

आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / ITA No. 415/Hyd/2021
(निर्धारण वर्ष / Assessment Year: 2016-17)

Jenendra Kumar Jain,
Hiran-Magri,
Rajasthan
[PAN No. AIXPJ3306K]

Income Tax Officer,
Vs. (International Taxation)-1,
Hyderabad

अपीलार्थी / Appellant

प्रत्यर्थी / Respondent

निर्धारिती द्वारा / Assessee by: Shri S.P.Chidambaram, AR
राजस्व द्वारा / Revenue by: Shri Ajit Kumar Laskar, DR

सुनवाई की तारीख/Date of hearing: 10/11/2022
घोषणा की तारीख/Pronouncement on: 15/12/2022

आदेश / ORDER

PER K. NARASIMHA CHARY, JM:

Aggrieved by the order dated 22/06/2021 passed by the learned Commissioner of Income Tax (Appeals)-10, Hyderabad ("Learned CIT(A)"), in the case of Jenendra Kumar Jain ("the assessee") for the assessment year 2016-17, assessee preferred this appeal.

2. It could be seen from the record that there is a delay of 53 days in preferring these appeals and the reason attributed for the delay in filing

the appeals to the pandemic. As a matter of fact, though the learned DR does not concede to condone the delay, there is no denial of the fact that the Hon'ble Supreme Court in the Suo Motu proceedings in the case of M.A.No. 21/2022 in M.A.No. 665/2021 in SMW(C) No.3 of 2020 by order dated 10/01/2022 held that in cases, where the limitation would have expired during the period between 15/03/2020 and 28/02/2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01/03/2022, and in the event of actual balance period of limitation remaining with effect from 01/03/2022 is greater than 90 days, that longer period shall apply. We, therefore, now shall proceed to hear the appeal condoning the delay.

3. Assessee is an individual. During the assessment year 2016-17, he was employed with Amazon Development Centre (India) Pvt. Ltd (Amazon India) between 1/4/2015 and 17/10/2015, and was subsequently transferred to Amazon Corporate LLC (Amazon USA) from 20/10/2015. It is an undisputed fact that the assessee resided in India for more than 183 days during the financial year 2015-16 and, therefore, he qualify to be a Resident and Ordinarily Resident (ROR) in India for the assessment year 2016-17.

4. Assessee filed the return of income for the assessment year 2016-17 but did not include his income between the period 17/10/2015 and 31/3/2016 the period during which the assessee was under the employment with the Amazon USA. When questioned, assessee replied that he was qualified to be a resident of two countries for the period between 17/10/2015 and 31/3/2016, he is entitled to avail the benefit under the Income Tax Act, 1961 (for short "the Act") or India-USA Double Taxation Avoidance Agreement (DTAA) and, therefore, in terms of Article 4 of DTAA and more particularly in terms of Article 4(2) thereof, his residency breaks to USA for the period between 17/10/2015 and 31/3/2016 and tackling him to claim exemption in terms of schedule EI of the Act.

5. Learned Assessing Officer considered the plea taken by the assessee, but did not accept the same for the reason that when the assessee was offered a job in India, the letter of appointment dated 6/12/2011 read that he was appointed as a Software Development Engineer-Test (SDE-T) and his position was based in Bangalore; whereas in the letter dated 3/6/2015 where under he was offered a job in the United States, except mentioning that it was an internal transfer at a particular position, all the terms and conditions of employment in India were made applicable to the new position also. According to the learned Assessing Officer, the shift of the assessee to USA was only a temporary one and that is the reason why no sites of employment was mentioned in the letter, because the company treated his position to be based at Bangalore and once the assessee performed to satisfactory level then only you would get a fresh appointment at a given place of working.

6. Further according to the learned Assessing Officer, the assessee does not get himself entitled to the status of a resident of USA automatically on his going to USA and its only when his stay exceeded 183 days in 2016 then he qualified himself as a 'resident alien' in USA for 2016, which happened later than 31/3/2016. Learned Assessing Officer referred to the return of income filed by the assessee in USA in the status of a 'resident alien' by opting for election under IRC section 7701(b)(4) and his own choosing to file the return of income in such capacity does not jeopardise the right of India to tax his global income during that assessment year in which he remained a Resident and Ordinarily Resident in India.

7. Learned Assessing Officer rejected the tiebreaker plea under Article 4(2)(a) of DTAA stating that the assessee had a permanent home available in India, and also he had personal relations like spouse, parents, in-laws etc., in India during that period. Learned Assessing Officer also rejected the plea of the assessee that his economic relations were closer to USA on the ground that such as of his job was in India and it has been proved beyond

doubt that the assessee's job in USA emanated only from India, in terms of the letters dated 6/12/2011 under which he was employed in India and the letter dated 3/6/2015 under which he was transferred to USA. For these reasons, learned Assessing Officer brought the income of salary earned by the assessee in USA to tax in India.

8. Aggrieved by the action of the learned Assessing Officer, assessee preferred appeal before the learned CIT(A) and took the identical plea as was taken before the learned Assessing Officer. Learned CIT(A) considered the submissions of the assessee in the light of the definition of resident as per the OECD and union model convention along with the tiebreaker rule. Learned CIT(A) considered that under Article 4(2) of OECD and the union model convention, where an individual, by reason of the provisions of Article 4 (1) is a resident of both the contracting states, his status shall be determined by applying a series of four tests ending at the earliest possible moment, namely that he shall be deemed to be a resident only of the state in which he has a permanent home available to him, failing which he shall be deemed to be a resident only of the state in which he has an habitual abode, failing which he shall be deemed to be a resident of the state of which he is a national, and failing all of which such a status shall be determined by mutual agreement between the competent authorities of the contracting states.

9. By applying the above tests, successively one after the other, learned CIT(A) found that the expression 'permanent home' available to the assessee shall be understood in the context of house, family, home furnishings, rental apartment, owned apartment, passport, sharing a room, no rent, no race, place where the taxpayer was born and revised, children, country of birth of children, spouse, country of diverse, where spouse's employment, family visits, the other family members, such as parents, partners, friends, acquaintances, membership, language skills, work, employer, adoption of professional qualifications, temporal dislocation, no relations apart from day to day, living expenses such as

running on yearly basis, bank account only for needs abroad, no car, relocation support normally granted when an employee has temporarily moved to work in another country than that in which he had his residence, bank accounts, brokerage account, credit card, money transfer, health insurance, driving license, personal belongings such as coral, purchasing of new home, registration of, future retirement plans, retirement accounts etc., in the context of the circumstances in which the assessee moved to USA and reached a conclusion that the centre of his vital interest is in India, though he might have acquired a house on lease in USA and has no house in India. Ultimately she found that in the permanent home contest, legally, the assessee's homeless. She therefore proceeded to the next tiebreaker rule of habitual abode.

10. On the aspect of habitual abode, learned CIT(A) found that the assessee himself had chosen by way of election to be a resident alien and USA and a Resident and Ordinarily Resident in India during the period between 17/10/2015 and 31/3/2016 and the details and the number of days stay given by the assessee himself in USA clearly establish the fact that the habitual abode of the assessee was in India during the financial year 2016-17. By following the default rule, learned CIT(A) considered the nationality of the assessee, which is not in contest and does not necessarily require a territorial relationship and has no actual relationship to residence. On the basis of admitted facts, learned CIT(A) found that the assessee clearly fits into the tiebreaker test and since he is an Indian national, such test breaks to India.

11. Having considered all these aspects in a systematic manner, learned CIT(A) found that the exemption claimed by the assessee in respect of salary earned in USA is not correct not only as per the DTAA but also as per applicable provisions of the Act which emphasise that global income of resident assessee needs to be taxed in India. Learned CIT(A) accordingly uphold the findings of the learned Assessing Officer and dismissed the appeal.

12. Assessee is, therefore, before us in this appeal, challenging the orders of the authorities taking a similar plea basing on the tiebreaker rule. It is an admitted fact that when the assessee was appointed by way of letter dated 6/12/2011, it was clearly mentioned that he was appointed as a 'Software Development Engineer-Test' (SDE-T) and his position was based in Bangalore. As against this specific mentioning of the place of work, the letter dated 3/6/2015 under which he was moved to USA, it was mentioned that he was offered an internal transfer to the position of SDE-T (job level: 5). While clarifying and confirming the new terms of employment with the company, it was specifically stated that except as specifically stated, all the current terms and conditions of employment remain unchanged. It goes without saying that there is no indication as to the permanency of the employment USA. There is nothing before us to show that an internal transfer of an employee of Amazon is equivalent to fresh employment or that under the letter dated 03/06/2015 the assessee was offered a permanent employment straight away in USA, in which case it would have been but natural to mention the place of employment along with the designation. The continuity of employment from India to USA is evident from the contents of the letter dated 03/06/2015 wherein it is stated that save as otherwise provided in the letter all the terms and conditions of employment in India shall remain unchanged. It does not indicate that there is any need of permanent movement of the assessee to America by vacating the residence in India once for all.

13. It is also not clear whether the assessee moved to America at once with wife and children and severed all his connections with India on his first movement itself. Apart from that the assessee made an election under IRC section 7701(b)(4) to qualify as a resident in the resident of arrival in US, for which one of the conditions is that the assessee shall not meet the SPT in the current year. It is, therefore, clear that the election of the assessee under IRC section 7701(b)(4) shows that in the relevant year,

he did not meet the SPT, which is mandatory to be considered as a tax resident in US.

14. It would be worth to note that for calculating the SPT in the context of US Tax resident consideration, it is enough if the assessee stays for 31 days in the current year or 183 days during the period of three years which includes current year and two immediately preceding years counting all the days of the current year, $1/3^{\text{rd}}$ of the days of presence in the first year and $1/6^{\text{th}}$ of the days of presence in the second year before the current year. This calculation does not automatically trigger the US residency for the period between 17/10/2015 and 31/03/2015 and that is the reason why instead of claim the status of 'resident of USA', the assessee opted to be a 'resident alien'.

15. For the period between 17/10/2015 and 31/03/2016, the assessee was not taxed in USA not on the residence basis but on the basis of source. Article 4(1)(a) of DTAA clearly excludes a person who is liable to tax in USA in respect only on income from the sources in USA from the definition of 'resident' who is otherwise liable to be taxed by reason of his domicile, residence, citizenship, place of management, place of incorporation etc.

16. There is nothing before us to contradict the findings of the learned CIT(A) in respect of the tie breaker test, inasmuch as mere securing a house on rent in USA is not the conclusive fact that the assessee had become an USA resident the moment he moved from India to USA. Viewing from the angle of surrounding facts enumerated by the learned CIT(A) in the impugned order, we find it difficult to hold that tie breaks in favour of US residency, because it cannot be said that the moment he shifted to USA, he had no permanent residence whatsoever in India or that all his vital interests in the form of personal and economic relations ceased to be centered in India or that he will have no habitual abode at all in India more particularly when the assessee was not given to understand where exactly will his new place of work will be in USA in the letter dated 03/06/2015.

17. For these reasons, we are of the considered opinion that the impugned order does not suffer any illegality or irregularity and, therefore, decline to interfere with the same. We, however, deem it just and necessary to direct the Learned Assessing Officer to consider the request of the assessee in respect of grant of foreign tax credit of the taxes paid by the assessee in USA in accordance with law. Additional ground is accordingly allowed.

18. In the result, appeal of the assessee is allowed in part.

Order pronounced in the open court on this the 15th day of December, 2022.

Sd/-
(RAMA KANTA PANDA)
ACCOUNTANT MEMBER

Sd/-
(K. NARASIMHA CHARY)
JUDICIAL MEMBER

Hyderabad,
Dated: 15/12/2022

TNMM

Copy forwarded to:

1. Shri Jenendra Kumar Jain, F-42 Sector-14, Hiran-Magri, Rajasthan.
2. Income Tax Officer (International Taxation)-1, Hyderabad.
3. CIT(Appeals)-10, Hyderabad.
4. CIT(IT & TP)-Hyderabad.
5. DR, ITAT, Hyderabad.
6. GUARD FILE

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ITAT, HYDERABAD