आयकर अपीलीय अधिकरण "डी"न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
"D" BENCH, CHENNAI

माननीय श्री महावीरसिंह, उपाध्यक्ष एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VP AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

1. आयकरअपीलसं./**IT(TP)A No. 51/Chny/2018**
(**निर्धारणवर्ष /** Assessment Year: 2015-16)

Shri Ramesh Kumar AE, 601, Vedanshi Apartments 18, 100 Ft.Road, Velachery, Chennai-600 042.	**बनाम**/ Vs.	**ITO** International Taxation-2(1) Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.**AERPR-0904-D**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

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2. आयकरअपीलसं./**ITA No. 2731/Chny/2018**
(**निर्धारणवर्ष /** Assessment Year: 2015-16)

Shri Kalyana Murugan Arumugam No.1/44, Pillaiyar Koil Street, Ariyur, Vellore-632 055.	**बनाम**/ Vs.	**ITO** International Taxation-1(2) Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.**ARRPK-9359-G**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

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3. आयकरअपीलसं./**IT(TP)A No. 53/Chny/2018**
(**निर्धारणवर्ष /** Assessment Year: 2015-16)

Shri Sundarrajan Venkatesan GRI House, 2nd floor,New No.12, Old No.112,Dr.Ranga Road, Mylapore, Chennai-600 004.	**बनाम**/ Vs.	**ITO** International Taxation-2(2) Chennai.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.**AJRPS-6986-K**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

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4. आयकरअपीलसं./**IT(TP)A No. 52/Chny/2018**
(**निर्धारणवर्ष /** Assessment Year: 2015-16)

Sriram Prabhu Krishnamoorthy 5, 3rd Cross Street, Jayanagar, Tambaram Sanatorium, Chennai-600 047.	**बनाम**/ Vs.	**ITO** International Taxation-2(1) Chennai.

स्थायीलेखासं./जीआइआरसं./PAN/GIR No.**ALHPP-3144-Q**		
(□ पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri S.P.Chidambaram(Advocate) – Ld.AR
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri Suresh Guduri(JCIT) – Ld.Sr. DR

सुनवाईकीतारीख**/Date of Hearing**	:	18-07-2023
घोषणाकीतारीख/**Date of Pronouncement**	:	11-08-2023

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. The facts as well as issues in aforesaid appeals by different assessee for Assessment Year (AY) 2015-16 are quite identical. It is admitted fact that adjudication in any appeal would apply to the other appeals also. For the purpose of adjudication, IT(TP)A No.51/Chny/2018 in the case of Shri Ramesh Kumar AE has been taken as the lead appeal. This appeal arises out of the order of learned Commissioner of Income Tax (Appeals)-16, Chennai [CIT(A)] dated 26-07-2018 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143(3) of the Act on 29-12-2017. The grounds taken by the assessee read as under:

"1.The order of the Commissioner of Income Tax (Appeals) ['CIT(A)'] is contrary to law, facts and circumstances of the case.

2.Disallowance of claim of exemption under Article 15(1) of the Double Taxation Avoidance Agreement between India and China ('DTAA'):

2.1 The learned CIT (A) has erred in denying exemption under Article 15(1) of the DTAA between India and China for salary income received by the appellant (who qualified as a non-resident in India and a resident in China for the period January to March 2015) amounting to INR 20,78,092/- for exercising employment in China.

2.2 The learned CIT (A) failed to appreciate that under Article 15(1) of the DTAA between India and China, exclusive right to tax income from salary is attached to the state in which employment is exercised and in the instant case, the appellant was physically present in China and exercised the employment there.

2.3The learned CIT(A) erred in applying Article 23 of the DTAA for a case squarely covered by Article 15(1). Without appreciating that Article 23 of the DTAA comes into play only when the income is taxable in both the countries, i.e. in India and China, whereas in the instant case, India has no right to tax income from salary and therefore Article 23 is not applicable.
2.4The learned CIT (A) failed to appreciate that section 5(2) cannot be read and applied in isolation. It has to be read with the related provisions of the Act before taxability or otherwise is determined. In the appellant's case, section 5(2) has to be read with section 9 of the Act, in which case income of the appellant will not be taxable in India. The CIT (A) failed to appreciate that under section 9(1)(ii) of the Act, income from salary is taxable in India if it is earned in India. It is submitted that if service is not rendered in India then income from salary is not subject to tax under the Act.
2.5The learned CIT (A) ought to have appreciated that the employment cost reimbursement was on a cost to cost basis and as such there is no income taxable in India.
2.6The learned CIT (A) failed to appreciate the fact that the appellant was working solely for Ford China, was economically associated with Ford China alone during the assignment.
3.The learned CIT (A) erred in concluding without any basis that Ford India will have a direct benefit in the form of service fee from Ford China for the work done by the appellant. Further, the CIT(A) erred in concluding that the above resulted in an employer-employee relationship of the appellant with Ford India."

The assessee has also filed additional grounds of appeal to assail charging of interest u/s 234B and 234C. As is evident, the sole grievance of the assessee is that exemption under Article 15(1) of Double Taxation Avoidance Agreement (DTAA) between India and China has been denied to the assessee for salary earned for services rendered in China.

2. The Ld. AR advanced arguments and submitted that the aforesaid income has already been offered to tax in China and taxes has been paid in China by the employer M/s Ford Motor (China) Co. Ltd. The Ld. AR also submitted that the assessee has not claimed any foreign tax credit in either of the jurisdiction. The Ld. Sr. DR, on the other hand, supported the orders of lower authorities. Having heard rival submissions and upon perusal of case records, our adjudication would be as under.

The assessee is assessed as non-resident in this year. He has been employed with M/s Ford Motor Private Ltd. in India.

Proceedings before lower authorities

3.1 The assessee filed original return of income admitting income of Rs.98.68 Lacs. However, the return was revised at Rs.69.38 Lacs and refund of Rs.9.10 Lacs was claimed. The amount shown by his employer in Form 16 was Rs.99.20 Lacs. Accordingly Ld. AO held an opinion that this amount should be taxable instead of Rs.69.69 Lacs as offered by the assessee.

3.2 It transpired that the assessee was employed with M/s Ford Motor Private Ltd. in India. He was sent to China on an assignment from August, 2014 onwards. The salary continued to be paid in India by the employer. The assessee submitted that he being tax resident of China, the salary income was taxable in China only and the same has been offered to tax in China. Further, he being non-resident, the salary received in India for work performed in China would be exempt in India as per Article 15(1) of DTAA between India and China. The assessee submitted that salary is taxable in India only if it accrues in India and salary is considered to be accrued where the employment is exercised.

3.3 However, Ld. AO held that the assessee did not shift his employer and the assessee continued to be on the payroll of its employer. There existed employer-employee relationship. Therefore, the income so received would be chargeable to tax in India u/s 15 of the Act which provides that any salary due from an employer would be chargeable to tax under the head salaries. Further, in terms of the provisions of Sec.5(2), salary received by non-resident in India would be taxable in

India. Therefore, the assessee's submissions were rejected. It was, however, held that the assessee could avail tax credit on the tax payable in China as per Article 23 of DTAA. The assessee was non-resident and therefore, he was not eligible to claim benefit of DTAA. Accordingly, the income as reflected in Form 16 was brought to tax. The Ld. CIT(A) confirmed the stand of Ld. AO against which the assessee is in further appeal before us.

Our findings and Adjudication

4. We find that similar issue, on similar facts, has been decided by us in our decision titled as **Shri Kanagaraj Shanmugam vs. ITO (ITA No.2936/Chny/2018 dated 07.09.2022)** as under: -

> **Our findings and Adjudication**
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> 5. From the fact it emerges that the assessee has stayed in India for 63 days during this year and his status, as per law, is non-resident. The assessee has worked in India for 21 days and offered proportionate salary to that extent to tax. For remaining period, the work has been performed in UK though the salary has been received in India from existing employer. It is also a fact on record that this salary, for work performed in UK, has been offered to tax in UK which is evident from Tax Returns filed in UK. The assessee submit the as per Article 16(1) of DTAA, this income would be taxable in UK only. Alternatively, the assessee relies on the provisions of Sec.15 read with Sec.5(2) and Sec.9(1)(ii) which provides for taxability of salary on accrual basis and not on receipt basis. However, Ld. CIT(A) has held that the assessee would not be eligible for the benefit of DTAA since DTAA relief is to be given by resident country which is UK in the present case.
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> 6. We find that an identical issue has been addressed by coordinate bench of Chennai Tribunal in **Shri Paul Xavier Antonysamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020).** In this decision, the bench has held that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), 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. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016) was held to be factually distinguished on the ground that in that case the assessee was claiming

> foreign tax credit relief for taxes paid on doubly taxed income which was not the case in that appeal. In para-7, the bench found the issue to be covered in assessee's favor by various judicial precedents including the decision of Hon'ble Karnataka High Court in DIT V/s Prahlad Vijendra Rao (198 Taxman 551); decision of Hon'ble Bombay High Court in CIT V/s Avtar Singh Wadhawan (247 ITR 260); decision of Hon'ble Calcutta High Court in Sumanabandyopadhyay V/s DDIT (TS-281-HC-2017) as well as CBDT Circular No.13/2017 dated 11/04/2017.
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> 7. We find that facts are pari-materia the same before us and the ratio of this decision is squarely applicable to the present case. Therefore, we would hold that salary income as accrued to the assessee for work performed in UK would not be taxable in India. However, the salary received for work performed in India would be taxable in India. Accordingly, we direct Ld. AO to re-compute the income of the assessee. The above proposition is also supported by the fact that upon perusal of UK tax return, it could be seen that the assessee has offered earnings from employment for£24184 on net basis which has been tax grossed up for £6046. This is in view of the fact that OFSSL has paid provisional payment of £9062 to UK revenue authorities since the employer has undertaken to meet the UK income tax liability arising from employee's earnings in UK. Accordingly, the assessee has claimed refund of £3016. On the basis of the above, it could be seen that separate tax payment has been made by OFSSL to UK revenue authorities to discharge the tax liability of the assessee in that country.
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> 8. The assessee has also placed on record Tax Residency Certificate (Page nos. 192-193 of paper book). As per this certificate, the assessee has claimed relief for foreign earning not taxable in UK for £7952. The same shall be considered by Ld. AO while computing the quantum of income taxable in India as directed by us in preceding para-7.
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> 9.The appeal stands partly allowed in terms of our above order.

In the above decision, we have held that salary income as accrued to the assessee for work performed in a foreign jurisdiction would not be taxable in India whereas the salary received for work performed in India would be taxable in India. The benefit of DTAA would be available to the assessee as per the decision of coordinate bench of Chennai Tribunal in **Shri Paul Xavier Antonysamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020)** wherein it was held by the bench that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), 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. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of **Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016)** was held to be factually distinguishable.

5. We find that similar fact exists before us in the present appeal. The proportionate salary for services rendered in India has already been offered to tax in India whereas the balance salary has been offered to tax in China. The salary reconciliation statement has been placed by Ld. AR on record. The assessee has not claimed any foreign tax credit in any of the jurisdiction. The China tax has been paid by the foreign entity i.e., M/s Ford Motor (China) Co. Ltd. and the assessee has offered salary income on gross basis.

6. The Ld. Sr. DR has relied on the decision of SMC bench in the case of **Dennis Rozario (ITA No.298/Mds/2016 dated 06.01.2017)** as well as another decision of SMC bench in **Shri M.Ramesh Kumar (ITA No.1979/Mds/2017 dated 16.11.2017)** which has taken a view against the assessee. However, both these decisions have been rendered by SMC bench and therefore, we are inclined to follow our own decision as cited above which has been rendered by coordinate bench. The Ld. AO is directed to re-compute the income of the assessee. The substantiative

grounds raised by the assessee stand allowed which render additional grounds of appeal as infructuous. In the result, the appeal of the assessee is allowed in terms of our above order.

7. Since the facts in other appeals are identical, our adjudication as above shall mutatis mutandis apply to the other three appeals also.

8. In the result, all appeals stand allowed in terms of our above order.

Order pronounced on 11th August, 2023

Sd/-	***Sd/-***
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपाध्यक्ष /VICE PRESIDENT	**लेखासदस्य / ACCOUNTANT MEMBER**

चेन्नई Chennai; दिनांक Dated : 11-08-2023
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant2. प्रत्यर्थी/Respondent 3. आयकर आयुक्त/CIT4. विभागीय प्रतिनिधि/DR 5.गार्डफाईल/GF