INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
(Through Video Conferencing)

BEFORE
SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No. 4728/Del/2015
Asstt. Year 2010-11

Shri Aditya Khanna, C-90, Panchsheel Enclave New Delhi PAN AOEPK2073B	Vs.	DDIT, Circle-3(1), Intt. Taxation New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Ved Jain, Sr. Advocate Shri Sunil Goel, CA
Department by :	Shri Satpal Gulati, CIT
Date of Hearing	01/09/2020
Date of pronouncement	07/09/2020

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

This appeal has been preferred by the assessee against order dated 15.05.2015 passed by the Ld. Commissioner of Income-tax (Appeals) -43, New Delhi ['CIT(A)] for assessment year 2010-11.

2.0 The brief facts of the case are that the assessee had filed the original return of income declaring total income of Rs. 71,07,337/-. Thereafter a revised return was filed declaring the same income but also claiming a refund of Rs. 4,69,500/-. As per the records, the assessee was employed with M/s. Allen & Co., LLC, USA and had declared income under the head 'salaries' on a proportionate basis as under:-

Taxable income in India = Total income *230/365

i.e. Rs.1,12,76,036/-*230/365 = Rs. 71,07,337.

2.1 Accordingly, the total income offered to tax in India was Rs. 71,07,337/-. In the original return of income the assessee had computed his tax liability at Rs. 4,69,704/- which was paid as self assessment tax. However, in the revised return, the amount of Rs.4,69,504/- was claimed as refund. It was the assessee's contention that he was claiming relief for double taxation with respect to the taxes paid in United States in respect of salary earned/ taxed in India. The proportionate tax credit being claimed by the assessee for the period of stay in India was for 230 days and it was calculated at Rs. 21,35,813/- but was restricted to the amount of the Indian income tax liability. It was the assessee's

plea that the assessee should be given credit of Federal as well as State taxes paid in the United States. However, the Assessing Officer was of the opinion that only the Federal income tax paid in the USA would be covered for the purpose of credit of tax paid abroad which worked out to Rs. 15,37,382/- on proportionate basis for 230 days.

2.2 Aggrieved, the assessee approached the Ld. First Appellate Authority challenging the action of the Assessing Officer and submitted before the Ld. CIT (A) that firstly there was an error in the computation of number of days of his stay in India which was 223 days and not 230 days. It was further submitted before the Ld. CIT (A) that the assessee should be allowed the credit of State taxes paid in India and that the assessee's claim should be allowed u/s 91 of the Income Tax Act, 1961 (hereinafter called 'the Act') . However, the Ld. CIT (A) rejected the assessee's appeal and denied the credit of State taxes paid in USA. The Ld. CIT (A) also held that since the assessee was not ordinarily resident in India during the year under consideration, the benefit of provisions of section 91 of the Act would not be available to him.

2.3 The assessee is now before this Tribunal challenging the findings of the Ld. CIT (A) and has raised the following grounds of appeal:-

1. *"The order passed by the Learned DDIT Circle 3(1), International Taxation, Delhi to the extent sustained by CIT (Appeals)-43 is bad in law, arbitrary and contrary to the facts of the case and therefore, deserves to be set aside.*

2. *The Learned CIT (Appeals) has erred on the facts and law in denying the benefit u/s 91 of the Act on the plea that the assessee being "Resident but not Ordinarily Resident" is not a "Resident in India" and hence not entitled to the benefit of the ^-Section.*

3. *The Learned CIT (Appeals) has erred on the facts and in law in denying the Foreign Tax Credit for New York State Taxes (including local taxes) paid of Rs 4,55,757/- and restricting the same to US Federal Taxes only.*

4. *The Learned CIT (Appeals) has erred on the facts and in law in interpreting that the provisions of Section 91 of the Act (which do not discriminate between the taxes levied by the Federal Government and the taxes levied by the State Government), do not apply where there is a treaty entered into for Avoidance of Double Taxation in complete disregard to the provisions of Section 90(2) of the Act where the assessee can take benefit of provisions of the Act that are more beneficial to him.*

5. *The Learned CIT (Appeals) is wrong in upholding that the judgments in "DCIT Vs Tata Sons Ltd": (2011) 135 TTJ (Mumbai) 1: (2011) 9 ITR 154 as well as that passed in "Tata Sons Ltd vs DCIT" in ITA No. 4978/Mum/04" do not apply to the assessee.*

6. *That without prejudice to Grounds 2, 3, 4 and 5, Learned CIT (Appeals) has erred on the facts and in law in not considering the "alternate plea" of the assessee that the "New York State Taxes (including local taxes) paid in USA" should not form part of taxable income in India if the same are not considered for the purpose of Foreign Tax Credit as there is no deeming provision u/s 198 of the Income Tax Act, 1961 with respect to taxes deducted at source outside India.*

7. *The Assessee craves leave to add, amend, alter or forego any of the above grounds of appeal at any time hereafter.*

3.0 At the outset, the Ld. Authorised Representative submitted that the assessee's case is squarely covered by the order of the Tribunal in assessee's own case for the immediately succeeding assessment year i.e. assessment year 2011-12 in ITA No. 6668/Del/2015 vide order dated 17.05.2019. The Ld. Authorised Representative drew our attention to the relevant paragraphs of the order of the Tribunal as aforesaid and submitted that in view of the order of the Tribunal in assessee's own case on identical issue in favour of the assesse, the present appeal of the assessee also deserves to be allowed.

4.0 Per contra, the Ld. CIT (DR) placed reliance on the concurrent findings of the Assessing Officer as well as the Ld. CIT (A). The Ld. CIT (DR), however, fairly accepted that since the Tribunal had decided the issue in favour of the assessee in the succeeding assessment year, the same was a binding precedent for this Bench.

5.0 We have heard the rival submissions and have also perused the material available on record. We have also gone through the

order of the coordinate bench of this Tribunal for the assessment year 2011-12 in ITA No. 6668/Del/ 2015 vide order dated 17.5.2019 and we find that issue has been discussed at length in paragraphs 10 to 14 of the said order and the same are being reproduced here-in-under for a ready reference :-

"10. We have carefully considered the rival contentions and perused the orders of the lower authorities. Admittedly in the case the assessee is a „resident but not ordinarily resident" assessee. The assessee has claimed the credit for taxes paid of federal as well Page | 10 as state income tax in United States of America. Therefore the following 2 questions arise before us:-

a. whether the assessee can claim tax relief u/s 91 of the income tax act with respect to the federal tax and state income tax or not.

b. Whether the assessee who is not a „resident" but „resident and not ordinarily resident" can also claim relief/ deduction u/s 91 of the act or not.

11. With respect to the 1st issue that whether the benefit conferred u/s 91 of the income tax act has to be extended to the income tax paid in foreign jurisdictions pertaining to the federal tax and state tax or not, question has been answered by the honourable Karnataka High Court in case of Wipro Ltd vs Deputy Commissioner Of Income Tax [382 ITR 179] wherein it has been held as under:-

> *"66. The said provision provides for deduction of the tax paid in any country from the Indian Income-tax payable by him of a sum calculated on such doubly taxed income even though there is no agreement under section 90 for the relief or avoidance of double taxation. Explanation (iv) defines the expression Income-tax in relation to any country includes any excess profit tax or business profits tax charged on the profits by the Government of any part of that country or a local authority in that country. Therefore the intention of*

Parliament is very clear. The Income-tax in relation to any country includes Income-tax paid in any part of the country or a local authority. It applies to cases where in a federal structure a citizen is made to pay federal Income-tax and also the State income tax. The Income-tax in relation to any country includes Income-tax paid not only to the Federal Government of that country, but also any Income-tax charged by any part of that country meaning a State or a local authority, and the assessee would be entitled to the relief of double taxation benefit with respect to the latter payment also. Therefore, even in the absence of an agreement under section 90 of the Act, by virtue of the statutory provision, the benefit conferred under section 91 of the Act is extended to the Income-tax paid in foreign jurisdictions. India has entered into an agreement with the federal country and not with any State within that country. In order to extend the benefit of this, relief or avoidance of double taxation, the aforesaid Explanation explicitly makes it clear that Income-tax in relation to any country includes the Incometax paid to the Government of any part of that country or a local authority in that country. Therefore, even though, India has not entered into any agreement with the State of a country and if the assessee has paid Income-tax to that State, the Income-tax paid in relation to that State is also eligible for being given credit to the assessee in India. Therefore, the argument that in the absence of an agreement between India and the State, the benefit of section 90 is not available to the assessee is ex-facie illegal and requires to be set aside.

[Underline supplied by us]

12. Futher coordinate bench in case of ITA No.1285/Ahd/2014 Assessment year: 2010-11 in Dr. Rajiv I. Modi Vs. The Deputy Commissioner of Income-tax (OSD) ....Respondent Range-1, Ahmedabad has also dealt with similar question and held as under :-

> *"5. The issue as to whether state taxes on income paid by the assessee in the USA are eligible for tax credit is no longer res integra. The Co-ordinate Bench of this Tribunal in the case of Tata Sons Ltd vs. DCIT [(2011) 10 taxmann.com 87 (Mum)], speaking through*

one of us, i.e. AM, has decided the issue in favour of the tax payer. While doing so, the Tribunal observed as follows:-

> *3. In the original hearing, the assessee had not pressed the ground of appeal seeking credit in respect of state income tax paid in United States, Page | 12 but had claimed deduction in respect of the same under section 37(1). The reason, for not pressing this ground of appeal, was stated to be that the assessee was content with CIT(A)‟s having granted the deduction in respect of these taxes, as the claim for tax credit was anyway not admissible in terms of the Indo US tax treaty. The Assessing Officer was also in appeal before us in respect of the deduction having been granted by the CIT(A). For the detailed reasons set out in our order dated 24t h November, 2010, we upheld the grievance of the Assessing Officer and held that deductions in respect of any income tax paid abroad, whether state or federal, were not admissible. One of the arguments before us was that at least deduction in respect of US and Canada state income taxes should be allowed, since the US and Canada state income tax payments did not entitle the assessee to any tax credit, and either an income tax payment is to be allowed as deduction or it is to be taken into account for giving tax credit. We were also taken through the provisions of India-USA Agreement for Avoidance of Double Taxation and Prevention of Fiscal Evasion [187 ITR (Statute) 102 - hereinafter referred to as „Indo US tax treaty], to show that the tax credits under the India US tax treaty are restricted to credits in respect of federal income tax paid in the United States. It Page | 13 was also submitted that under the India Canada Double Taxation Avoidance Agreement, tax credits are admissible only in respect of tax paid under the „Income Tax Act of Canada‟ whereas state income taxes are levied under separate provincial*

legislations. It could not, according to the learned counsel, result in a situation in which an income tax payment cannot have any tax implication – neither as a charge on income, nor as an allocation of income. While rejecting these arguments, and allowing the appeal of the Assessing Officer on this issue, we had, inter alia, observed as follows:

> *"20. Learned counsel has also contended that in any event, we must allow deduction in respect of state income-taxes paid in USA and Canada as relief is not admissible in respect of the same in respective tax treaties. We have been taken through India USA tax treaty to point out that tax credits are admissible only in respect of Income-tax levied by the federal Government and not by the State Governments. It is contended that since no relief is admissible in respect of state taxes under section 90 or section 91, these taxes will continue to be tax deductible, and to that extent, decisions of the coordinate benches will hold good. We are unable to see legally sustainable merits in this submission either. Apart from the fact that such a claim of deduction is clearly contrary to the law laid down by Hon"ble jurisdictional High Court in Lubrizol India Ltd."s case (supra), there is another independent reason to reject this claim as well. The reason is this. It is only elementary that tax treaties override the provisions of the Income-tax Act, 1961, only to the extent the provisions of the tax treaties are beneficial to the assessee. In other words, a person cannot be worse off visa-vis the provisions of the Income-tax Act, even when a tax treaty applies in his case. Section 90(2) states that even in relation to the*

assessee to whom a tax treaty applies "the provisions of this Act shall apply to the extent they are more beneficial to that assessee". Undoubtedly, title of section 91 as also reference to the countries with which India has entered into agreement, suggests that it is applicable only in the cases where India has not entered into a double taxation avoidance agreement with respective jurisdiction, but the scheme of the section 91, read alongwith section 90, does not reflect any such limitation, and section 91 is thus required to be treated as general in application. The scheme of the Income-tax Act is to be considered in entirety in a holistic manner, and each of the section cannot be considered on standalone basis. It is important to bear in mind the fact that so far as section 91 is concerned, it does not discriminate between taxes levied by the Federal Governments and taxes levied by the State Government. The Income-tax levied by different States in USA usually ranges from 3 per cent to 11 per cent, and the aggregate Income-tax paid by the assessee in USA will range from 38 per cent to 46 per cent. Therefore, on the facts of the present case and bearing in mind the fact that the Federal Incometax in USA at the relevant point of time was lesser in rate at 35 per cent vis-avis 38.5 per cent Incometax rate applicable in India, the admissible double taxation relief under section 91 will be higher than relief under the tax treaty. It will be so for the reason that State Incometax will also be added to Income-tax abroad, and the aggregate of taxes so paid will be eligible for tax relief - of course subject to tax rate on which such income is actually taxed in India.

The tax relief under section 91 thus works out to at least 38 per cent, as against tax credit of only 35 per cent admissible under the tax treaty. In such a situation, the assessee will be entitled to relief under section 91 in respect of federal as well as state taxes, and that relief being more beneficial to the assessee vis-a-vis tax credit under the applicable tax treaty, the provisions of section 91 will apply to state Income-taxes as well. The state Income-tax is also, therefore, covered by Explanation 1 to section 40(a)(ii), and deduction cannot be allowed in respect of the same. Finally, in view of Hon‟ble Bombay High Court‟s judgment in S. Inder Singh Gill‟s case (supra), Income-tax abroad cannot be allowed as a deduction in computation of income and this judgment does not discriminate between federal and state taxes either. Interestingly, state Income-taxes paid in USA, subject to certain limitations, are deductible in computation of income for the purposes of computing federal tax liability in USA, but that factor cannot influence deductibility of these taxes, particularly in the light of the provisions of Explanation 1 to section 40(a)(ii) and in the light of Hon‟ble Bombay High Court‟s judgment in S. Inder Singh Gill‟s case (supra), in computation of Page | 17 business income under Indian Income-tax Act. For all these reasons, we are unable to uphold the plea of the assessee seeking deduction of at least state Income-tax paid in USA."

4. *Having so held that deduction in respect of state income tax paid is not admissible, when we took up the appeal of the assessee and noticed that*

the assessee has not pressed grievance against tax credit in respect of state income tax paid in USA and Canada, for the stated reason that the same is not admissible in terms of the Indo US and Indo Canada tax treaty provisions, we deemed it appropriate to once again hear the parties on this issue. In our considered view, it is indeed an incongruous position that payment of state income taxes in US and Canada are not allowed deduction as these are treated as in the nature of taxes on income, in terms of the provisions of domestic tax law in India, and these payments are also not being taken into account for granting credit for taxes paid abroad by the assessee, as only federal income tax is eligible for tax credit in terms of the Indo US and Indo Canada tax treaty. If this approach is adopted, the assessee does not get a deduction for state taxes so paid abroad, nor does he get the tax credit for the same, and if these two propositions are correct, there is clearly an inherent contradiction in these propositions on tax treatment for state income taxes paid abroad. There cannot obviously be a tax payment which is neither treated as admissible expenditure, because it is treated as an income tax, nor is it taken into account for tax credits, because it is not to be treated as income tax. However, as we have observed in our order on the cross appeal, extracts from which are reproduced in the preceding paragraph, it is incorrect to proceed on the assumption that state income tax paid in USA, or for that purpose paid in Canada, cannot be taken into account for the purposes of computing admissible tax credits. It is so for the elementary reason that the provisions of a tax treaty, based on which tax credits are said to be inadmissible, cannot be pressed into service to decline a benefit to the assessee which is otherwise available to him, even in the absence of such a tax treaty, under

the provisions of the Income Tax Act.

5. *Even as we have held that, in principle, state income taxes paid in USA are eligible for being taken into account for the purpose of computing admissible tax credit under Section 91, we are alive to the fact that Section 91 refers to a situation in which the assessee has paid tax "in any country with which there is no agreement under section 90 for the relief or avoidance of double taxation" and that there is indeed an agreement under section 90 with United States of America, as also with Canada. If we adopt a literal interpretation of this provision, and bearing in mind the undisputed position that tax credit provisions under section 91 are more beneficial to the assessee vis-à-vis the tax credit provisions in related tax treaties inasmuch as while section 91 permits credit for all income taxes paid abroad – whether state or federal, relevant tax treaties permit credits in respect of only federal taxes, it will result in a situation that an assessee will be worse off as a result of the provisions of tax treaties. That certainly is not permissible under the scheme of the Income Tax Act. Circular 621 dated 19-12-1991 [(1992) 195 ITR (Statutes) 154] issued by the Central Board of Direct Taxes, which is binding on the Assessing Officer under section 119(2) of the Act, inter alia , observes that "Since the tax treaties are intended to grant relief and not put residents of a Contracting State at a disadvantage vis-a-vis other taxpayers, section 90 of the Income-tax Act has been amended to clarify any beneficial provision in the law will not be denied to a resident of a contracting country merely because corresponding provision in a tax treaty is less beneficial". In the case before us, however, tax credit provisions in Indo US tax treaty are admittedly less advantageous to the assessee, but just because there is a tax treaty between India and USA, the benefits of the*

domestic law provisions are being declined to the assessee. That is an interpretation which leads to absurdity and calls for an interpretation harmonious with the scheme of the Income Tax Act. In case of any conflict between the provisions of the agreement and the Act, the provisions of the agreement would prevail over the provisions of the Act, as is also clear from the provisions of section 90(2) of the Act. Section 90(2) makes it clear that "where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax, or for avoidance of double taxation, then in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to that assessee" meaning thereby that the Act gets modified in regard to the assessee in so far as the agreement is concerned if it falls within the category stated therein. It would thus appear that the treaty override is only restricted to the extent it is beneficial to a taxpayer. In other words, the fact that a taxpayer is entitled to make a particular claim, in accordance with a tax treaty provisions, does not disentitle him to make the claim in accordance with the provisions of the Act. In this view of the matter, and further to the observations made by us in our order on the cross appeal, in our considered view, the provisions of Section 91 are to be treated as general in application and these provisions can yield to the treaty provisions only to the extent the provisions of the treaty are beneficial to the assessee; that is not the case so far as question of tax credits in respect of state income taxes paid in USA are concerned. Accordingly, even though the assessee is covered by the scope of India US and India Canada tax treaties, so far as tax credits in respect of taxes paid in these countries are concerned, the provisions of Section 91, being beneficial to the assessee,

hold the field. As Section 91 does not discriminate between state and federal taxes, and in effect provides for both these types of income taxes to be taken into account for the purpose of tax credits against Indian income tax liability, the assessee is, in principle, entitled to tax credits in respect of the same. Of course, as is the scheme of tax credit envisaged in Section 91, tax credit in respect of foreign income tax is restricted to actual income tax liability in India, in respect of income on which taxes have been so paid abroad."

6. We have noted that the concerned CIT(A) has declined to follow the decision of the Tribunal even though he was fully aware of the same. Merely because a judicial precedent is challenged in further appeal, the precedence value of such a judicial precedent does not get diluted. The stand of the CIT(A), in conscious disregard of a binding judicial precedent, cannot but be condemned. Be that as it may, in any event, we see no reason to take any other view of the matter than the view so taken by the co-ordinate bench. Respectfully following the same, we uphold the plea of the assessee in respect of the credit for the state tax paid in the USA. This is, however, subject to the rider that the credit for all taxes paid abroad in any case cannot exceed the Indian income-tax liability in respect of the same income. While giving effect to this order, the Assessing Officer will verify this aspect of the matter. With these observations, the matter stands restored to the file of the Assessing Officer for granting admissible relief, if any."

13. In view of the above judicial precedents, respectfully following them, we hold that assessee is entitled for tax credit of federal as well as state taxes paid by him u/s 91 of the Act.

14. The 2nd question that arises whether the assessee being „resident but not ordinarily resident‟ in India is entitled to tax relief u/s 91 of the income tax act or not. Provisions of section 91 (1) provides relief/deduction of taxes paid with respect to a person who is a „resident‟ in India. The provisions of section 91 (2) also deals with the person who is a „resident‟ in India. The provisions of section 91 (3) deals with the person who is a „non-resident‟. The revenue contends that as the assessee is not a „resident‟ therefore he is not entitled to benefit of section 91 of the act. The provisions of section 6 of the income tax act provides for qualification of the persons who are residents in India. The provisions of section 6 (6) carves out another category of person in „ Residents‟ , who is said to be „not ordinarily resident‟ in India. However such persons are also „resident‟. The category is also called a „resident but not ordinarily resident‟ in India. Therefore persons who are „resident but not ordinarily resident‟ in India are forming larger group of the persons who are „resident‟ in India. In view of this, we reject the contentions of the revenue that benefit of section 91 (1) of the act does not apply to a person who is „not ordinarily resident‟ in India. In view of this, ground number 2 – 5 of the appeal of the assessee are allowed. "

5.1 Therefore, in view of the issue having been settled in favour of the assessee in the immediately succeeding assessment year we, respectfully, following the order of the coordinate bench, allow ground Nos. 2 to 5 of the assessee's appeal.

5.2 Ground No. 6 is an alternative plea of the assessee that the New York State Taxes should not form part of taxable income in India if the same are not considered for the purpose of foreign tax credit as there is no deeming provision u/s 198 of the Act with respect to taxes deducted at source outside India. Since we have already allowed ground Nos. 2 to 5 of the assessee's

appeal, ground No. 6 becomes *in fructuous* and is dismissed as such.

5.3 Ground Nos. 1 and Ground No. 7 are general grounds need not requiring specific adjudication.

6.0 In the final result the appeal of the assessee stands partly allowed.

Order pronounced on 7th September, 2020.

sd/- sd/-

(G.S. PANNU)
VICE PRESIDENT

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Dated: 07/09/2020

Veena

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi