<u>आयकर अपीलीय अधिकरण, कोलकाता पीठ "एसएमसी, कोलकाता</u>

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH: KOLKATA

श्री राजेश कुमार, लेखा सदस्य के समक्ष

[Before Shri Rajesh Kumar, Accountant Member]

I.T.A. No. 1127/Kol/2023
Assessment Year: 2014-15

Shri Arindam Dasgupta (PAN: AFDPD 6536 L)	Vs.	ACIT, IT-1(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	21.12.2023
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	20.02.2024
For the Appellant/ निर्धारिती की ओर से	Shri Nageswar Rao, Sr. Counsel Shri Parth, Advocate
For the Respondent/ राजस्व की ओर से	Shri Vijay Kumar, Addl. CIT

<u>ORDER / आदेश</u>

<u>Per Rajesh Kumar, AM:</u>

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-22, Kolkata (hereinafter referred to as the Ld. CIT(A)"] dated 12.04.2023 for the AY 2014-15.

2. The only issue raised by the assessee in the various grounds of appeal is against the order of Ld. CIT(A) confirming the order of AO wherein salary receipt including foreign assignment allowance amounting to Rs. 26,10,209/- for services rendered outside India was to tax under the Act, 1961 by not allowing exemption claimed

under Article 16(1) of India-UK Double Taxation Avoidance Agreement and further enhancing the income by Rs. 24,28,806/-.

3. Facts in brief are that the assessee is a non-resident employee with IBM India Pvt. Ltd. and was sent on short term foreign assignment to United Kingdom for relevant period. The assessee was in receipt of total salary income amounting to Rs. 50,39,015/- from his employer on which taxes were deducted at source and withheld in India. Out of the salary income of Rs. 50,39,015/-, an amount of Rs. 26,10,209/- was received by the assessee outside India and the remaining salary income of Rs. 24,28,806/- was received by the assessee in India. The assessee claimed the relief u/s 5(2)(b) of the Act amounting to Rs. 26,10,209/- and further relief of Rs. 24,28,806/- under Article 16 of India-UK Double Taxation Avoidance Agreement (DTAA). The assessee filed return of income declaring total income of Rs. 40,090/- by claiming refund of Rs. 15,73,960/-. According to AO, since the assessee has not derived valid tax residency certificate from United kingdom Tax Authorities, the assessee's claim of Rs. 24,28,806/- was accordingly disallowed and added to the income of the assessee thereby assessing the income at Rs. 25,96,920/- vide order dated 19.12.2016 passed u/s 143(3) of the Act.

4. In the appellate proceedings, the Ld. CIT(A) not only dismissed the appeal of the assessee but also enhanced the assessment after issuing show cause notice dated 3.3.2023 calling upon the assessee as why the amount of Rs. 26,10,209/- representing his salary received directly in the UK as foreign allowance should not be added to the total salary income which remained non-complied and finally the income was enhanced to Rs. 56,27,490/-.

5. After hearing the rival contentions and perusing the material on record, we find that undisputedly the assessee is a non-resident employee in an Indian Company IBM India Pvt. Ltd. and was sent abroad to UK for rendering services there. There is no dispute that the service was rendered in UK though the appointment made in India. The assessee has received total salary as stated above and the same has been returned

and offered to tax in UK. The income tax return and certificate of residence has been placed in the paper book from page no. 27 to 32. The assessee claimed relief as per DTAA between India and United kingdom which was not allowed for the want of tax residency certificate by the AO. In our opinion, once the assessee qualifies to be treated as non-resident u/s 6 of the Act then the scope of the taxable income is in the hands of assessee would be as per Section 5(2)(b) of the Act. In the present case also the assessee undisputedly is a non-resident and therefore the salary received by the assessee while rendering service in abroad is not taxable in India. The case of the assessee finds support from the decision of Hon'ble Co-ordinate Bench of Agra in the case of Arvind Singh Chauhan vs. ITO in [2014] 42 taxmann.com 285 (Agra-Trib) wherein the Hon'ble Tribunal has held as under:

> ***"8**. Once it is not in dispute that the assessee qualifies to be treated as a 'non-resident' under Section 6 of the Act, as is the undisputed position in this case, the scope of taxable income in the hands of the assessee, under Section 5(2), is restricted to (a) income received or is deemed to be received in India, by or on behalf of such person; and (b) income which accrues or arises, or is deemed to accrue or arise to him, in India. Therefore, it is only when at least one of these two conditions is fulfilled that the income of a non-resident can be brought to tax in India. In the present case, the services are rendered outside India as crew on merchant vessels and tankers plying on international routes. A salary is compensation for the services rendered by an employee and, therefore, situs of its accrual is the situs of services, for which salary paid, being rendered. In the case of CIT v. Avtar Singh Wadhwan [2001] 247 ITR 260/115 Taxman 536 (Bom.), Hon'ble Bombay High Court has held that income from salary, in the case of crew of even an Indian vessel operating in international waters, is to be treated as having accrued outside India. As for the Assessing Officer's reliance on Hon'ble Supreme Court's judgment in the case of Shri Govardhan Ltd (supra) and his observation to the effect that "by receiving the appointment letter and details of salary to be paid, the assessee gets right to receive the salary", this is wholly incorrect to assume that an employee gets right to receive the salary just by getting the appointment letter. An employee has to render the services to get a right to receive the salary and unless these services are rendered, no such right accrues to the employee. Undoubtedly, if an assessee acquires a right to receive an income, the income is said to have accrued to him even though it may be received later, on it's being ascertained, but this proposition will be relevant only when assessee gets a right to receive the income, and, in the present case, assessee gets his right to receive salary income when he renders the services and not when he simply receives the appointment letter. The stand of the Assessing Officer, which has been rather mechanically approved by the learned Commissioner (Appeals) as well, is devoid of legally sustainable merits."*

Similar finding has been taken in the case of ITO vs. Sri Sunil Chitaranjan Muncif in [2013] 35 taxmann.com 142 (Ahmedabad-Trib) wherein the Hon'ble Bench has held as under:

> ***"10.*** *After hearing both the parties and perusing the record, we find that there is no dispute about the fact that assessee is a NRI and the salary income received by him in India for employment exercised in U.K. has been offered by him for taxation in U.K in pursuance of Article 16 of DTAA with U.K. On these facts Ld. CIT(A) by following the advance ruling in the case of British Gas India (P.) Ltd. In re [2006] 287 ITR 462/157 Taxman 225 (AAR – New Delhi) has rightly held that the salary received by the assessee was not taxable in India in pursuance of DTAA between India and U.K. therefore the order passed by him is hereby upheld."*

In the case of Sreenivasa Reddy Cheemalamarri vs. ITO in [2020] 118 taxmann.com 684 (Hyderabad-Trib) wherein the Bench has held as under:

> *"11. I have considered the rival submissions and carefully perused the material on record. From the Orders of the Ld. Revenue Authorities , I find that the Ld. AO has disallowed the exemption claimed by the assessee under Article 15(1) of the India-Austria DTAA only for want of Tax Residence Certificate (TRC) from Austria. The submission of the assessee in this regard was that despite best possible efforts he was not able to procure TRC from country of residence and the situation may be treated as "impossibility of performance". I find merits in the submission of the assessee. Normally it is a herculean task to obtain certificates from alien countries for compliance of domestic statutory obligations. In such circumstances the taxpayer cannot be obligated to do impossible task and penalized for the same. If the assessee provides sufficient circumstantial evidence in such cases, the requirement of section 90(4) ought to be relaxed. Further, it is obvious that where there is a conflict between the Treaty and the Act, the Treat shall overrule the Act. In the case of the assessee, by virtue of the Treaty, the assessee is liable to tax in Austria for the services rendered in Austria and not in India. Therefore, though the Act mandates Tax Residency Certificate of Austria , non-production of the same before the Ld. Revenue Authorities shall not enable the Ld. Revenue Authorities not to grant the benefit of the Treaty to the assessee. Therefore, the Ld. Revenue Authorities have erred in not granting the benefit of the Treaty to the assessee just for the reason that the assessee has not submitted the Tax Residency Certificate from Austria. The Ahmedabad Bench of the Tribunal in the case of Skaps Industries India (P.) Ltd vs. ITO, International Taxation, Ahmedabad reported in 171 ITD 723 taking cue from the decision of the Hon'ble P & H High Court in the case of Secro BPO (P.) Ltd vs. Authority for Advance Ruling reported in 379 ITR 256 had held that "Whatever may have been the intention of the lawmakers and whatever the words employed in Section 90(4) may prima facie suggest, the ground reality is that as the things stand now, this provision cannot be construed as a limitation to the superiority of treaty over the domestic law. It can only be pressed into service as a provision beneficial to the assessee.....". Therefore, the stand of the Ld. Revenue Authorities on this issue is devoid of merits.*

12. As per Article 15(1) of the India -Austria DTAA, "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 therefore may be taxed in that other state." Further, Article 4(1) the India-Austria DTAA defines the term resident as under:

"For the purposes of this convention, the term 'resident of a contracting state' means any person who, under the laws of that state, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that state and any political sub-division or local authority thereof."

13. Therefore, in the case before me the following conditions are required to be satisfied to claim exemption under Article 15(1) of the India -Austria DTAA:

- The person should be a resident of Austria and
- The salary and other remuneration should be earned in respect of employment exercised in Austria.

14. From the facts of the case it is apparent that d uring the previous relevant to AY 2014-15, the assessee qualifies as a non-resident in India and as a tax resident in Austria. The salary and allowances are earned by the assessee in respect of employment rendered in Austria due to his foreign assignment. Hence, the first two conditions enumerated under Article 15(1) of the India-Austria DTAA stands satisfied. Therefore, the assessee 's claim of exemption in regard to his salary income as per the provisions of Article 15(1) of the India-Austria DTAA in the return of income filed by him is appropriate.

15. Further in the case of ITO Vs. Sunil Chitranjan Muncif (2013 58 SOT 356 - ITAT, Ahmedabad), on which reliance placed by the assessee, it was held that there was no dispute about the fact that the assessee is a NRI and the salary income received by him in India for employment exercised in UK has been offered by him for taxation in UK in pursuance of Article 16 of DTAA with UK. Hence, the salary received by the assessee was not taxable in India in pursuance of DTAA between India and UK.

16. In the case of DIT Vs. Prahlad Vijendra Rao (239 CTR 107), on which reliance placed by the assessee, the Hon'ble Karnataka High Court held that under section 15 of the Act even on accrual basis salary income is taxable i.e. it becomes taxable irrespective of the fact whether it is actually received or not; only when services are rendered in India it becomes taxable by implication. However, if services are rendered outside India such income would not be taxable in India.

17. The other objections raised by the Ld. AO that evidence was not produced for receiving the foreign allowance outside India and the bank account of the assessee maintained abroad was not produced is not relevant because the facts of the case establishes that the salary and the foreign allowance was received in India for the services rendered abroad and by virtue of DTAA and the Act, there is no bar in law for receiving the money in India. For the above-mentioned reasons, I hereby direct

the Ld.AO to delete the tax imposed on the assessee with respect to his salary income of Rs. 12,90,846/- and the foreign allowances of Rs. 22,48,501/ - aggregating to Rs. 3539347/- earned by him outside India during the relevant assessment year.

18. In the result, appeal of the assessee is allowed."

Considering the facts of the case and in the light of the above decisions, we are inclined to set aside the order of Ld. CIT(A) and direct the AO to delete the addition.

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

Order is pronounced in the open court on 20th February, 2024

Sd/-

(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 20th February, 2024

SM, Sr. PS

Copy of the order forwarded to:

1. Appellant- Arindam Dasgupta, C/o Kakoli Sikdar, 87/14, A.K. Mukherjee Road, Kolkata-700090
2. Respondent – ACIT, International Taxation-1(1), Kolkata
3. Ld. CIT(A)-22, Kolkata
4. Ld. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata