

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“SMC-A” BENCH : BANGALORE**

**BEFORE SHRI JASON P. BOAZ, ACCOUNTANT MEMBER**

ITA No.2579/Bang/2018
Assessment Year : 2013-14

Shri. Vijendra Govinda Setty, Vaastu Hill View II, #438, Bangarappa Nagar Main Road, Raja Rajeshwari Nagar, Bangalore – 560 098. <b>PAN : ARAPS 3570 J</b>	Vs.	The Income-Tax Officer Ward-5(3)(5), Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri. Sandeep C, CA
Revenue by	:	Shri. Sumer Singh Meena, Addl. CIT

Date of hearing	:	22.04.2019
Date of Pronouncement	:	24.05.2019

**ORDER**

This appeal by the assessee is directed against the order of CIT(A)-5, Bangalore, dated 24.11.2017 for Assessment Year 2013-14.

2. Briefly stated, the facts of the case are as under:

2.1 The assessee, an individual, is an employee of Tata Consultancy Services Ltd., (TCS). During the year under consideration, the assessee was sent on deputation to USA for official work. For Assessment Year 2013-14, the assessee filed the return of income on 08.08.2013 declaring income of Rs.35,464/-. The case was selected for scrutiny for this Assessment Year. In the course of assessment proceedings, the Assessing Officer (AO) observed that the total income as per Form 16 issued by the employer was Rs.8,58,870/- as against Rs.35,464/- declared by the assessee in the return of income. As per the AO, the

assessee admitted that he had adopted the net income as per pay slips while computing the total income from salaries and agreed for the adoption of the amount of Rs.8,58,870/- as total income in India. Therefore, the total income of the assessee in India was assessed at Rs.8,58,870/- as per Form 16.

2.1.2 The AO further noticed that the assessee had been sent on deputation by his employer to USA from 30.08.2009 to 14.01.2013. As per the return of income filed in the USA, the assessee has shown taxable income in USA of US\$43,872/- in the year 2012, which worked out to Rs.23,33,552/-. The AO observed that since the assessee has stayed in India for 77 days during the previous year 2012-13 and more than 365 days in preceding four years, the assessee qualifies as "Resident" for the year under consideration. By holding the assessee as 'Resident', the AO assessed the global income of the assessee i.e., by including the income received in USA and granted credit for taxes paid in USA. In this manner, the assessee's income was determined at Rs.31,92,122/- (viz., Rs.8,58,870/- as per Form 16 and Rs.23,33,552/- as per return of income filed in USA). The order of assessment was accordingly concluded under section 143(3) of the Income Tax Act, 1961 (in short 'the Act') vide order dated 29.03.2016.

3. Aggrieved by the order of assessment dated 29.03.2016 for Assessment Year 2013-14; the assessee preferred an appeal before the CIT(A)-5, Bangalore, claiming that the deputation income received by the assessee in USA is towards living allowance / expenses which is exempt under section 10(14) of the Act and therefore should be excluded from the assessed income. In support of this contention, the assessee placed reliance on the decision of the ITAT, Kolkata Bench in the case of ITO Vs. Saptarishi Ghosh in ITA No.915/Kol/2010 dated 30.09.2011. The CIT(A) dismissed the assessee's appeal vide the impugned order dated 24.11.2017. While doing so, the CIT(A) observed that the assessee himself, during assessment proceedings, had asked the AO to consider the global income and grant credit for taxes paid in the USA and therefore there is no

infirmity in the order of the AO. It is seen that the CIT(A) neither adjudicated / addressed the issue of whether the deputation income received by the assessee while on deputation in USA is in the nature of living allowance exempt under section 10(14) of the Act nor did the CIT(A) consider the judicial decision of ITAT, Kolkata Bench cited by the assessee (supra).

4.1 Aggrieved by the order of CIT(A)-5, Bangalore, dated 24.11.2017 for Assessment Year 2013-14, the assessee has preferred this appeal before the Tribunal, wherein he has raised the following grounds:

1. *That the order of the learned Commissioner of Income Tax (Appeals) is prejudicial to the interests of the appellant, is bad and erroneous in law and against the facts and circumstances of the case.*
2. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in holding, that the living allowance received by the appellant in USA while on official tour is income liable to tax.*
3. *Without prejudice to the generality of the above ground, the learned Commissioner of Income Tax (Appeals) erred in law and on facts in not holding that the living allowance is exempt u/s 10(14) of Income Tax Act 1961 (Act)*

*Each of the above grounds is without prejudice to one another, the appellant craves the leave of the Hon'ble Income Tax Appellate Tribunal, Bangalore to add, delete, amend or modify otherwise all or any of the above grounds either before or at the time of hearing this appeal.*

#### **Additional Grounds of appeal**

4.2.1 The assessee, vide letter dated 05.11.2018, has raised the following additional grounds of appeal:

*The appellant herein seeks the leave of the Hon'ble Income Tax Appellate Tribunal, Bangalore file the following additional grounds.*

1. *That the learned lower authorities erred in law and on facts in assessing the appellant in the status of Resident even though the appellant left India for the purposes of employment outside India and has stayed for 77 days only in India during financial year 2012-13.*

2. *That the learned lower authorities ought to have held that the appellant is a non-resident.*
3. *That the learned lower authorities erred in law and on facts in assessing the salary income of 23,33,552/- received for the employment performed in United States of America even though the appellant is a Non-Resident.*

4.2.2 After hearing the rival contentions in the matter in respect of the admission of additional grounds of appeal, sought to be filed by the assessee (supra), I am of the view that they are to be admitted for consideration and adjudication since the facts and material relating to the above additional grounds are already on record and also since they are purely legal in nature. In coming to this finding, I draw support and place reliance on the decision of the Hon'ble Apex Court in the case of CIT Vs. NTPC Ltd., (229 ITR 383) (SC).

4.3 Vide letter dated 05.12.2018, the assessee has sought leave to file an additional evidence the copy of Deputation Agreement entered into between the assessee and his employer (TCS) to buttress the already accepted fact that the assessee was granted living allowance for his official duties on deputation / assignment in USA (placed at pages 11 to 25 of Paper Book). In my view, this additional evidence is also to be admitted for consideration as it is said to pertain/support the additional grounds of appeal raised (supra).

4.4.1 In support of grounds raised in this appeal (supra), the assessee has filed a Paper Book (pages 1 to 67) containing various documents, copies of certain judicial pronouncements; including the decision in the case of ITO Vs. Saptarishi Ghosh (supra). The assessee has also raised additional grounds (supra) canvassing the argument that since the assessee has stayed in India for only 77 days in the relevant previous year, therefore he should have been treated as a Non-Resident and assessed as such. It was submitted that since the assessee is a Non-Resident, the income received in USA was not liable to be assessed in India at all. To buttress his contentions in the additional grounds, the assessee

has filed a copy of the Deputation Agreement entered into by him with his employer as additional evidence (copy placed at pages 11 to 25 of Paper Book).

4.4.2 The issue that the assessee is a non-resident for tax purposes due to his stay in India for only 77 days has not been raised either before the AO on the CIT(A). However, the taxability of the income depends critically on the residential status of the assessee. Therefore, it is deemed appropriate to admit the additional grounds raised and the additional evidence submitted.

4.5 The learned AR of the assessee submitted that the income adopted by the AO was based on the details furnished by the assessee and the issue for consideration / adjudication is only on the correct characterization of the income. According to the learned AR, the assessee should have been characterized as a non-resident based of his duration of stay of 77 days in India in the year under consideration; the facts of which are on record and duly noted by the AO in the order of assessment and in which case, the income received by the assessee in USA is not taxable in India at all. It is contended that even if the assessee considered as Resident, the income received by the assessee in USA was living allowance which is exempt under section 10(14) of the Act. It was submitted that the issue of income being exempt under section 10(14) of the Act was raised before the CIT(A), but was not adjudicated by the CIT(A).

4.6 Per contra, the learned DR for Revenue vehemently argued in support of the orders of the Authorities below. According to the learned DR, the assessee had characterized himself as Resident and agreed for assessing his global income in India. It is also pointed out that the AO has granted credit for taxes paid by the assessee in USA and therefore the assessee should not have any grievance, as observed by the CIT(A). In support of the contention that the assessee is a resident in the relevant year, AO's letter dated 18.01.2019 was submitted, wherein it is stated that the assessee satisfies the twin conditions of 77 days of

stay in India in the year under consideration and more than 365 days in the preceding four previous years.

4.7.1 I have considered the rival contentions, examined the details / documents produced and on or record; including the judicial pronouncements cited. On an appraisal of the record, it emerges that the assessee had taken conflicting stands before the authorities below. The assessee did not declare / disclose the correct income from salaries in India, while filing the return of income for Assessment Year 2013-14. He subsequently submitted that he was not aware that the income earned in USA should also be declared in the return of income filed in India. Before the AO, the assessee agreed for assessment of his global income, provided he is given credit for the taxes paid in USA. Subsequent, when carrying the matter in appeal before the CIT(A), he raised the ground Nos.2 and 3 contending that the income received by the assessee for official work while on deputation in USA is living allowance which is exempt under section 10(14) of the Act; a claim not raised before the AO in assessment proceedings. In the present appeal, the contentions in the ground raised by the assessee (supra) are that he should be assessed as a non-resident; thereby challenging the very characterization of his residential status.

4.7.2 Be that as it may, it is the duty of the AO to assess the correct income of the assessee and for that purpose it is essential and necessary to determine the correct status of the assessee. That the assessee stayed in India for 77 days in the previous year relevant to Assessment Year 2013-14 is not in dispute. However, the twin conditions that he should have been in India for 365 days in the four preceding previous years has neither been raised or examined by the authorities below. The AO, in the order of assessment, had made a claim towards that end and the AO's letter dated 18.01.2019 filed by Revenue reiterates the same. It is however seen that the AO himself stated that the assessee's deputation period was from 30.08.2009 to 14.01.2013. That being so, it is not

clear as to how the AO determined that the period of stay of the assessee in India was 365 days in the four previous years. This issue requires to be examined / verified factually. As mentioned earlier, this issue is crucial to decide the residential status of the assessee, which is critical for assessment of the income received by the assessee in USA in the year under consideration. In view of the factual matrix of the case, as discussed above, it is deemed appropriate to set aside the orders of the authorities below and restore the matter to file of the AO to examine / verify the facts of the matter and decide the residential status of the assessee in the previous relevant to Assessment Year 2013-14 for assessment of the correct income of the assessee in accordance with law. Needless to add, the AO shall afford the assessee adequate opportunity of being heard and to file details / submissions required, which shall be duly considered by the AO before adjudication. I hold and direct accordingly.

5. Since the basic issue of the residential status of the assessee has been remanded back to the file of the AO for examination / adjudication, it is not necessary at this juncture to decide the issue of whether the income received by the assessee in USA for official work while on deputation / assignment is living allowance which is exempt under section 10(14) of the Act, though the judicial decision of ITAT, Kolkata Bench cited by the assessee (supra) is squarely on the facts of the case and the issue raised in the case on hand. Needless to add, in case the AO determines the status of the assessee to be Resident in India, he shall examine the taxability of the income received by the assessee in USA, in the light of the aforesaid decision of the ITAT – Kolkata such in ITO Vs. Saptarishi Ghosh (supra), cited by the assessee.

6. In the result, assessee's appeal for Assessment Year 2013-14 is allowed for statistical purposes.

*Pronounced in the open court on 24<sup>th</sup> May, 2019.*

Sd/-  
**(JASON P. BOAZ)**  
**Accountant Member**

Bangalore.

Dated: 24<sup>th</sup> May, 2019.

/NS/\*

Copy to:

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|-------------------------|---------------|
| 1. Appellants           | 2. Respondent |
| 3. CIT                  | 4. CIT(A)     |
| 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,  
ITAT, Bangalore.