendered outside India cannot accrue or arise or deemed to accrue or arise in India and cannot be taxed in India notwithstanding the fact that the same is credited in bank in India or TDS has been deducted on such income. He submitted that the Ld. CIT (A) in the instant case has given a finding that the assessee has stayed outside India for 247 days which is more than 182 days. Therefore, regardless of being in India for 365 days or more during four preceding previous years, the assessee cannot be treated as resident of India. Referring to the decision of the Delhi Bench of the Tribunal in the case of Pramod Kumar sapra vs. ITO reported 167 ITD 596 he submitted that the Tribunal in the said decision has held that where stay of the assessee employee of RIL and deputed to Iraq, outside India, was for more than the threshold limit of 182 days, salary income of assessee for previous year could not be held to be taxable because he was not resident in India.

6. Referring to the decision of the Authorities for Advance Ruling vide AAR 839 of 2009 order dated 11.02.2010, he submitted that the AAR in the said decision has held that as per provision of section 6 (1) read with the Explanation an individual who has left India for employment outside India should be treated as resident of India only if he was in India during the relevant period / year for 182 days or more. In other words, if an individual has spent less than 182 days in India during a previous year and was outside India for the purposes of employment, then regardless of his being in India for 365 days or more during 4 preceding previous years, he cannot be treated as a resident of India.

7. Referring to the decision of Delhi Bench of the Tribunal in the case of ADIT Vs. Rajiv Bali in ITA No.1813/Del/2012 order dated 28.06.2012 for the A. Y. 2006-07 he submitted that under identical circumstances the

Tribunal upheld the order of the CIT (A) and the appeal filed by the revenue was dismissed. He accordingly submitted that since the assessee in the instant case was outside India for more than 182 day, therefore, he became a non-resident and not liable to tax on the salary income of Rs.17,09,702/-.

8. The DR on the other hand heavily relied on the orders of the authorities below.

9. I have considered the rival arguments made by both the sides and perused the material available on record. I find on the basis of the Form 26AS the Assessing Officer made addition of Rs.17,09,702/- which is the income earned by the assessee from his foreign employer received outside India on the ground that tax has been deducted by the employer from such salary income and assessee has not disclosed the same in his salary income. It is the submission of the Ld. Counsel for the assessee that since the assessee was outside India for a period of more than 182 days, (247 days to be precise), therefore, he has become a non-resident and therefore, is not liable to tax on such income received from his foreign employer which was received outside India. I find some force in the above argument for the Ld. Counsel for the assessee. It has been held in various decisions that when a citizen of India leaves India for employment abroad and stayed outside India for 182 days or more, then he becomes a non-resident and the income received from services rendered outside India cannot accrue or arise or deemed to accrue or arise in India and cannot be taxed in India notwithstanding the fact that the same is credited in the bank in India or TDS has been deducted on such income.

10. I find the Delhi Bench of the Tribunal in the case of Pramod Kumar Sapra (supra) has held that where the stay of the assessee, an employee of RIL, and deputed to Iraq outside India was for more than threshold 182 days, salary income of assessee for the previous year could not be held to be taxable because he was not resident of India. The Delhi Bench of the

Tribunal in the case of Addl. CIT Vs. Rajiv Bali (supra) under identical circumstances, following various decisions has held that remuneration received by the assessee in respect of the foreign employment is not taxable in India under provision of section 5 (2) (a) of the IT Act, 1961 and such income cannot be taxed in India when the assessee stayed outside India for more than 182 days. The relevant observations of the Tribunal from para 4 onwards read as under :-

"4. The only issue involved is against the deletion of addition of Rs.22,29,385/- made by the Assessing Officer by holding that the remunerations received by the assessee in respect of the employment in Russia and Tanzania are not taxable in India under the provisions of section 5(2)(a) of the Income-tax Act, 1961.

5. We have heard both the sides on this issue. After hearing, we find that during the relevant period, the assessee has stayed in India for 135 days. As per the provisions of section 6(1)(a) and (c) read with Explanation (a) to section 6(1), the period of stay of an individual should be 180 days for being a resident in India. Thus, the status of the assessee was a nonresident. In view of this fact, the income can be taxed only with the provisions of section 5(2)(a) of the Income-tax Act, 1961. The assessee has rendered services outside India and the income has accrued outside India. The only issue is that whether the amount credited in the NRI account of the assessee located in India as per his instructions to the employer can be taxed as per provisions of section 5(1)(a) and (b) of the Income-tax Act, 1961 with regard to scope of income. We have considered all the facts of the case and we find that this issue is covered in favour of the assessee by the decision of Hon'ble ITAT in the case of Ranjit Kumar Bose vs. ITO reported in 18 ITD 230 (ITAT - Calcutta) where it is held as under :-

"14. True, in this case, salary income accrued outside India, but was received in India in the same accounting year. It is clear that salary income could not have been brought to tax on accrual basis for the simple reason that it accrued outside India. The provisions of section 5(2)(a) are subject to section 15 which, inter alia, says that salary is chargeable to income-tax on due basis irrespective of the fact whether it has been received or not. So, salary income is not liable to be taxed in India on recent basis under section 15. We are, therefore, clearly of the view that the salary received in India in this case was not chargeable to income-tax under the head 'Salaries' under section 15(a). As has also been pointed out above, this case does not fall either under clause (b) or clause (c) of section 15."

ITAT, Delhi has also decided in the case of ADIT vs. Nandan Singh Chauhan reported in 2011 -TII-27-ITAT-DEL-NRI as under :-

"We have carefully considered the submissions and perused the record We find is

undisputed that the assessee is NRI and he has received income from foreign company for the services rendered outside India. Just merely because he has instructed the salary to be transferred to his FCNR a/c maintained with HSBC bank, Barakhamba Road, Connaught Place, New Delhi can not bring the amount to taxation under Indian Income Tax Act. This view is clearly supported by the tribunal's decision as above. Hence, respectfully following the precedent as above, we uphold the order of Ld. CIT(A) and decide the issue in favour of the assessee and against the revenue."

Considering the totality of the facts and circumstances and also ITAT decisions, we uphold the order of the CIT (A) and dismiss the revenue's appeal."

11. Since the assessee in the instant case has stayed outside India for more than 182 days, therefore, respectfully following the decisions cited (supra), I set aside the order of the CIT (A) and direct the Assessing Officer to delete the addition.

12. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 30.07.2018.

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

NEHA
Date:- 30.07.2018

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	24.07.2018
Date on which the typed draft is placed before the dictating Member	25.07.2018
Date on which the approved draft comes to the Sr.PS/PS	30.07.2018
Date on which the fair order is placed before the Dictating Member for Pronouncement	30.07.2018
Date on which the fair order comes back to the Sr. PS/ PS	30.07.2018
Date on which the final order is uploaded on the website of ITAT	30.07.2018
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	