

**IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM**

**BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 456/VIZ/2018
(Asst. Year : 2015-16)**

DCIT, Circle-1(1),
Guntur.

vs. Chukkapalli Mallikarjuna,
D.No. 6-20, Main Road,
Duggirala, Guntur District.

(Appellant)

PAN No. ACNPC 9354 J
(Respondent)

Assessee by : Shri Mohd. Afzal – Advocate.
Department By : Smt. Suman Malik – Sr.DR

Date of hearing : 16/04/2019.
Date of pronouncement : 03/05/2019.

ORDER

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals)-1, Guntur, dated 29/06/2018 for the Assessment Year 2015-16.

2. Facts of the case, in brief, are that assessee is a seafarer working in Marine Shipping by name Fender Care Nigeria Ltd. The assessee is a non-resident for the A.Y. 2015-16. He rendered services outside India and earned salary income, which was remitted by the employer to NRO account maintained with SBI,

Duggirala. According to the assessee, as per CBDT Circular No. 13/2017, dated 11/04/2017 the same is not taxable in India. However, the Assessing Officer not accepted the explanation of the assessee and by following the decision of the Kolkata Bench of the ITAT in the case of Tapas Kumar Bandopadhyay Vs. DDIT (ITA No. 70/KOL/2016) has observed that as per section 5(2)(a), the relevant criterion is not the right to receive a salary but the actual receipt of salary income which is in India, therefore it has to be taxed in India. Accordingly, addition was made.

3. On appeal before the Id. CIT(A), it is submitted that the assessee is a non-resident and the salary income earned by the assessee outside India, it cannot be taxed in India simply because it is remitted to the NRO account of the assessee by the employer. Before the Id. CIT(A), the assessee has relied on the Circular issued by CBDT No. 13/2017, dated 11/04/2017. The Id. CIT(A) after considering the explanation of the assessee and by following the decision of the Hon'ble Supreme Court in the case of *Indian Oil Corporation* (267 ITR 272) and also the judgment of the Kolkata High Court in the case of *Smt. Sumana Bandopadhyay* (G.A.No. 3745/2016, dated 13/07/2017) and also the decision of the Hon'ble Karnataka High Court in the case of *Prahlad Vijedra Rao [(2011) 51 DTR 95]* held that the salary income earned by the

assessee and credited by the employer directly to the NRO account maintained by the assessee in India is not taxable. The relevant portion of the order is extracted as under:-

"I have carefully considered the assessment order, statement of facts, grounds of appeal, additional evidence, Report of the AO, counter comments of the appellant and decisions relied upon by the appellant along with submissions and also the decisions relied upon by the AO.

Though multiple grounds were raised the contention of the appellant is to delete the addition made on account of salary income received by the appellant in India.

The undisputed facts as emanating from assessment order are as under which are necessary to appreciate the issue and to decide the grounds.

- 1. The appellant is working with a marine shipping company by name "FENDER CARE NIGERIA LIMITED".*
- 2. The appellant was non-resident for the Asst. year 2015-16 as his stay in India was less than 182 days.*
- 3. The appellant rendered service outside India and earned salary income.*
- 4. The salary of the appellant was remitted by the employer in the NRO account maintained by the appellant with SBI, Duggirala.*
- 5. The appellant has no permanent residential address outside India.*
- 6. The appellant has no bank account outside India.*

During the course of assessment proceedings, the appellant argued that he has rendered service outside India with a foreign company and salary accrued outside India. In view of this, the salary amount is not taxable though remitted by the employer in the bank cannot be taxable in India merely money is received in India. However, these arguments are not appreciated by the AG. The AG relying on the decision of the Hon'ble ITAT, Kolkata in the case of Tapas Kumar Bandopadhyay (ITA No. 70/Kol/2016) considered the facts and decided that the income in the form of salary was received in India by the appellant by virtue of sec. 5(2)(a) of the Income Tax.

During the course of appellate proceedings, the appellant filed

submissions and also copies of decisions in the following cases.

- 1. Avatar Singh Wadhwan (247 ITR 260) Bombay HC*
- 2. UTANKA Roy (W.P. No. 369/2014) Calcutta HG*
- 3. Sumana Bandopadhyay & another in GA 3745/2016 Calcutta HC*
- 4. Arnab Bose in (ITA No. 176/Kol/2016) ITAT, Kolkata.*
- 5. Arvind Singh Chauhan (ITA No. 319 & 320/Agr/2013) ITAT, Agra*
- 6. Tarun kumar Sarkar (ITA No. 69/Kol/2016) ITAT, Kolkata.*

The appellant contended that the provisions of sec. 5(2) of the Act are subject to provisions of the Act which means the other provisions of the Act should also be considered before taking decision u/s. 5(2) of the Act. The appellant also discussed about sec. 9, sec. 6 and the concept of accrual and receipt of income. The appellant relied on the circular issued by the Board on 11-04-2017 and stated that the salary amount remitted by the employer in the bank account of the appellant in India is not taxable and does not come under the purview of sec. 5(2)(a) of the Act. The appellant also contended that even prior to the issuance of Circular the provisions are very clear to state that the income received by the seafarers for the services rendered outside is not taxable.

I have carefully considered the arguments put forth by the appellant and carefully considered the decisions relied. The AO has mainly contended that as the income was received in India it is taxable as per sec. 5(2)(a) of the Act. The decision relied upon by the AG has been considered by various authorities and gave relief to the appellants in those cases. The Circular issued by the Board has been considered by Hon'ble Courts and ITATs and held that on mere receipt of salary income in the bank account of the appellant in India cannot be taxed.

The Hon'ble ITAT, Kolkata in the case of Tarun Kumar Sarkar considered the identical facts and the circular issued by the Board and also considered the decision of Hon'ble ITAT, Kolkata in the case of Tapas Bandopadhyay on which the AG relied and held that the Circular issued by the Board is binding on the revenue authorities in view of the decision of Hon'ble Supreme Court in the case India Oil Corporation Ltd. (267 ITR 272) and also stated that the salary receipt in the NRE account of the appellant maintained in India is not taxable and beyond the scope of sec. 5(2)(a) of the Act.

The Hon'ble ITAT, Agra in the case of Arvind Singh Chauhan also considered the CBDT's circular and held that once the salary accrued outside India for the services rendered outside India, by

an arrangement, the said salary is remitted to India to made available to the employee, it will not constitute receipt of salary in India by the assessee so as to trigger taxability u/s. 5(2)(a) of the Act.

The Hon'ble ITAT, Kolkata in the case of Arnab Bose after considering the CBDT's circular on which the appellant relied and also the decision of the Hon'ble High Court of Kolkata in the case of Smt. Sumana Bandopadhyay and the decision of Hon'ble High Court of Karnataka in the case of Prahlad Vijedra Rao and held that the salary remitted in the bank account of the assessee in India is out of the purview of sec. 5(2)(a) of the Act and not taxable.

After careful consideration of the decisions on the issue, it is felt that the salary income accrued to the appellant outside India for the services rendered outside India and the salary which was remitted directly by the employer in the bank account maintained by the appellant is out of the purview of sec. 5(2)(a) of the Act. In the present case, the appellant received salary directly from the employer in the ordinary account maintained with SBI in India. The Circular issued by the Board speaks as under:

"It is hereby c/ar/fled that sa/aiy accrued to a non-resident seafarer for services rendered outside India on a foreign ship shall not be inc/uded in the total income merely because that said salaty has been credited in the NRE account maintained with an Indian Bank by the seafarer."

On careful reading of the Circular it is felt that the Circular is applicable to the facts of the case. The intention in issuing the Circular by the Board is to mitigate the hardship faced by the seafarers with regard to the salary income earned outside India. The spirit of the circular is that a non-resident seafarer by rendering service outside India and for that any salary accrues to him outside India and the said salary was remitted in the bank account maintained in India, the same is not to be treated as received or deemed to be received in India as per sec. 5(2)(a) of the Act. The Circular mentions about remittance of salary in NRE account of the seafarers but in the present case the appellant maintained NRO account with SBI, Duggirala. In view of this, it is felt that the Circular being beneficial circular and the spirit is to mitigate the hardship, the same is required to be applied to the facts of the present case. Whether it is NRE account or NRO account, it is immaterial as long as the fact remains that the seafarer as the appellant render service outside India for which salary accrues there and salary amount is remitted in Indian Bank account maintained by the appellant, then the same is out of the purview of sec. 5(2)(a) of

the Act and not taxable. In view of this the addition made by the AO is hereby deleted and the grounds raised are allowed.

In effect, the appeal is allowed."

4. On being aggrieved, Revenue carried the matter in appeal before this Tribunal.

5. Ld. Departmental Representative relied on the order passed by the Assessing Officer.

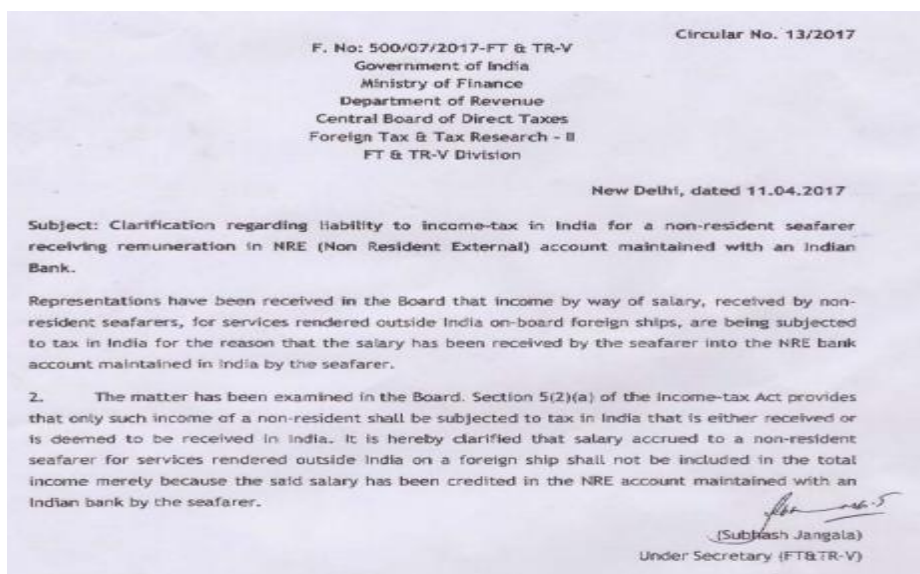
6. On the other hand, ld. counsel for the assessee has submitted that the assessee is NRI and working in foreign ship outside India, the salary income received in India cannot be taxed. To support his contention, he relied on the Circular issued by the CBDT No. 13/2017, dated 11/04/2017, which is placed at page No. 30 of paper book. He also relied on the following judicial pronouncements:-

- 1) CIT Vs. Avtar Singh Wadhwan [(2001) 247 ITR 260]
- 2) Utanka Roay Vs. DIT (Int. Taxation) [Hon'ble Calcutta High Court in W.P.No. 369/2014 dated 15/12/2016]
- 3) Smt. Sumana Bandyopadhyay & Ano. Vs. DDIT (Int. Taxation) [Hon'ble Calcutta High Court in G.A.No. 375/2016, dated 13/07/2017]
- 4) Arnab Bose Vs. DCIT (IT) [ITAT Kolkata 'C' Bench in ITA No. 176/Kol/2016, dated 09/08/2017].

7. We have heard both the sides, perused the material available on record and orders of the authorities below.

8. The assessee is a seafarer working in the marine shipping by name Fender Care Nigeria. It is undisputed fact that assessee is

non-resident for the A.Y. 2015-16. He stayed in India less than 182 days. The assessee rendered services outside India and earned salary income, which was remitted by the employer in NRO account maintained by the assessee with SBI, Dugiralla Branch, Guntur. The assessee is not having any permanent residence and bank account outside India. The case of the Assessing Officer is that as the assessee has received salary income in India, as per section 5(2)(a) of the Act, the same is taxable in India. Accordingly, the same is taxed and added to the total income of the assessee. Before the Id. CIT(A), the assessee has relied on the circular of the CBDT NO. 13/2017, dated 11/04/2017 and submitted that the income earned by the assessee outside India cannot be taxed in India. For the sake of convenience, CBDT Circular No. 13/2017, dated 11/04/2017 is extracted as under:-



9. From the above circular of CBDT, it is very clear that income earned by the seafarer outside India credited in the NRE account cannot be taxed in India. In the present case, the salary income earned by the assessee has been credited to NRO account maintained with SBI, Dugiralla Branch, Guntur, in our opinion, whether the amount is credited to NRE/NRO doesn't make any difference. From the above circular, the only point for consideration is the assessee should be non-resident seafarer received a salary for his services rendered outside India, the same cannot be taxed in India. In this case, it is a not disputed fact that the assessee is a non-resident seafarer, he received salary income for the services rendered abroad. Therefore, the Assessing Officer ought not to have taxed the income earned by the assessee outside India as per the above CBDT circular. However, the Id. CIT(A) by considering the circular and also various case-laws, directed the Assessing Officer to delete the addition.

10. In the case of *CIT Vs. Avtar Singh Wadhwan* (supra), the Hon'ble Bombay High Court by considering section 5(2)(b) and section 9(1)(ii) has observed that to determine the taxability of income, the relevant test to be applied where services have been rendered not source of income.

11. In the case of *Utanka Roy Vs. DIT (Int. Taxation) (supra)* , the Hon'ble Calcutta High Court has held as under:-

"Explanation 1 to Sub-Section 2 states that, income accruing or arising outside India shall not be deemed to be received in India within the meaning of such section by reason only of the fact that it is taken into account in a balance sheet prepared in India. Explanation 2 clarifies that income will not be treated to be received in India solely on the basis that such income was received or deemed to be received in India. Therefore, it has to be found out where the income to the person concerned had accrued. For the purpose of finding out the place of accrual of the income, the place where the services have been rendered becomes material. In fact, the place where the income gave rise is required to be considered to arrive at a finding whether the income was in India or outside India.

In Prahlad Vijendra Rao (Supra) an income derived by a person working outside India for 225 days has been held not to have accrued in India.

In Avtar Singh Wadhwan (Supra) it has been held that, the relevant test to be applied to decide whether the income accrued to a non-resident in India or outside is concerned, is to find the place where the services were rendered, in order to consider where the income accrued. The source of the income was not relevant for the purposes of ascertaining whether the income had accrued in India or outside India.

The question whether the petitioner has rendered services in India or not is a question of fact. It is not disputed that the petitioner as a marine engineer had rendered services outside India for the period of 286 days. He has received his remuneration for such work from a foreign company. Consequently, the income received by the petitioner for services rendered outside India has to be considered as income received out of India and treated as such."

12. In the case of *Smt. Sumana Bandyopadhyay & Ano. Vs. DDIT (Int. Taxation) (supra)*, the Hon'ble Calcutta High Court has considered the similar issued and held as under:-

"5. As regards the legal position in a similar situation, clarification has been given by the Ministry of Finance on 11th April 2017 under Circular No. 13/2017. This Circular specifies:-

"Subject: Clarification regarding liability to income-tax in India for a non-resident seafarer receiving remuneration in

NRE (Non Resident External) account maintained with an Indian Bank.

Representations have been received in the Board that income by way of salary, received by non-resident seafarers, for services rendered outside India on-board foreign ships, are being subjected to tax in India for the reason that the salary has been received by the seafarer into the NRE bank account maintained in India by the seafarer.

2. The matter has been examined in the Board Section 5(2)(a) of the Income-tax Act provides that only such income of a non-resident shall be subjected to tax in India that is either received or is deemed to be received in India. It is hereby clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign ship shall not be included in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer."

6. We concur with the ratio of the decision of the Karnataka High Court and in our opinion the interpretation be given to sub Section (b) of Section 5(2) of the Act would also apply to Section 5(2)(a) of the Act. The Circular is clarificatory in nature and is applicable for construing the aforesaid provision for the relevant assessment year. In our opinion the authorities under the Income Tax Act did not properly apply the provisions of law to the case of the assessee. We are of the view that the Assessing Officer was wrong in adding the aforesaid sum to the income chargeable to tax of the assessee for the relevant assessment year. We accordingly allow the appeal and answer the question framed by us in favour of the assessee."

13. In the case of *Arnab Bose Vs. DCIT (IT)*, (supra) the ITAT,

Kolkata Bench has considered section 5(2)(a) and held as under:-

"11.1. A perusal of the Circular referred to above shows that salary accrued to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) shall not be included in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer. Remittances of salary into NRE Account maintained with an Indian Bank by a seafarer could be of two types : (i) Employer directly crediting salary to the NRE Account maintained with an Indian Bank by the seafarer ; (ii) Employer directly crediting salary to the account maintained outside India by the seafarer and the seafarer transferring such

money to NRE account maintained by him in India. The latter remittance would be outside the purview of provisions of section 5(2)(a) of the Act, as what is remitted is not "salary income" but a mere transfer of assessee's fund from one bank account to another which does not give rise to "Income". It is not clear as to whether the expression "merely because" used in the Circular refers to the former type of remittance or the latter. To this extent the Circular is vague.

11.2. In the instant case, the employer has directly credited the salary, for services rendered outside India, into the NRE bank account of the seafarer in India. In our considered opinion, the aforesaid Circular is vague in as much as it does not specify as to whether the Circular covers either of the situations or both the situations contemplated above. Hence we deem it fit to give the benefit of doubt to the assessee by holding that the Circular covers both the situations referred to above. The result of such interpretation of the Circular would be that the provisions of Sec.5(2)(a) of the Act is rendered redundant. Be that as it may, it is well settled that the Circulars issued by CBDT are binding on the revenue authorities. This position has been confirmed by the Hon'ble Apex Court in the case of Commissioner of Customs vs Indian Oil Corporation Ltd reported in 267 ITR 272 (SC) wherein their Lordships examined the earlier decisions of the Apex Court with regard to binding nature of the Circulars and laid down that when a Circular issued by the Board remains in operation then the revenue is bound by it and cannot be allowed to plead that it is not valid or that it is contrary to the terms of the statute. Moreover, we note that the similar issue came up for consideration before the Hon'ble Calcutta High Court wherein Their Lordships in GA 3745 of 2016 with ITAT 374 of 2016 dated 13.07.2017 in Smt. Sumana Bandyopadhyay & Anr. Vs. The Deputy Director of Income Tax (International Taxation 3(1) admitted the appeal on 11.07.2017 on the following question:

"Whether on the facts and in the circumstances of the case and in law, income by way of salary which became due and has accrued to the assessee, a non-resident, for services rendered outside India and which is not chargeable to tax in India on the "due" or "accrual" basis, can be said to be chargeable to tax on the "receipt" basis merely because the foreign employers, on the instructions of the assessee, have remitted a part of amount of salary to the assessee's NRE bank account in India?"

While adjudicating the issue, Their Lordships taking note of the Circular No. 13/2017, supra and the Karnataka High Court's

judgement in Director of Income-tax (International Taxation) Vs. Prahlad Vijendra Rao (IT Appeal No. 833 of 2009) held as under:

"6. We concur with the ratio of the decision of the Karnataka High Court and in our opinion the interpretation be given to sub section (b) of Section 5(2) of the Act would also apply to Section 5(2)(a) of the Act. The Circular is clarificatory in nature and is applicable for construing the aforesaid provision for the relevant assessment year. In our opinion the authorities under the Income Tax Act did not properly apply the provisions of law to the case of the assessee. We are of the view that the Assessing Officer was wrong in adding the aforesaid sum to the income chargeable to tax of the assessee for the relevant assessment year. We accordingly allow the appeal and answer the question framed by us in favour of the assessee."

Accordingly, the ground raised by the assessee is allowed.

14. Therefore considering the facts and circumstances of the case and also by considering the CBDT Circular No. 13/2017, dated 11/04/2017 and by following the various judicial pronouncements, we find no infirmity in the order passed by the Id. CIT(A). Thus, this appeal filed by the Revenue is dismissed.

15. In the result, appeal filed by the Revenue is dismissed.

Order Pronounced in open Court on this 03rd day of May, 2019.

Sd/-
(D.S. SUNDER SINGH)
Accountant Member

sd/-
(V. DURGA RAO)
Judicial Member

Dated: 03rd May, 2019.

vr/-

Copy to:

1. *The Assessee – Chukkapalli Mallikarjuna, D.No. 6-20, Main Road, Duggirala, Guntur District.*
2. *The Revenue – DCIT, Circle-1(1), Guntur.*
3. *The Pr.CIT, Guntur.*
4. *The CIT(A)-1, Guntur.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.