

IN THE INCOME TAX APPELLATE TRIBUNAL “SMC” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM]

I.T. A No. 595/Kol/2017 A.Y 2012-13

Ashwini Kumar Singh
PAN: BCXPS7564P
(Appellant)

V/s. D.C.I.T (IT)- 1(1), Kolkata
(Respondent)

For the Appellant : Shri Anikesh Banerjee, Advocate, Id.AR

For the Respondent : Shri C.J. Singh, JCIT, Id.DR

Date of Hearing : 047-03-2019

Date of Pronouncement: 10 -05-2019

ORDER

1. This Assessee’s appeal for assessment year 2012-13 arises against the CIT(A), 22, Kolkata’s order dated 24-01-2017 passed in case no. 04/CIT(A)-22/Kol/12-13/14/16-17 involving proceedings u/s 143(3) of the I.T Act, 1961 (in short ‘Act’).

Heard both the parties.. Case file perused.

2. It transpires during the course of hearing that sole dispute between the parties is about taxability of assessee’s salary amounting to Rs.47,86,485/- received from its overseas employer in the Republic of Nijeria, M/s. GIO Mobile Ltd during the relevant previous year. The CIT(A)’s detailed discussion affirming Assessing Officer’s action reads as follows :-

06.

DECISION:

1. I have carefully analyzed the action of the Ld. AO in bringing to tax an amount of Rs.47r86r485/- received by the assessee-individual from the

overseas employer, i.e. an employer in the Republic of Nigeria MI5 Gio Mobile Ltd., during the relevant A.Y 2012-13. The main reasons for such action by the Ld A.O in summary are that:

- a, The amounts paid to the assessee were into the account maintained in India at Kolkata, namely Axis Bank, Main Branch, Kolkata.*
- b. The "first Instance of receipt of the Income" was in India well within Indian Territory, and this has not been disputed by the assessee, or at least he has not led any evidence to the contrary.*
- c. The assessee could well be non-resident, but the income accrues In India and as per Sec 5(2) of the Income Tax act which deals With the scope of income arising to anon-Resident, any itncome of a non-resident received In India 15 taxable in India.*
- d. The assessee gains first control of the money in India only after the same is credited to the NRE account maintained by the assessee-individual in India.*
- e. For any non-resident Indian, the scope of total income has four modes, one of which is receipt in India from whatever source derived.*
- f. The charge on the income is independent of the currency or equivalent and receipt of any foreign currency in an Indian account (in equivalent Indian currency) is not a determinative factor .*
- g. Sec. 15 of the Income Tax Act is the determinative section and the charging section for income under the head or "salaries". Section 15 of the Act is the charging section for income under the head "salaries". In this regard, the following are .regarded as chargeable,*
 - i any salary cue to an assessee from an employer in the previous year, whether paid or not;(section 15(a))*
 - ii. Any salary paid or allowed to an assessee in the previous year by or on behalf of an employer, though not due or before it became due; [section 15(b)]*

iii.. any arrears of salary paid or allowed to an assessee in the previous year ,if not charged to tax for any earlier previous year. [Section 15(c)]

h. A plain reading of section 15 suggests that salary becomes chargeable on cue basis', even ~f it is not paid by the employer. However, it can be charged to tax on receipt basis also but this could be done only in cases where the salary i5 received before it is due or when it has not become due at all. In the present easel it is not the contention th.at the salary has been received before it became due or when it is not due at all.

i. In the present case, the salary Income cannot ran under section 15(b) or 15 (c) for arriving at i'l basis of charge. As section 15('a) is applicable, there can be a mistaken view that if salary has become due to the assessee overseas, it cannot be charged to tax in India on receipt basis.

j. In summary the impugned income is deemed to arise and accrue in India.

2. On the other hand, during the appeal, it has been contended in summary by the appellant-individual, Ld A.R for the appellant, that:

a. The appellant is a Non-resident individual, and there is no dispute about that.

b. The appellant was in the employment of a forei9fl country, and services were rendered outside India.

c, The contract for employment was made outside India and the Employer .does not have any Permanent Establishment in India,

d. The payments are being made to the assessee-individual by the foreign country for services rendered by the assessee outside India and remitted to the assessee's NRE account in India.

e. If Sec. 5 is interpreted the way the Ld. AO has done, then it would be rendered useless and redundant, as no benefit would flow to a non-resident for services rendered outside India, and this cannot be the intention of the Hon'ble Legislature.

f. As section 5 is subject to section .15 of the Income Tax act, 1961, the salary, once it becomes due, taxability arises and in the case of the assessee clearly the salary becomes due outside India where services were rendered and income was generated outside India and only remittance made in India. The following case laws were relied upon for such proposition:

i. Ranjtt Kurnar Bose VS; HO 25 TIJ 368 (Kol Trib) : Directly on the issue of section 5(2)(a) and section 15 of the Act and srrnl.ar to the facts of the assessee's case.

,ii. CIT Vs Bachubnai Nagindas Shah [1976] 104 ITR 551 (Gujarat)

iii.. Hon'ble Supreme Court in the case of CH VS Toshoku Ltd [1980] 125 ITR. 525.

iv, The ITAT, Delhi in the case of Assistant Director of Income Tax, Circle 1(1), International Taxation v«. Sh. Nandan Singh Chauhan, New Delhi, ITA No. 1171/DEL/2009 rightly upheld the decision of the Ld. Commissioner of Income Tax (Appeals) and .decided the issue in favour of the assessee and against the revenue. It was held that-nit is undisputed that assessee is an NRI and he had 'received Income from foreign company for the services rendered outside India. Just merely because he has instructed th e salary to be transferred to his FCNR account maintained with the HSBC account, Barakhamba Road, Connaught Place, New Delhi cannot bring the amount to taxation under the Indian Income Tax Act. This view is clearly supported by the tribunal's decision as above. Hence, respectfully following the precedent as above, we uphold the order of the to. Commissioner of Income Tax (Appeals) and decide the issue in favour of the assessee and against tile revenue."

v, The Income tax Appellate Tribunal, Agra Bench in the case of Arvind Singh Chauhan Vs. Income, Tax Officer, Ward 1(2), Gwalior, ITA No. 319 and 320 held that- "the money was received in India, since beyond any dispute or controversy, the salary Cheques were credited to the assessee's account with HSBC, Mumbai. So far as this aspect .of the matter is concerned, ill our considered view, the law is trite that receipt of income, for this purpose, refers to the first occasion when assessee gets

*the money in his own control -real or constructive. What is material is the receipt of income in its character as income, in its character as such is received by the assessee or his agent; an income cannot be received twice or on multiple occasions. As the bank: statement of the assessee clearly reveals these are US dollar denominated receipts from the foreign employer and credited to non-resident e.' terns! account maintained by the assessee with HSBC Mumbai. The assessee was in lawful right to receive these monies, as an employee, at the place of employment, i.e. at the location of its foreign employer, and it is a matter of convenience that the monies were thereafter transferred to India. These monies were thereafter transferred to India. These monies were thereafter transferred to India. These monies were at the disposal of the assessee outside India, and, it was in exercise of his rights to so dispose of the money, that monies were transferred to India. We may', in this regard, refer to Hon'ble Madras High Court's judgment in the case of **CIT Vs AP Kalyankrishnan (195 ITR 534)** wherein their lordships were in seisin of a situation in which the assessee had received pension from Malaysian Government which was remitted by the Accountant General, Federation of Malaya, Kuala Lumpur to Accountant General Madras, for onward payment to the assessee. On these facts, rejecting the contention of the revenue that the pension amounts are required to be treated as having been received in India, Their Lordships observed, inter alia, held " that the pension payable to the assessee had accrued in Malaya And only thereafter, by an arrangement embodied in the letter found in Annexure D to the stated case, the pension had been remitted to the assessee in India and made available to him. The assessee had, therefore, to be regarded as having received the income outside India and the pension had been remitted or transmitted to -the place where the assessee was living, as a matter of convenience and that would not, in our view, constitute receipt pension in India by the assessee, falling within .5(1)(a) of the Act "*

vi. This would show that once an income is received outside India, whether in reality or on constructive basis, the mere fact that it has been remitted to India would not be decisive on the question as to income is to be treated as having been received in India. The connotation of an income having been received and an amount having being received are qualitatively different. The salary amount is received in India in this case but the salary income is received outside India. It is elementary that an income cannot be taxed more once but if, at each point of

receipt, the income is to be taxed, it may have to be taxed on multiple occasions. In this view of tile matter, in a situation in which the salary has accrued outside India and, thereafter, by an arrangement, salary is remitted to India and made available to the employee, it will not constitute receipt 9f salary in India by the assessee so as to trigger taxability under section 5(2)(a) of the Act.

vii. The Appellant prays before the Hon'ble Commissioner of Income Tax (Appeals)-22, Kolkata to delete the additions made based on the above facts and circumstances.

3. After analyzing the factual and legal matrix of the case, it is clear without an iota of doubt that the salary in the case of the appellant-individual was received in an NRE account in India. Such a clear fact would suggest that the receipt in India of the salary for certain services rendered abroad [Nigeria in the case at hand] outside the country would be adequate and sufficient to give the country where it is received me right to tax the said income on receipt basis.

4. On an Identical set of facts and circumstances, the Hon'ble Jurisdictional ITAT has decided the matter in favour of Revenue. Reference is made to the case of Tapas Kumar Bandopadhyay Vs DDIT (Int. Tax.)-3(1), Kolkata in ITA No. 70/Kol/2016 in the ITAT -" C"-Bench Kolkata, the date of order being 0.1.06.2016. In an identical matrix, after discussing the various arguments and counter- arguments, as well as the judicial decisions, the Hon'ble ITAT held as under:

[quote]

"10. We have heard the rival submissions and perused the materials available on record. The scheme. of the Act is such that charge of tax is made independent of territoriality and residency and currency, The Ld. DR argued that the assessee though rendered services outside India had received salary in India by way of fund transfer from foreign company in abroad directly to NRE account of the assessee in India. The character of receipt of salary does not change according to Ld. DR. He argued that the receipt contemplated u/s, 5(2)(a) of the Act is actual receipt. Hence, income which is actually received in India is taxable in India u/s. 5(2)(a) of the Act and hence, the Third Member decision relied on by the

Ld.CIT(A) is directly in favour of the revenue. When the decisions of both Bombay and Kamataka High Courts were put across to the Learned DR, he argued that both the Courts did not frame question of law and it was rendered in the context of taxability o/s. 5(2)(b) of the Act and not section 5(2) of the Act. The Learned DR on the reliance placed by the Learned AR on the decision of Agrd Bench of ITAT in the case of Arvind Singh Chauhan, supra and hence to be ignored.

10.1. We find that the assessee was only trying to introduce one more layer to the entire transaction that the assessee had the control over his money in the form of salary income in international waters and for the sake of convenience, he instructed the foreign employer to send the monies to NRE account in India. It was argued by the assessee that income was actually earned by the assessee outside India and assessee had only brought those amounts into India. In other words, what was brought into India is not the salary income but only the salary amount. But we find that no evidence has been brought on record to prove that the assessee had the control over his salary income in international waters. Moreover, we find that if this argument of the assessee is to be accepted, then the assessee goes scot free from not paying tax anywhere in the world on this salary income. The provisions of section 5(2)(a) of the Act are probably enacted keeping in mind that income has to suffer tax in some tax jurisdiction. We believe that such provisions would exist in tax legislation of all countries. We hold that if the argument of the assessee is accepted, then it would make the provisions of section 5(2)(a) of the Act redundant. It is only elementary that a statutory provision is to be interpreted ultires magis valeat quam pereat, i.e to make it workable rather than redundant. From the provisions of section 5(1) of the Act, in the case of a resident, the global income is taxable in India. In case of non-residents, the scope of total income has foru modes, one of which is receipt in India from whatever source derived'. If this is construed to mean that income from whatever source, should first accrue or arise in India and then it should be received in India to be included under section 5(2)(a), then section 5(2) will lose its independence and will become a subset of section 5(2)(b) and there would not be any need for having section 5(2)(a) on the statute.

10.2 We find that heavy reliance has been placed by the Learned AR on the decision of the Hon'ble Bombay High Court in the case of CIT vs. Avtar Singh Wadhwan reported in 247 ITR 260(Bom) which was in turn

followed by Hon'ble Karnataka High Court in the case of DIT (Intl.) Taxn) vs Prahlad Vijendra Rao reported in 239 CTR 107 (Kar). We find that the question before the Hon'ble Bombay High Court was to decide the place of accrual of income. The Court held that the income accrues in the place where the services were rendered which was admittedly outside India. We find that the Court did not have an occasion to deliberate upon the fact that the receipt of the income has been in India as the issue decided by them was only the place of accrual of income in the context of section 5(2)(b) of the Act. Hence the decision relied upon by the Learned AR are factually distinguishable.

10.3. The argument of Learned AR was that the salary was received on the high seas and by way of a convenient arrangement, the same was directed to be deposited in the NRE account of the assessee in India. The question that arises for consideration is can a person receive salary on high seas. The only possibility of receiving salary on board of Tapas Kr, Bimdopadhyay AY 2910-11 a ship on high seas is to receive in hot currency. It is not the case of the assessee that the hot currency got deposited in the NRE account, On the other hand, the money was transferred from the employer's account outside India to the assessee's NRE account in India. In such circumstances, it is difficult to accept the contention of the Learned AR that salary was not received in India. The decision rendered by the Agra Tribunal in the case of Arvind Singh Chauhan vs. ITO in ITA Nos. 319 & 320/Agra/2013 dated 14.2.2014 is on the decision rendered by the Hon'ble Madras High Court in the case of CIT vs. A.P Kalyankrishnan 195 ITR 534 (Mad), The facts before the Hon'ble Madras High Court were that the assessee in that case received pension from the Malaysian Govt. and claimed it as not taxable. The AO found that the assessee received the pension in India through the Accountant General Madras directly and hence the pension received is liable to tax In India on receipt basis, The first appellate authority found that the pension amount received by the assessee had been subjected to assessment in Malaysia in the status of non-resident and that clearly pointed out that the pension had accrued to the assessee only in Malaysia, It was further held that pension had accrued to assessee only in Malaysia and the Accountant General Madras was merely authorize to arrange for the payment of pension to the assessee rendering the amount of pension received in India by the assessee not liable to tax. On further appeal by

the revenue, the Tribunal found that there was a letter dated 23.6.1969 addressed by the Accountant General of the Federation of Malaya to the Accountant General Madras and that letter indicated an arrangement for payment in India and the circumstance that the pension of the assessee had also been assessed to tax in Malaya in the status of non-citizen and non-resident would clearly establish that the pension of the assessee had been remitted to India by arrangement with the Accountant General Madras. On further appeal, the Hon'ble Madras High Court firstly held that the Malaysian Govt had assessed the assessee to income tax on the pension. The Hon'ble High Court also found that the Malaysian Govt had deducted tax at source which clearly indicated that the income had accrued to assessee in Malaysia and therefore not assessable in the hands of the assessee in India. The Hon'ble Court found that the accrual of pension and receipt of pension had already been taken place in Malaya. The Hon'ble Court held that the letter dated 23.6. 1969 addressed by the Accountant General Federation of Malaya Kuala Lumpur to the Accountant General Madras was only intended as an arrangement for the Tapas kr. Bandopadhyay AY 2010-11 payment of pension to the assessee to be made at the nearest treasury and the rate of exchange was also indicated therein. Further the letter also stated that the payment requested to be made was in respect of the pension payable to the assessee and at the rate of exchange indicated therein and the amount so paid, should, according to the letter, be charged to the Govt. of Federation of Malaya in the usual manner. Taking note of the contents of the aforesaid letter, the Hon'ble Court held that payment in India was only an arrangement to ensure the prompt payment of pension which had already suffered tax in India. The Hon'ble High Court therefore held that the income should be construed as having been received outside India and the fact that the pension had been remitted or transmitted to the place where the assessee was living was a matter of convenience and that would not constitute receipt of pension in India by the assessee falling within section 5(1) of the Act.

10.3.1 The above explanation would clearly prove that the facts before the Hon'ble Madras High Court (supra) are distinguishable from the facts of the present case in as much as the income in the present case did not suffer tax in any other jurisdiction nor was it received in any other tax jurisdiction. The receipt in the NRE account in India is the first point of receipt by the assessee and prior to that it cannot be said that the assessee

had control over the funds that had deposited in the NRE account from the employer.

10.4 The facts in the case decided by the Agra Tribunal supra were that the assessee received salary cheque by way of credit to his bank account with HSBC Mumbai. The Agra Tribunal took the view that the assessee had a lawful right to receive the salary as an employee at the place of employment i.e at the location of its foreign employer and it was a matter of convenience that the monies were thereafter transferred to India. As we have already seen that in section 5(2) of the Act, right to received salary is not the relevant criterion but the relevant criterion is the receipt of payment which is admittedly in India. Therefore, we have our own doubts as to the applicability of the decision of Tapas Kr. Bandopadhyay AY 2010-11 High Court in the case of A.P Kalyankrishnan (supra) to the facts of the present case.

10.5 Now what we are left with is the decision relied upon by the Learned DR on their Third Member decision of Mumbai Tribunal in the case of Captain A.L Fernandez Vs. ITO reported in 81 ITD 203 TM, wherein it was held as below:-

8. In my opinion, the salary is includible in the assessment under s. 5(2)(a) of the Act, which says that any income received by a non-resident in India is taxable in India. There is a clear finding in the order of the learned AM, that there is no dispute that the salary was received in India. This should put an end to the controversy. I may add, that the Ld. AM has not disputed the correctness of the ld. JM's finding that under International law, the floating island theory has undergone a change and it is no longer correct to regard the Indian ships as floating islands. Therefore, the position accepted by the learned members is that the services were rendered outside India, the ships not being considered as part of India. However, since the salary was received in India, it was rightly held taxable in India under section 5(2)(a). I agree with the ld. AM in this respect.

This decision clearly lays down that the receipt in India of salary for services rendered on board a ship outside the territorial waters of any country would be sufficient to give the country where it is received the

right to tax the said income on receipt basis. Such a provision is found in section 5(2)(a) of the Act which was applied in the aforesaid decision. It is true that decision of a Third Member would be equivalent to a decision of a Special Bench and thereby would become a binding precedent on the division bench.

10.6 We may also point out that the Agra Tribunal in the case supra had not considered the decision of the Third Member of Mumbai Tribunal supra. We therefore prefer to follow the decision of the Third Member case in the facts and circumstances of the present case.

10.7 To sum up, the facts of the instant case directly fits into the facts of the Third Member decision relied upon by the Learned DR supra and respectfully following the same, we hold that the salary received in India is taxable in India in terms of section 5(2)(a) of the Act and accordingly dismiss the grounds raised by the assessee.

11. In the result, appeal of assessee is dismissed.

5. Quite similarly in the case of Tapan Kumar Patanaik Vs DDIT(IT)-3 (1),Kolkata I On an Identical set of facts and circumstances, the Hon'ble Jurisdictional ITAT has decided the matter in favour of Revenue. Reference is made to the case of the judgment Kolkata in ITA No. 68/Kol/2016 In the ITAT- "C"-Bench Kolkata, for the A.Y 11-12, the date of order being 10.06.2016. In an identical matrix, after discussing the various arguments and counter-arguments, as well as the judicial decisions, the Hon'ble ITAT held as under:-

"5. The ld. Counsel for the assessee reiterated before us the submissions made before the ld. CIT(A) on this issue. The main plank of his argument was that the amount in question received for the services rendered outside India having been paid by the employer to the assessee on board of the ship outside India and the same having been thereafter transferred to the NRE account of the assessee in India, the provisions of section 5(2)(a) of the Act are not applicable.

5.1 In support of his contention, the ld. Counsel for the assessee relied mainly on the decision of Agra bench of this Tribunal in the case of Arvind Singh Chauhan vs. ITO 147 ITD 509. As regards, Third Member decision

of Mumbai bench of this Tribunal in the case of Captain A.L Fernandez vs. ITO (supra) relied upon by the CIT(A) in his impugned order, he contended that the same is distinguishable on facts in as much as the employer in the said case was Central Govt. Undertaking and the amount in question towards salary was received by the assessee in India. He contended that the Id. CIT(A) however has not appreciated this distinguishable features and wrongly placed reliance on the decision in the case of Captain A.L Fernandez (supra) ignoring completely the fact that the amount in question towards salary was initially received by the assessee outside India.

6. The Id. DR, on the other hand, submitted that there is no proof brought on record by the assessee to establish that the amount in question towards salary was received by him outside India. In this regard, he invited our attention to the relevant observations recorded by the Id. CIT(A) in his impugned order to point out that the assessee never had any control over the salary amount before it got credited to his NRE account maintained in India. He contended that it is thus a clear case of receipt of salary by the assessee in India which is chargeable to tax in India as per the provisions of section 5(2)(a) of the Act which are clearly applicable. He, therefore strongly supported the impugned order of the CIT(A) on the issue under consideration and urged that the same may be upheld,

7. We have considered the rival submissions and also perused the relevant material available on record. It is observed that the Coordinate Bench of this Tribunal in the case of Shri Tapas Kr. Bandopadhyay-vs-DDIT(IT) in ITA No.70/Kol/2016 had an occasion to consider the similar issue involving identical facts and circumstances and after discussing all the relevant aspects of the matter and dealing with all the submissions made on behalf of both the parties, which are similar to the submission made before us in the present case, the Tribunal decided the issue vide paragraph no. 10 (including paragraph nos. 10.1 to 10.6) of its order dated 01.06.2016 as under:

"10. We have heard the rival submissions and perused the materials available on record, The scheme of the Act is such that charge of tax is made independent of territoriality and residency and currency. The Id. DR argued that the assessee though rendered services outside India had received salary in India by way of fund transfer from foreign company in

abroad directly to NRE account of the assessee in India., The character of receipt of salary does not change according to Ld. DR. He argued that the receipt contemplated U/s. 5(2)(a) of the Act is actual receipt. Hence, income which is actually received in India is taxable in India u/s 5(2)(a) of the Act and hence, the Third Member decision relied on by the Ld. CIT(A) is directly in favour of the revenue. . When the decisions of both Bombay and Karnataka High Courts were put across to the Learned DR, he argued that both the Courts did not frame question of law and it was rendered in the context of taxability u/s. 5(2)(b) of the Act and not section 5(2)(a) of the Act. The Learned DR on the reliance placed by the Learned AR on the decision of Agra Bench of ITAT in the case of Arvind Singh Chauhan, supra argued that the said decision had not considered the Third Member decision, cited supra and hence to be ignored.

*10.1. We find that the assessee was only trying to introduce one more layer to the entire transaction that the assessee had the control over his money in the form of salary income in international waters and for the sake of convenience, he instructed the foreign employer to send the monies to his NRE account in India. It was argued by the assessee that income was actually earned by the assessee outside in India. It was argued by the assessee that income was actually earned by the assessee outside India and assessee had only brought those amounts into India. In other words, what was brought into India is not the salary income but only the salary amount. But we find that no evidence has been brought on record to prove that the assessee had the control over his salary income in international waters. Moreover, we find that if this argument of the assessee is to be accepted, then the assessee goes scot free from not paying tax anywhere in the world on this salary income. The provisions of section 5(2)(a) of the Act are probably enacted keeping in mind that income has to suffer tax in some tax jurisdiction. We believe that such provisions would exist in tax legislation of all countries. We hold that if the argument of the assessee is accepted, then it would make the provisions of section 5(2) of the Act redundant. It is only elementary that a statutory provision is to be interpreted *ultires magis veleat quam pereat*, i.e to make it workable rather than redundant. From the provisions of section 5(1) of the Act, in the case of a resident, the global income is taxable in India. In case of non-residents, the scope of total income has four modes, one of which is receipt in India, 'from whatever source derived',. If this is construed to mean that income from whatever source, should first accrue or arise in*

India and then it should be received in India to be included under section 5(2)(a), then section 5(2) will lose its independence and will become a subset of section 5(2)(b) and there would not be any need for having section 5(2) on the statute.

10.2. We find that heavy reliance has been placed by the Learned AR on the decision of the Hon'ble Bombay High Court in the case of CIT vs Avtar Singh Wadhwan reported in 247 ITR 260 (Bom) which was in turn followed by Hon'ble Karnataka High Court in the case of DIT(Intl. Taxn) vs. Prahlad Vijendra Rao reported in 239 ITR 107(Kar). We find that the question before the Hon'ble Bombay High Court was to decide the place of accrual of income. The Court held that the income accrues in the place where the services were rendered which was admittedly outside India. We find that the Court did not have an occasion to deliberate upon the fact that the receipt of the income has been in India as the issue decided by them was only the place of accrual of income in the context of section 5(2) of the Act. Hence, the decision relied upon by the Learned AR are factually distinguishable.

10.3. The argument of Learned AR was that the salary was received on the high seas and by way of a convenient arrangement, the same was directed to be deposited in the NRE account of the assessee in India. The question that arises for consideration is can a person receive salary on high seas. The only possibility of receiving salary on board of a ship on high seas is to receive in the local currency. It is not the case of the assessee that the local currency got deposited in the NRE account. On the other hand, the money was transferred from the employer's account outside India to the assessee's NRE account in India, in such circumstances, it is difficult to accept the contention of the Learned AR that salary was not received in India. The decision rendered by the Agra Tribunal in the case of Arvind Singh Chauhan vs. ITO in ITA Nos. 319 & 320/Agra/2013 dated 14.2.2014 is based on the decision rendered by the Hon'ble Madras High Court in the case of CIT vs A.P.Kalyankrishnan 195 ITR 534 (Mad), The facts before the Hon'ble Madras High Court were that the assessee in that case received pension from the Malaysian Govt and claimed it as not taxable. The AO found that the assessee received the pension in India through the Accountant General Madras directly and hence the pension received is liable to tax in India on receipt basis. The first appellate authority found that the pension amount received by the assessee had

been subjected to assessment in Malaysia in the status or non-resident and that clearly pointed out that the pension had accrued to the assessee only in Malaysia. It was further held that pension had accrued to assessee only in Malaysia and the Accountant General Madras was merely authorized to arrange for the payment of pension to the assessee rendering the amount of pension received in India by the assessee not liable to tax. On further appeal by the revenue, the Tribunal found that there was a letter dated 23.6.1.969 addressed by the Accountant General of the Federation of Malaya to the Accountant General Madras and that letter indicated an arrangement for payment in India and the circumstance that the pension of the assessee had also been assessed to tax in Malaya in the status of noncitizen and non resident would clearly establish that the pension of the assessee had been remitted to India by arrangement with the Accountant General Madras. On further appeal, the Hon'ble Madras High Court firstly' held that the Malaysian Govt had assessed the assessee to income tax on the pension. The Hon'ble High Court also found that the Malaysian Govt. had deducted tax at source which clearly indicated that the income had accrued to assessee in Malaysia and therefore not assessable in the hands of the assessee in India. The Hon'ble Court found that the accrual of pension and receipt of pension had already been taken place in Malaysia. The Hon'ble Court held that the letter dated 23.6.1969 addressed by the Accountant General Federation of Malaya Kuala Lumpur to the Accountant General Madras was only intended as an arrangement for the payment of pension to the assessee and the said letter was couched in the form of a request, requesting payment to the assessee to be made at the nearest treasury and the rate of exchange was also indicated therein. Further the letter also stated that the payment requested to be made was in respect of the pension payable to the assessee and at the rate of exchange indicated therein and the amount so paid, should, according to the letter, be charged to the Govt of Federation of Malaya in the usual manner. Taking note of the contents of the aforesaid letter, the Hon'ble Court held that payment in India was only an arrangement to ensure the prompt payment of pension which had already suffered tax in India. The Hon'ble High Court therefore held that the income should be construed as having been received outside India and the fact that the pension had been remitted or transmitted to the place where the assessee was living was a matter of convenience and that would not constitute receipt of pension in India by the assessee falling within section 5(1)(a) of the Act.

10.3.1 The above explanation would clearly prove that the facts before the Hon'ble Madras High Court (supra) are distinguishable from the facts of the present case in as much as the income in the present case did not suffer tax in any other jurisdiction nor was it received in any other jurisdiction. The receipt in the NRE account in India is the first point of receipt by the assessee and prior to that it cannot be said that the assessee had control over the funds that had deposited in the NRE account from the employer.

10.4 The facts in the case decided by the "9ra Tribunal supra were that the assessee received salary cheques by way of credit to his bank account with HS8C Mumbai. The Agra Tribunal took the view that the assessee had a lawful right to receive the salary as an employee at the place of employment i.e at the location of his foreign employer and it was a matter of convenience that the monies were thereafter transferred to India. As we have already seen that in section 5(2) of the Act, right to receive salary is not the relevant criterion, but the relevant criterion is the receipt of payment which is admittedly in India. Therefore, we have our own doubts as to the applicability of the decision of High Court in the case of A. P. Kalyankrishnan (supra) to the facts of the present case.

10.5 Now what we are left with is the decision relied upon by the Learned DR on the Third Member decision of Mumbai Tribunal in the case of Captain A.L Fernandez Vs. ITO reported in 81 ITD 203(TM), wherein it was held as under:

8. In my opinion, the salary is includible in the assessment under s. 5(2)(a) of the Act, which says that any income received by a non-resident in India is taxable in India. There is a clear finding in the order of the learned AM, that there is no dispute that the salary was received in India. This should put an end to the controversy. I may add, that the Ld. AM has not disputed the correctness of the Ld. JM's finding that under International law, the floating island theory has undergone a change and it is no longer correct to regard the Indian ships as floating islands. Therefore, the position accepted by the learned members is that the services were rendered outside India, the ships not being considered as part of India. However, since the salary was received in India, it was rightly held taxable in India under section 5(2)(a). I agree

with the ld. AM in this respect. This decision clearly lays down that the receipt in India of salary for services rendered on board a ship outside the territorial waters of any country would be sufficient to give the country where it is received the right to tax the said income on receipt basis. Such a provision is found in section 5(2)(a) of the Act which was applied in the aforesaid decision. It is true that decision of a Third Member would be equivalent to a decision of a Special Bench and thereby would become a binding precedent on the division bench.

10.6 We may also point out that the Agra Tribunal in the case supra had not considered the decision of the Third Member of Mumbai Tribunal supra. We therefore prefer to follow the decision of the Third Member case in the facts and circumstances of the present case.

7.1 As the issue involved in the present cases as well as all the material facts relevant thereto are similar to the case of Shri Tapas Kumar Bandopadhyay (supra), we respectfully follow the decision of the Coordinate Bench of this Tribunal rendered in the said case and uphold the impugned order of the ld. CIT(A) confirming the addition of Rs. 21,56,683/- made by the AO under section 5(2)(a) of the Income Tax Act, 1961 towards the amount of question representing salary income received in India.

11. In the result, appeal of assessee is dismissed.

Order Pronounced in the Open Court on 10th June, 2016''

6. During the course of the appeal hearing, the appellant/Ld. AR have also relied upon the decision of the Hon'ble Calcutta High Court in the case of Utanka Roy Vs. DIT (Int. Tax) Kolkata & Ors in W.P 369 of 2014, the date of judgment being 15th December, 2016 i.e. a very recent judgment. It is seen that the judgment of the Hon'ble Court was rendered in a situation where the appellant had suo mottu disclosed the amounts received in a similar situation for taxation, and the application seeking revision of such disclosure under Sec. 264 had not found favour with the Commissioner while adjudicating the application of the assessee u/s. 264 of the Income Tax Act. In this case, the order sought to be revised was an intimation u/s. 143(1), and there had been no scrutiny u/s. 143(3) of the Act to bring out the full factual matrix of the case. Also, while rendering

the said judgment, the Hon'ble High Court did not have an occasion to discuss the above two judgments of the Hon'ble jurisdictional ITAT, and therefore I find the reliance of the assessee on the judgment to be incomplete and without full justification.

Overall, in the facts and circumstances of the assessee, I find that the matter is covered against the assessee-appellant by the decisions of the Hon'ble ITAT as discussed above. I am therefore inclined to uphold the action of the ld.AO and the grounds taken by the appellant stand dismissed.”

3. I have given my thoughtful consideration to the rival contentions. I make it clear that there is dispute about assessee having rendered his services in Nijeria in view of impugned salary. In this backdrop of facts I find the jurisdictional hon'ble high court's decision in Utanka Roy V/s. Director of Income Tax, International Taxation, Transfer Pricing, Kolkata & Ors, W.P No. 369 of 2014, dt. of judgment: 15-12-2016 holds that such an income received by an assessee for services rendered outside India has to be considered as income accrued out of India not liable to be assessed in India. Learned Departmental Representative fails to dispute that the CIT(A) has nowhere disputed relevant facts of services rendered in said judicial precedent. I accordingly conclude that both the lower authorities have erred in assessing the tax payer's salary income of Rs.47,86,485/- as taxable in India.

4. This Assessee's appeal is allowed.

Order pronounced in the Court on 10-05-2019

Sd/-

[S.S.Godara]
Judicial Member

Dated : 10-05-2019

****PRADIP, Sr. PS**

Copy of the order forwarded to:

1. Appellant/Assessee: Shri Ashwini Kumar Singh 8A MIG-2,Block-7 Greenfield Ambition, Newtown, Rajarhast, Kolkata-156.
2. Respondent/Department: D.C.I.T (IT)-1(1),Aaykar Bhawan Poorva, 2nd Fl, 110 Shantipally, Kolkata-107.
- 3..C.I.T(A).- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Assistant Registrar
H.O.O/D.D.O Kolkata