IN THE INCOME TAX APPELLATE TRIBUNAL "A"
(Virtual Court Hearing) BENCH KOLKATA

Before Shri Sanjay Garg, Judicial Member and Shri Rajesh Kumar, Accountant Member

I.T.A. No.1914/Kol/2019
Assessment Year: 2016-17

Rajat Dhara..……………………….……Appellant
C/o Subash Agarwal &
Associates, Advocates,
Siddha Gibson,
1, Gibson Lane, Suite 213,
2nd Floor, Kolkata-700069.
[PAN: ABQPD1200L]

vs.

DCIT (I.T), Circle-2(1), Kolkata...……….…..........….........……...…..…..Respondent

Appearances by:
Shri Siddharth Agarwal, Advocate, appeared on behalf of the appellant.
Smt. Ranu Biswas, Addl. CIT-DR, appeared on behalf of the Respondent.

Date of concluding the hearing : December 21, 2021
Date of pronouncing the order : March 02, 2022

Hearing through Video Conferencing

ORDER

Per Sanjay Garg, Judicial Member:

The present appeal has been preferred by the assessee against the order dated 24.06.2019 of the Commissioner of Income Tax (Appeals)-22, Kolkata [hereinafter referred to as 'CIT(A)'] passed u/s 250 of the Income Tax Act (hereinafter referred to as the 'Act'). The assessee in this appeal has taken the following grounds of appeal:

> *"1. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in upholding the order of the A.O. holding that the appellant assessee qualified as resident but ordinarily resident in India and DTAA with the United States of America was not applicable to the assessee in respect of his global income ignoring the provisions of Section 90 of the Act.*
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> *2. a. For that on the facts and in the circumstances of the case, the Ld. CIT(A) was not justified in confirming the addition of Rs. 42,58,111/- being salary earned in USA while residing in that country as fully taxable in India though as per Article 4(1) & 4(2) of the DTAA, the assessee qualified as a resident of USA and therefore income earned as salary should have been taxed there.*
>
> *b. For that Ld. CIT(A) ought to have held that even otherwise, the salary amounting to Rs.42,58, 111/- earned by the assessee in the USA was not taxable in India.*

3. For that on the facts and in the circumstances of the case, the Ld. CIT(A) erred in confirming an addition of Rs.4,10,558/-, being dividend earned in the USA, which ought not to be included in the income of the assessee pursuant to the provisions of Section 90 of the Act read with DTAA with USA.

4. For that the appellant craves to add, alter or delete all or any of the grounds of appeal."

2. **Ground Nos.1 & 2** : The brief facts relevant to the issue raised vide Ground No.1 & 2 are that the assessee was qualified as resident and ordinarily resident in India for the assessment year under consideration and filed his return of income of Rs.57,07,250/-. In the course of assessment proceedings, the Assessing Officer noticed that apart from the aforesaid income, the assessee had received salary income of Rs.42,58,111/- from Stanadyne LLC, USA and claimed it exemption under Article 16(1) of the Double Taxation Avoidance Agreement (DTAA) between India and USA. The Assessing Officer observed that since the assessee had conceded that he was physically present in India for more than 182 days (i.e. 200 days) during the financial year 2015-16 and for more than 729 days (i.e 1044 days) in the seven tax years (2008-09 to 2014-15) immediately preceding the financial year 2015-16, hence, the assessee qualified as resident and ordinarily resident of India during the tax year in question. The Assessing Officer thereafter relied the provisions of section 5 of the Income Tax Act, relevant part of which is reproduced as under:

"Scope of total income.
5. *(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a 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
(b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or
(c) accrues or arises to him outside India during such year........."

The Assessing Officer relied upon clause C of section 5 and held that the global income of any individual resident is taxable in accordance with section 5(1) of the Income Tax Act. Hence, the salary received by the assessee from his foreign employer was chargeable to tax in India. The Assessing Officer placing reliance on the provisions of section 90 of the Income Tax Act held that since the assessee qualified as resident and

ordinarily resident in India for the year under consideration, therefore, DTAA was not applicable to the assessee in respect of salary income earned in USA.

2.1 Being aggrieved by the above action of the Assessing Officer, the assessee preferred an appeal before the CIT(A) and reiterated that in view of Article 16 of the DTAA, the salary income of the assessee was taxable in USA and not in India. However, the Ld. CIT(A) did not agree with the contention of the assessee and confirmed the addition so made by the Assessing Officer observing as under:

> *"3. After giving a thoughtful consideration to the facts of the case and the provisions of law, I am unable to agree with the contentions of the Ld. AR of the appellant. From the facts on record it is clearly discernible that the appellant was a resident and ordinary resident of India within the meaning of Section 6 of the Act. It is further noted that the sources of income of the appellant was far greater in India in comparison to USA in as much as the taxable income derived in India was in excess of Rs.52 lacs during the year in comparison to Rs.48 lacs earned in USA. On these facts therefore I am of the considered view that, both from the point of view of the period of stay in the Country as well as the relative economic nexus with the Country, the appellant individual was a tax resident of India. In that view of the matter I am of the considered view that both the salary income as well as dividend earned by the appellant individual was taxable in India in terms of Section 5 read with Section 6 of the Income-tax Act, 1961. I therefore agree with the Ld. AO that the Double taxation Avoidance Agreement between India & USA was not applicable in the given facts of the present case. I thus do not find any infirmity whatsoever in the order of the Ld. AO."*

Being aggrieved by the above order of the ld. CIT(A), the assessee has come in appeal before us.

2.2 We have heard the contentions of the ld. representatives of both the parties and also gone through the records. Before proceeding further, it will be relevant to reproduce the relevant provisions of section 90 of the Act:

> **"DOUBLE TAXATION RELIEF**
>
> ***[Agreement with foreign countries or specified territories.***
>
> *90. (1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—*
>
> *(a) for the granting of relief in respect of—*
>
> *(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or*
>
> *(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or*

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.........”

A perusal of the above reproduced provisions of section 90 of the Act would reveal that the Central Government may enter into an agreement (DTAA) with Government of any country outside India for grant of relief in respect of income tax chargeable under the Act and under the corresponding law in force in that other country. Sub-Section (2) to section 90 provides that where the Central Government has entered into an agreement (DTAA) with the Government of any other country, then in relation to the assessee to whom such agreement applies in, the provisions of the Act shall apply to the extent they are more beneficial to the assessee. So, as per the provisions of section 90 of the Act, the assessee have an option to choose either the DTAA or the provisions of the Income Tax whichever is beneficial to him for the purpose of taxation of his income. In this case, the assessee, right from the very beginning, has claimed that since Article 16 of the DTAA is applicable to him, therefore, the salary income earned by him during the stay in USA was chargeable in that country and not in India. Article 16 of the DTAA for the sake of ready reference is reproduced as under:

“ARTICLE 16 - Dependent personal services –

1. Subject to the provisions of Articles 17 (Directors’ Fees), 18 (Income Earned by Entertainers and Athletes), 19 (Remuneration and Pensions in respect of Government Service), 20 (Private Pensions, Annuities, Alimony and Child Support), 21 (Payments received by Students and Apprentices) and 22 (Payments received by Professors, Teachers and Research Scholars), salaries, wages and other similar remuneration derived by a resident of a Contracting State 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 therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if :

(a)	*the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year ;*
(b)	*the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State ; and*
(c)	*the remuneration is not borne by a permanent establishment or a fixed base or a trade or business which the employer has in the other State.*

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operating in international traffic by an enterprise of a Contracting State may be taxed in that State."

As per the aforesaid Article 16 of the DTAA with USA, the salary income of a resident earned by him in other State shall be taxable in that State if such a resident is present in that other State for a period not exceeding 183 days in the relevant taxable year. The case of the assessee is that his total stay during the year was 165 days only, therefore, the salary income earned by him as per the aforesaid provisions of Article 16 was taxable in USA and not in India.

This claim of the assessee has not been rebutted or denied by any of the lower authorities. Both the lower authorities have simply relied upon the provisions of section 5 and section 90 to state that since the assessee was a resident and ordinarily resident in India during the year, therefore, the provisions of DTAA would not apply in the case of the assessee. However, a perusal of section 90 read with Article 16 of the DTAA would show that section 90 did not bar in any manner the operation of the relevant provision of DTAA in respect of income earned by the assessee in other country, with whom the Central Government has entered into a DTAA. In view of this, the impugned order of the ld. CIT(A) on this issue is not sustainable and the same is accordingly set aside. The additions made by the Assessing Officer on this issue are accordingly ordered to be deleted.

3. **Ground No.3:** Vide Ground No.3, the assessee has agitated confirmation of addition made by the Assessing Officer in respect of dividend income earned by the assessee in USA. The ld. counsel for the assessee has submitted that as per instruction of his client, he does not press Ground no.3. Ground no.3 is, therefore, dismissed as not pressed.

In view of the above discussion, the appeal of the assessee is treated as partly allowed.

4. In the result, the appeal of the assessee stands partly allowed.

Kolkata, the 2nd March, 2022.

Sd/-	Sd/-
[Rajesh Kumar]	**[Sanjay Garg]**
Accountant Member	**Judicial Member**

Dated: 02.03.2022.
RS

Copy of the order forwarded to:
1. Rajat Dhara
2. DCIT (I.T), Circle-2(1), Kolkata
3. CIT(A)-
4. CIT- ,
5. CIT(DR),

//True copy//

By order

Assistant Registrar, Kolkata Benches