आयकर अपीलीय अधिकरण 'ए'न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीयश्रीमहावीर सिंह, उपाध्यक्षएवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI MAHAVIR SINGH, VICE PRESIDENT AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./ **ITA No.2936/Chny/2018**
(निर्धारणवर्ष / Assessment Year: 2015-16)

Shri. Kanagaraj Shanmugam Flat No. 30, 3rd East Street, Pallapatti, Salem – 636 009.	**बनाम**/ Vs.	**ITO** (International Taxation), Ward 1(2),Chennai.
स्थायीलेखासं./जीआइआरसं./**PAN/GIR No. AYMPK-7359-Q**		
(अपीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Ms. M.Abhinaya and Shri V.Balaji (CA)-Ld. ARs
प्रत्यर्थीकीओरसे/**Respondent by**	:	Shri ARV Sreenivasan (Addl. CIT)-Ld. DR
सुनवाईकीतारीख**/Date of Hearing**	:	26-08-2022
घोषणाकीतारीख/**Date of Pronouncement**	:	07-09-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2015-16 arises out of the order of learned Commissioner of Income Tax (Appeals)-16, Chennai [CIT(A)] dated 02.08.2018 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) of the Act on 27.12.2017. The grounds raised by the assessee read as under:

> 1. The learned CIT(A) has erred in law and on facts in not allowing benefit of Treaty exemption amounting to INR3,940,843 claimed by the Appellant under Article 16(1) of India-UK Double Taxation Avoidance Agreement ('Treaty') in the revised return of income, based on erroneous and incorrect interpretation that the Appellant is not eligible to claim relief under Article 16(1) of India - UK Treaty, since the Appellant is a resident of UK and non-resident of India.

2. The learned CIT(A) has erred in law and on facts in not appreciating that as per Article 16(1) of India-UK Treaty, salary received by the Appellant being a tax resident of UK, is taxable only in the country where employment is exercised (i.e., UK). The learned CIT(A) has further erred in law and on facts in not appreciating that merely because the Appellant is on the payroll or employment of OFSS India, that by itself will not impact or alter the taxability in India.

3. Without prejudice to the above, that the learned CIT(A) has erred in law and on facts in holding that as per provision of section 5(2) of the Act, salary of the Appellant shall be taxable in India on receipt basis. While holding so, the learned CIT(A) has not appreciated the provisions of section 15 read with section 5(2) and section 9(i)(ii) of the Act, which clearly provides for taxability of salary on accrual basis and not on the basis of receipt of salary income (except in case of salary received in advance or arrears of salary).

4. Without prejudice to the above, that the learned CIT(A) has further erred in law and on facts in holding that salary has accrued in India (and not in UK) based on employer-employee relationship between OFSS India and the Appellant. While holding so, the learned CIT(A) has completely ignored the settled law that place of accrual of salary is the place where employment is actually exercised i.e. the place where services are performed - which in the instant case is UK (and not the place where contract of employment is signed).

5. That the learned CIT(A) has erred in law and on facts in dismissing the ground relating to withdrawal / recovery of interest under section 244A amounting to INR 82,739 and levy of interest under section 234D of the Act amounting to INR 89,749.

6. That the learned CIT(A) has further erred in law and on facts in not adjudicating the ground relating to initiation of penalty proceedings under section 274 of the Act.

7. The Appellant craves leave to alter, amend or withdraw all or any of the grounds of appeal herein or add any further grounds as may be considered necessary and to submit such statements, documents and papers as may be considered necessary either before or during the appeal hearing.

2. The Ld. AR advanced argument assailing the stand of lower authorities and relied on various judicial pronouncements. The same has been controverted by Ld. Sr. DR. Having heard rival submissions and after due consideration of material facts, our adjudication would be as under.

Assessment Proceedings

3.1 The assessee admitted salary income of Rs.37.32 Lacs in the return of income filed on 25.06.2015. However, the return was revised on 26.05.2016 wherein the income was declared as ‘nil’ after claiming exemption under Article 16(1) of India-UK Double Taxation Avoidance

Agreement (DTAA) and refund of Rs.9.73 Lacs was claimed. The Ld. AO show-caused the assessee as to why salary income of Rs.38.42 Lacs as reflected by assessee's employer in Form 16 not be considered as total income of the assessee.

3.2 It transpired that the assessee was an employee of M/s Oracle Financial Services Software Limited (OFSSL). The assessee was sent on an assignment to UK for the period from 22.04.2014 to 21.04.2016. The salary for that period has been paid by OFSSL in India though the same was reimbursable by foreign counterparts. As per Form 16, the assessee received gross salary of Rs.39.85 Lacs. After claiming exemption u/s 10, the taxable salary amounted to Rs.38.92 Lacs.

3.3 The assessee submitted that his stay in India during financial year (FY) 2014-15 was only 63 days. Being a tax resident of UK in the year under consideration, his salary income for FY 2014-15 was taxable in UK only and the same had, in fact, been offered to tax in UK. The assessee also submitted that salary received for work performed in UK would be exempt in India as per Article 16(1) of Double Taxation Avoidance Agreement (DTAA) between India and UK. It was further submitted that this salary would be taxable in India only if it accrues in India and salary is considered to be accrued where the employment is exercised. In support, the assessee relied on various decisions which has been enumerated in the assessment order. The Ld. AO demanded Tax Residency Certificate (TRC) which could not be produced by the assessee.

3.4 The Ld. AO to formed an opinion that employer-employee relationship between the assessee and OFSSL continued. The assessee was sent to UK on assignment only and had not shifted his employer

whichwas evident from the fact that salary was received in India and Form 16 was also issued by OFSSL. The assessee merely got an opportunity to work in UK only because of his being an employee of OFSSL which may benefit OFSSL in many ways, directly and indirectly. In the form of direct benefit, the company will be paid by the foreign company for the services rendered by its employee and in form of indirect benefit, the employee of company gets experience, which will help the company in getting internationally experienced employee. All these factors show that there was Employee-Employer relationship between assessee and OFSSL even though the assessee was working in UK. Therefore, the salary due from an employer would be taxable u/s 15 of Income Tax Act. Further, Sec.5(2) provide that for non-resident, salary received in India would be taxable in India. So far as DTAA was concerned, the assessee was resident of UK and being non-resident in India, the assessee would not be eligible for relief under Article 16 of DTAA. Finally, the salary was held to be taxable in India.

Appellate proceedings

4.1 During appellate proceedings, the assessee inter-alia, submitted that his stay in India during the whole financial year was only 63 days and therefore, he would be non-resident in India. Being a tax resident of UK, the salary income for this period was taxable in UK and the same has, in fact, been offered to tax in UK. Being non-resident in India, salary received for work performed in UK is exempt in India as per Article 16(1) of DTAA.

4.2 It was alternatively submitted that the assessee would be entitled for relief as per Sec.15 read with Sec.5(2) and Sec.9(1)(ii) of the Act which provides for taxability of salary on the basis of accrual and not on

the basis of receipt of salary income. The assessee exercised employment inUK and salary thus earned was offered to tax in UK. The assessee also submitted that if a transaction results in receipt of an amount in India then it would not necessarily mean that it is taxable in India unless the provisions of the Act provide for taxing such receipts. To support, the same, the assessee relied on various judicial decisions.

4.2 The Ld. CIT(A) after appreciating the statutory provisions and the terms of DTAA opined that DTAA relief, if any, has to be given by the resident country. Since the assessee was resident of UK, he was not eligible to claim the relief under Article 16 of DTAA. Therefore, the additions were upheld against which the assessee is in further appeal before us.

Our findings and Adjudication

5. From the fact it emerges that the assessee has stayed in India for 63 days during this year and his status, as per law, is non-resident. The assessee has worked in India for 21 days and offered proportionate salary to that extent to tax. For remaining period, the work has been performed in UK though the salary has been received in India from existing employer. It is also a fact on record that this salary, for work performed in UK, has been offered to tax in UK which is evident from Tax Returns filed in UK. The assessee submit the as per Article 16(1) of DTAA, this income would be taxable in UK only. Alternatively, the assessee relies on the provisions of Sec.15 read with Sec.5(2) and Sec.9(1)(ii) which provides for taxability of salary on accrual basis and not on receipt basis. However, Ld. CIT(A) has held that the assessee would not be eligible for the benefit of DTAA since DTAA relief is to be given by resident country which is UK in the present case.

6. We find that an identical issue has been addressed by coordinate bench of Chennai Tribunal in **Shri Paul Xavier Antonysamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020).** In this decision, the bench has held that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), salary income could be deemed to accrue or arise in India only if it is earned in India in respect of services rendered in India. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016) was held to be factually distinguished on the ground that in that case the assessee was claiming foreign tax credit relief for taxes paid on doubly taxed income which was not the case in that appeal. In para-7, the bench found the issue to be covered in assessee's favor by various judicial precedents including the decision of Hon'ble Karnataka High Court in DIT V/s Prahlad Vijendra Rao (198 Taxman 551); decision of Hon'ble Bombay High Court in CIT V/s Avtar Singh Wadhawan (247 ITR 260); decision of Hon'ble Calcutta High Court in Sumanabandyopadhyay V/s DDIT (TS-281-HC-2017) as well as CBDT Circular No.13/2017 dated 11/04/2017.

7. We find that facts are pari-materia the same before us and the ratio of this decision is squarely applicable to the present case. Therefore, we

would hold that salary income as accrued to the assessee for work performed in UK would not be taxable in India. However, the salary received for work performed in India would be taxable in India. Accordingly, we direct Ld. AO to re-compute the income of the assessee. The above proposition is also supported by the fact that upon perusal of UK tax return, it could be seen that the assessee has offered earnings from employment for£24184 on net basis which has been tax grossed up for £6046. This is in view of the fact that OFSSL has paid provisional payment of £9062 to UK revenue authorities since the employer has undertaken to meet the UK income tax liability arising from employee's earnings in UK. Accordingly, the assessee has claimed refund of £3016. On the basis of the above, it could be seen that separate tax payment has been made by OFSSL to UK revenue authorities to discharge the tax liability of the assessee in that country.

8. The assessee has also placed on record Tax Residency Certificate (Page nos. 192-193 of paper book). As per this certificate, the assessee has claimed relief for foreign earning not taxable in UK for £7952. The same shall be considered by Ld. AO while computing the quantum of income taxable in India as directed by us in preceding para-7.

9. The appeal stands partly allowed in terms of our above order.

Order pronounced on 07th September, 2022.

Sd/-	**Sd/-**
(MAHAVIR SINGH)	**(MANOJ KUMAR AGGARWAL)**
उपाध्यक्ष /VICE PRESIDENT	**लेखासदस्य /ACCOUNTANT MEMBER**

चेन्नई/ Chennai; दिनांक/ Dated : 07-09-2022

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त (अपील)/CIT(A)
4. आयकरआयुक्त/CIT
5. विभागीयप्रतिनिधि/DR
6. गार्डफाईल/GF