आयकर अपीलीय अधिकरण,'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
`C' BENCH : CHENNAI

श्री महावीर सिंह, उपाध्यक्ष

एवं श्री एम बाला गणेश, लेखा सदस्य

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT &
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

आयकर अपील सं./**I.T.A.No. 2233/Chny/2018**

निर्धारण वर्ष /Assessment year :2015-16

Shri Paul Xavier Antony samy, Plot No.1220/1, New No.12/1,First floor,20th Main road, Anna Nagar West, Chennai 600 040. **[PAN AWYPP 7892 H]** **(अपीलार्थी/Appellant)**	**Vs.**	The ITO, International Taxation 2(1), Chennai. **(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Mr.Ashik Shah C.A
प्रत्यर्थी की ओर से /Respondent by	:	M/s.Vijaya Prabha,JCIT,D.R
सुनवाई की तारीख/Date of Hearing	:	27.02.2020
घोषणा की तारीख /Date of Pronouncement	:	28.02.2020

आदेश / O R D E R

PER M. BALAGANESH, ACCOUNTANT MEMBER:

The assessee filed this appeal against the order of the Commissioner of Income Tax (Appeals)-16, Chennai in ITA

No.62/C.I.T(A)-16/2015-16, dated 07.05.2018 for the assessment year 2015-16.

2. The assessee has raised the following grounds for our consideration.

1. That on the facts and circumstances of the case & in law, ld. AO has erred in determining the assessed income of INR 4,985,450, as against returned income of INR 1,065,111 thereby resulting in non-issuance of refund amounting to INR 1,224,183, claimed in the return of income filed by the appellant.
2. That the IA. AO has erred in ignoring the applicability of Article 15(1) of the India-Australia DTAA by taxing in India the salary income earned in Australia by a Resident of Australia and a Non Resident of India merely because tile same has been received in India
3. That the Ld. AO has erred in ignoring the provisions of section 15 read with section 5(2) and section 9(1)(ii) of the Act, which clearly provides taxability of salary on the basis of accrual and not on the basis of receipt of salary income, Accordingly, the AO has erred in not appreciating that under provisions of Income-tax Act, 1961, salary received for services rendered in Australia will be taxable in Australia only and hence not taxable in India.
4. The Ld. AO has erred in invoking provision of clause (1) of Article of India-Australia DTAA, which deals in elimination of double taxation in Australia. Since the same is not applicable as Appellant was Resident of Australia which has primary right to tax the income on source basis,
5. The Ld. AO has erred in invoking provisions of clause (4) of Article-24 of India-Australia DTAA, as the same deals with elimination of Double taxation for a resident of India and since the appellant in Non-Resident of India, the same cannot be invoked.
The above grounds were argued before the Honourable CIT(A)-i6 which were dismissed and consequently relief was not granted.

Though the assessee has raised several grounds of appeal, the only effective issue to be decided in this appeal is as to whether

salary received by the assessee from Australia entity for the period 31.08.2014 to 31.03.2015 could be subjected to tax in India in the facts and circumstances of the case.

3. We have heard the rival submissions and perused the material available on record. We find that the following facts are undisputed and indisputable:-

a) The assessee is an individual, employed in M/s.General Electric International Inc. in India (GEII India).

b) The assessee was seconded by (GEII India) on overseas assignment for the purpose of employment with M/s.General Electric International Inc. in Australia (GEII Australia) during the year under consideration.

c) The assessee stayed in India for 151 days and left India for employment on 30.08.2014.

d) Accordingly, assessee qualified as a Non-Resident of India in accordance of Explantion-1(a) of section 6(1) of the Act.

e) The return of income was filed by the assessee in the capacity of non-resident for the assessment year 2014-15 admitting

the salary income received by him only in India for the period 01.04.2014 to 30.08.2014.

e) The salary income received in Australia was claimed as not taxable in India in view of the fact that services were rendered by the assessee in Australia, but monies for the same were paid by (GEII India) in the bank account of the assessee in India.

f) The salaries for the period 31.08.2014 to 31.03.2015 were paid by (GEII India) to the assessee by crediting the bank account of the assessee in India after duly subjecting the same to deduction of tax at source. Hence, the said salary is included in Form No.16 of the assessee.

g) The salary paid to the assessee from 31.08.2014 to 31.03.2015 was later reimbursed to (GEII India) by GEII Australia on ground that the said salary cost to employee should be absorbed as expenditure only in the books of GEII Australia.

Now, the short point that arises for our consideration is that the taxability of salary received for the period 31.08.2014 to

31.03.2015 in India in respect of services rendered by him in Australia. There is no dispute that services were rendered by the assessee in Australia during the relevant period as is evident from the facts narrated above. There is no dispute that the assessee has become a resident of Australia as per the Australian Tax Laws and had duly filed his tax returns for Australia Calendar Year 2014-15 offering the salary received for the period 31.08.2014 to 31.03.2015 in Australia. A copy of the said Australian tax returns were duly furnished by the assessee before the lower authorities. We find that the assessee had also furnished tax residency certificate of Australia before the lower authorities. We find that since the salary for the relevant period i.e. 31.08.2014 to 31.03.2015 was received by the assessee in India, the lower authorities had brought to tax the said salary in terms of section 5(2)(a) of the Act. For the sake of convenience, the said provision is reproduced herein under:-

Scope of total income.

5. (2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

4.1 We find that the provisions of Section 5(2) stipulate that the said provision is subjected to the provisions of this Act. As per the Act, the salary income is chargeable to tax as per Section 15. The regular salary paid to any assessee is chargeable to tax in terms of Section 15(a) of the Act. For the sake of convenience, the said provision is reproduced herein under:-

Salaries.

15. The following income shall be chargeable to income-tax under the head "Salaries"—

(a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;

4.2 From the reading of aforesaid provisions of Section 15(a) of the Act, it could be concluded that the salary is always taxable on accrual basis. Even as per Provisions of Section 9(1)(ii) which states that income deemed to accrue or arise in India, salary income could be deemed to accrue or arise in India, only if it is earned in India in respect of services rendered in India. Provisions of Section 9(1)(ii) of the Act read with Explanation to clause(a) is very clear in this regard.

5. We find the assessee had claimed exemption under Article 15(1) of India-Australia DTAA for claiming the salary income received for the period 31.08.2014 to 31.03.2015 as not

taxable in India in the sum of ₹.39,20,337/-. For the sake of convenience, the said Article 15 of India-Australia DTAA is reproduced herein under:-

ARTICLE 15
DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 16, 17, 18, 19 and 20, salaries, wages and other similar remuneration derived by an individual who is a resident of one of the Contracting States in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.

It was also to be pertinent to reproduce Article-1 of India-Australia Treaty, which is as under:-

"Article-1

PERSONAL SCOPE

This Agreement shall apply to persons who are residents of one or both of the Contracting States."

From the combined reading of Article-1 and Article-15 of India-Australia Treaty, it could be safely concluded that the Treaty benefit shall be applicable to persons, who are residents of both India as well as Australia. Hence, the contention of the Revenue that the assessee being a non-resident and hence treaty benefit

cannot be extended to the assessee, is incorrect. As per Article-15 of India-Australia Treaty, it has been categorically mentioned that salary income shall be taxable only in Australia, in case of an individual, who is a resident of Australia. In the instant case as narrated above, there is absolutely no dispute that assessee herein is a resident of Australia and non-resident of India during the year under consideration. Hence, assessee woud be entitled to India-Australia Treaty wherein as per Article-15, salary income of resident of Australia is taxable only in Australia. Accordingly we hold that the salary earned by the assessee in respect of services rendered in Australia for the period 31.08.2014 to 31.03.2015 is taxable only in Australia (this is also duly offered to tax by the assessee in Australia as evident from Australian Tax return filed by the assessee) and not in India.

6. We find that the Ld. D.R placed heavy reliance on the decision of Co-ordinate Bench of Chennai Tribunal in the case of SwaminathanRavichandranVs.ITO International Taxation in ITA No. No.2991/Mds/2016 dated 05.08.2016 wherein it was held that as per Article 23 of DTAA between India and China, the said Article allowed exemption only to resident Indian and assessee being a resident

of China and non resident in India is not eligible to claim relief under Article 15(1) of DTAA between India and China. But we find that Article-1 of India-Australia DTAA is very clear and categorical that the said treaty shall apply to persons who are residents of one or both of the contracting states. Moreover, in the case before Chennai Tribunal relied upon by the Ld. D.R., we find that the Tribunal had only disallowed the treaty relief on ground that the assessee was claiming foreign tax credit relief for taxes paid on doubly taxed income, which is applicable in the case of resident of India. However, in the case of instant assessee before us, the assessee has not claimed any relief of tax paid on doubly taxed income. Hence, the said decision is factually distinguishable with that of the assessee.

7. We also find that the issue in dispute is also covered in favour of assessee by the Hon'ble Karanataka High Court in the case of DIT(International Taxation) Vs. Prahlad Vijendra Rao reported in 198 Taxman 551 (Karnataka); the decision of Hon'ble Bombay High in the case of C.I.T Vs. Avtar Singh Wadhwan (2001) 247 ITR 260(Bom); the decision of Hon'ble Calcutta High Court in the case of Sumanabandyopadhyay & Anr Vs.Deputy

Director of Income Tax(International Taxation) in TS-281-H.C-2017(Cal) and also by CBDT Circular NO.13/2017 dated 11.04.2017.

8. In view of the aforesaid elaborate observations in the facts and circumstances of the case and also respectfully following the aforesaid decisions of the High Court together with CBDT Circular No.13/2017 dated 11.04.2017, the grounds raised by the assessee are hereby allowed.

9. In the result, the appeal of the assessee is allowed.

Order pronounced in the open court after conclusion of hearing on 28th February, 2020, at Chennai.

Sd/- Sd/-

(महावीर सिंह) एम बाला गणेश)
(MAHAVIR SINGH) **(M. BALAGANESH)**
उपाध्यक्ष**/Vice President** **लेखा सदस्य /Accountant Member**

चेन्नई/Chennai
दिनांक/Dated: 28th February,2020.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant 3. आयकर आयुक्त (अपील)/CIT(A) 5. विभागीय प्रतिनिधि/DR
2. प्रत्यर्थी/Respondent 4. आयकर आयुक्त/CIT 6. गार्ड फाईल/GF