

आयकर अपीलीय अधिकरण
कोलकाता 'एसएमसी' पीठ, कोलकाता में
**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA**

डॉ. मनीष बोर्ड, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष

Before

**DR. MANISH BORAD, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER**

**I.T.A. No.: 453/KOL/2021
Assessment Year: 2014-15**

***Mr. Debabrata Datta.....Appellant
[PAN: ADNPD 9820 D]***

Vs.

ACIT, (IT), Circle-1(1), Kolkata.....Respondent

Appearances by:

Sh. Ketan Ved, A/R, appeared on behalf of the Assessee.

Sh. Vijay Kumar, Addl. CIT, Sr. D/R, appeared on behalf of the Revenue.

Date of concluding the hearing : October 12th, 2022

Date of pronouncing the order : January 10th, 2023

ORDER

Per Manish Borad, Accountant Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short "AY") 2014-15 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the "Act") by Commissioner of Income Tax (Appeals)-22, Kolkata [in

short Id. "CIT(A)"] dated 11.03.2021 which is arising out of the assessment order framed u/s 143(3) of the Act dated 21.12.2016.

2. Registry has informed that the appeal is time barred by 43 days. Condonation application has been filed by the assessee. After perusing the same, we find force in the reasons mentioned therein and are satisfied that the assessee was prevented for reasonable cause in filing the instant appeal within statutory time limit. We, therefore, condone the delay and admit the appeal for adjudication.

3. The assessee is in appeal before the Tribunal raising the following grounds of appeal:

"1. Re.: Taxability of salary income

1.1. The Hon'ble CIT(A) has erred in confirming the action of the Assessing Officer ("AO") of determining the taxable salary income of the Appellant at Rs. 25,62,622 as against NIL salary income returned by the Appellant.

1.2. The Hon'ble CIT(A) has erred in not appreciating the fact that the Appellant is admittedly a non-resident for the year under consideration and consequently as per the provisions of section 5 read with sections 9 and 15 of the Act, only salary received for services rendered in India should be taxable in India.

1.3. Without prejudice to ground 1.2. above, the Hon'ble CIT(A) has erred in confirming the action of the AO of not granting the relief claimed by the Appellant under Article 15(1) of the Double Taxation Avoidance Agreement between India and Tanzania ("DTAA").

1.4. The Hon'ble CIT(A) has erred in confirming the action of the AO of denying the DTAA relief merely on the pretext that the Appellant had failed to furnish a tax residency certificate issued by the tax authorities of Tanzania; without appreciating the fact that the Appellant was not able to obtain the tax residency certificate as the said document is not issued by Tanzanian tax authorities.

1.5. *The Hon'ble CIT(A) has erred in holding that section 90(4) of the Act is an overriding provision for claiming benefits under DTAA.*

1.6. *The Hon'ble CIT(A) has erred in rejecting the submission of the Appellant that the maxim of Lex not cogit impossibila (i.e. law does not compel a man to do that which he cannot possibly perform) and impossibilum nulla obligatio est (i.e. law does not expect a party to do the impossible) applies in the case of the Appellant.*

2. *Re.: Not allowing carry forward of short-term capital loss*

2.1. *The Hon'ble CIT(A) has erred in not allowing carry forward of short-term capital loss of Rs. 74,862 under section 74 of the Act.*

3. *Re.: General*

3.1. *Each one of the above grounds of appeal is without prejudice to the other.*

3.2. *The Appellant craves leave to add, alter, amend, substitute and / or modify in any manner whatsoever the foregoing grounds of appeal at or before the hearing of the appeal.”*

4. Brief facts of the case as culled out from the records are that the assessee is a non-resident Indian, filed its original return of income on 18.07.2014 which was subsequently revised on 28.03.2016 declaring income of Rs. 19,890/-. Case selected for scrutiny through CASS followed by serving of notices u/s 143(2) & 142(1) of the Act. During the course of assessment proceedings ld. AO confronted the assessee with regard to the salary income of Rs. 25,62,622/- on which tax was deducted at source but the same being not offered to tax in the revised computation of income. It was stated on behalf of the assessee that he is employed with Consulting Engineering Services (India) Pvt. Ltd. (in short “CESIPL”) and was sent to Tanzania. The assessee performed the activities as an employee in Tanzania. However, since the assessee was unable to place on record a copy of tax residency certificate issued by the Government of Tanzania, ld. AO added the sum of

Rs. 25,62,622/- in the hands of the assessee as income as per Section 5(2)(a) of the Act and assessed the income at Rs. 25,82,509/-.

5. Aggrieved, the assessee preferred appeal before Id. CIT(A) but failed to succeed as Id. CIT(A) though accepted that the assessee is a non-resident Indian, by virtue of his stay in Tanzania during his term of employment for the relevant previous year but due to lack of any authentic document issued by the Government of Tanzania in form of tax residency certificate, Id. CIT(A) did not give any relief to the assessee.

6. Aggrieved, the assessee is now in appeal before this Tribunal. Ld. Counsel for the assessee, apart from referring to the detailed submission filed before the lower authorities, paper books filed in support of its contention and grounds of appeal also referred to the following written submissions including placing reliance on various judicial pronouncements and for the sake of convenience the extract of the same is reproduced below:

“The above-mentioned appeal was fixed for hearing before the Kolkata Bench of the Tribunal, "SMC" bench, on 12 October 2022 and has been taken as heard.

During the aforesaid hearing on 12 October 2022, the Hon'ble Bench had called for details in support of the fact that the Appellant had actually paid taxes in Tanzania and also a copy of the employment / assignment agreement entered into between the Appellant and the employer.

In response thereto, the Appellant has to submit as under:

1. The Appellant was employed with Consulting Engineering Services (India) Private Limited ("CESIPL") from 15 November 1977 to 3 June 2016

2. During the period 1 January 2012 to 31 May 2016, the Appellant was assigned by CESIPL as a Resident Engineer for the project in Tanzania.

3. A copy of assignment letter issued by CESIPL dated 21 October 2011 and an extension letter dated 4 March 2016 is enclosed herewith marked as Annexure A.

4. As per the domestic tax laws of Tanzania, CESIPL had paid PAYE (Pay-As-You-Earn) taxes i.e. withholding tax on the salary earned by the Appellant in Tanzania.

5. The details of the amount of salary and deposit of PAYE tax thereon for the Appellant for Tanzania year of income 2014 are as under:

Tanzania year of income 2014

Particulars	Amount (in TZS - Tanzanian Shilling)
Gross Salary	TZS 7,25,09,416 (Equivalent to INR 25,89,6222)3
Deposit of PAYE	TZS 2,04,34,925

6. The aforesaid taxes were paid by CESIPL with Tanzania Revenue Authority.

A declaration from CESIPL certifying the salary reported for Tanzania year of income 2014 and depositing of PAYE taxes in Tanzania is enclosed herewith marked as Annexure B.

In addition to above, the Appellant wishes to re-iterate that the issue in dispute is covered by the following decisions relied upon during the course of hearing:

a) Decision of the jurisdictional Calcutta High Court in the case of *Utanka Roy* - [2017] 390 ITR 109 (Calcutta) - copy thereof has been handed over during the course of the hearing

b) Decision of the Bombay High Court in the case of *CIT Vs. Avtar Singh Wadhwan* [2001] 247 ITR 260 (Bombay) - Refer page no. 96 to 100 of the paperbook

c) Decision of the Delhi Bench of the Tribunal in the case of *ACIT Vs. Ashok Jain* [2002] 121 Taxman 328 (Delhi) (Mag.) - Refer page no. 101 to 102 of the paperbook

d) Decision of Delhi Bench of the Tribunal in the case of DCIT Vs. Vivek Paul [2004] 82 TTJ 699 (Delhi) - Refer page no. 103 to 105 of the paperback

e) Decision of the Kolkata Bench of the Tribunal in case of Deepak Kumar Todi [ITA No. 1918/Kol/2017] - Refer page no. 109 to 113 of the paperback

f) Decision of the Karnataka High Court in the case of Prahlad Vijendra Rao [2011] 239 CTR 107 (Karnataka) - Refer page no. 106 to 108 of the paperback

g) Decision of Chennai Bench of the Tribunal in the case of Paul Xavier Antony Samy vs. ITO [2020] 183 ITD 143 (Chennai - Trib.) - Refer page no. 114 to 118 of the paperback

h) Decision of the Bangalore Bench of the Tribunal in the case of Bholanath Pal [2012] 52 SOT 369 (Bangalore) - Refer page no. 119 to 127 of the paperback

i) Decision of the Bangalore Bench of the Tribunal in the case of Lohitakshan Nambiar [ITA No.1045/ Bang /2009] - Refer page no. 128 to 130 of the paperback

j) Decision of the Delhi Bench of the Tribunal in the case of Pramod Kumar Sapra [2017] 167 ITD 596 (Delhi - Trib.) - Refer page no. 131 to 135 of the paperback

In view of the foregoing, it is submitted that the salary received by the Appellant for the services rendered in Tanzania is not subject to tax in India as per section 5(2) read with Explanation 1 and 2 thereto, section 9(1)(ii) and section 15 of the Act.

The Appellant requests your Honour to kindly take the above on record.

Trust the above submission meets the requirement. Should your goodself require any further information, then please do let us know."

7. Per contra, ld. D/R vehemently argued supporting the orders of both the lower authorities.

8. We have heard rival contentions and perused the records placed before us. The only issue in dispute before us is whether ld.

CIT(A) was justified in confirming the addition made by Id. AO taxing the salary of Rs. 25,62,622/- received by the non-resident assessee for the serviced performed outside India in Tanzania. As stated by Id. Counsel for the assessee that the assessee was employed with the CESIPL during the period 15.11.1977 to 03.06.2016. Further during the period 01.01.2012 to 31.05.2016, the assessee was working as resident engineer for the project in Tanzania. As per the letter dated 21.10.2011 issued by CESIPL for working at the post of resident engineer the assessee was paid remuneration @ US\$ 2,900/- per month along with certain other perquisites. It is also not in dispute before us that the assessee is a non-resident Indian and the activity carried out by the assessee is in the capacity as an employee working outside India. Documents are also placed on record which shows that CESIPL has deposited/deducted tax at source on the gross salary paid to the assessee and other employees working in Tanzania. As far as the assessee is concerned, it is stated that the gross salary in Tanzanian Shilling (TZS) equivalent to INR 25,89,622/- is calculated at TZS 7,25,09,416/- and on this amount of gross salary, employer company has deposited tax/PAYE at TZS 2,04,35,925/-. A Control Form No. 10742902 stand issued by Tanzania Revenue Authority on 06.10.2014 which proves that CESIPL has deducted tax/paid tax on the gross salary paid to its employees working in Tanzania. From these facts, it is discernible that the alleged amount received by the assessee is for services rendered outside India and salary for the said employment accrued outside India and was subjected to tax in Tanzania paid by the employer.

9. Now before, adverting the issue that whether the sum is taxable or not, we will first go through two of the relevant decisions relied on by the Id. Counsel for the assessee stating it to be squarely applicable on the issue raised before us.

9.1. Coordinate Bench of Delhi Tribunal in the case of *Pramod Kumar Sapra (supra)* has held as follows:

“8. This factum has not been disputed either by the Assessing Officer or by the Ld. Pr. CIT before whom these facts were brought on record. Thus, the assessee in terms of section 6 clearly cannot be held to be resident in India in the relevant previous year. So far as the observation that since the salary income has been received in India, i.e., it has been credited in the bank account of the assessee in India and also TDS has been deducted by the employer, this fact cannot be a determinative of the taxability of resident or non-resident in terms of provisions of the Act. What is relevant is, whether the income can be said to be received or deemed to be received in India. Sub-section (2) of section 5 merely provides that total income of any previous year of a non-resident includes all income from whatever source which is received or deemed to be received in India in such year or accrues or arises or is deemed to accrue or arise to him in India during such year. This sub-section only provides that if the income of the non-resident has been received or accrued in India or deemed to be received or accrued in India, the same shall be treated as total income of that person of that previous year. The said section does not envisages that the income received by a non-resident for services rendered outside India can be reckoned as part of total income in India. Here in this case, it is not the case that the assessee has received or deemed to have received any income in India because salary which has been received by the assessee is during his employment in Iraq as a Country Manager for the activities carried out in Iraq. No such income has been received by the assessee for carrying out any activity in India or source of income is from India which could be reckoned as income received or accrued in India. Thus, in terms of sub section (1) of section 6, salary income of the assessee for the previous year cannot be held to be taxable because he was not resident in India, as admittedly he was outside India for more than 182 days. Accordingly, salary of the assessee cannot be taxed in India and the same has rightly been claimed as deduction in the return of income. Thus, on

merits we hold that the assessment order passed by the Assessing Officer is not prejudicial to the interest of the Revenue, albeit can be reckoned as erroneous in the absence of any proper enquiry. It is trite law that revisionary jurisdiction under section 263 on an assessment order can only be exercised once the said order is found to be erroneous insofar as it is prejudicial to the interest of the Revenue, i.e., both the conditions should fulfil simultaneously and this has been held so by the Hon'ble Supreme Court, which has been referred and relied upon by the ld. CIT D.R., in the case of Malabar Industrial Co. Ltd. v. CIT [2000] 243 ITR 83/109 Taxman 66 (SC) , which principle has been reiterated later on not only by the Hon'ble Supreme Court but also by several High Courts. Thus, even if one of the limbs of said expression used in section 263 is missing, then ostensibly the assessment order cannot be set aside within the scope of revision u/s 263. Hence, on merits we quash the order of the Ld. Pr. CIT and uphold the allowability of deduction of salary as claimed by the assessee.”

9.2. Further Coordinate Bench of Bangalore Tribunal in the case of *Bholanath Pal (supra)* has held as follows:

“12. We have heard the rival submissions and perused the materials on record. It is an admitted fact that the assessee worked as the Managing Director of Motorola Japan during May, 2000 to April, 2006. It is also an admitted position that for the previous year relevant to the assessment year, namely, from 1/4/2005 to 31/3/2006, the assessee was a tax resident in Japan and salary was earned in Japan for which taxes were paid in Japan. In terms of Article 1 of the DTAA between India and Japan, DTAA shall apply to persons who are residents of one or both the countries. The assessee qualifies to be a non resident of India for the P.Y.2005-06. However, the assessee qualifies to be a non permanent tax resident of Japan (for the corresponding Indian P.Y. 2005-06) in accordance with the domestic tax laws of Japan.

12.1 Admittedly, the assessee is a non resident of India for the entire previous year and was a tax resident of Japan. The assessee, therefore, entitled to the benefits of the India-Japan DTAA as a tax resident of Japan (and non resident of India).

12.2 Article 15(1) of India Japan Treaty DTAA provides for the following:-

"Subject to the provisions of articles 16, 18, 19, 20 and 21, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that Contracting State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other Contracting State."

12.3 Article 15(2) of India Japan Treaty DTAA provides for the following:-

"Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned Contracting State, if:

(a) the recipient is present in that other Contracting State for a period or periods not exceeding in the aggregate 183 days during any taxable year or 'previous year', as the case may be; and

(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other Contracting State; and

(c) the remuneration is not borne by a permanent establishment or a fixed base which the employer has in that other Contracting State".

12.4 As per Article 15(1) of the DTAA between India and Japan, the tax resident of Japan can be taxed in India only if the assessee is present in India for more than 183 days. From the assessment order it is clear that the assessee was present in India only for 83 days and hence, the assessee cannot be taxed in India for any part of salary for services rendered to Motorola Japan. The tax year in Japan is January to December whereas for India, it is April to March. For the purpose of Indian tax, one has to see the corresponding position in Japan for determining tax residency in Japan. It is seen that the assessee was present in India only for 83 days during the period April 1, 2005 to March 31, 2006. Hence, as the assessee was present in Japan for more than 183 days during the said period, the assessee would be regarded as a tax resident of Japan and entitled to claim tax treaty benefits as a tax resident of Japan. In view of the same, and further that the assessee's stay in India was only 83 days during the year under appeal, the assessee is entitled for exemption of tax in respect of his income from salary for the entire year.

12.5 The salary amount that is received by the assessee during his stay in Japan is not taxable as per the provisions of Income Tax Act, 1961 for the following reasons:-

- The assessee is a non resident is an undisputed fact. A non resident is taxable under section 5(2). The provision reads as follows:

"Subject to the provisions of this Act, the total income of any previous year of a person who is a non resident includes all income from whatever source derived which Page 16 of 18 16 ITA No.10/Bang/2011

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year".

12.6 The provisions of section 5(2) start with the expression "subject to the provisions of this Act". Hence, the provisions of section 5(2) are subject to other provisions contained in the Act and other provisions of the Act will have significant impact on the interpretation of Section 5(2). Reference is made to "The Law and Practice of Income Tax" by Kanga, Palkhivala and Vyas (Vol.I, Ninth Edition, page 311). Reference is also to the following judgements:-

CIT v Nippon (1998) 233 ITR 158 (Calcutta) at page 162; *CIT v Khambaty* (1985) 159 ITR 203 (Bom.) at pages 207-208.

12.7 As per section 15, salary is not taxable on receipt basis except in case of advance salary or arrears salary. Regular salary under section 15(1)(a) is taxable on accrual basis. Salary is accrued where the employment services are rendered. In the instant case, for the assessee, the normal place where the employment services rendered is in Japan and not in India. His visits to India are in connection with business and not for rendering employment services for any Indian entity. There is no employment agreement for having rendered any services for Indian entity. In the instant case, the salary accrues to the assessee in Japan and the accrued salary is partly delivered by Motorola India in India. Hence, there is no accrual of salary in India.

12.8 In terms of section 9(1)(ii) income chargeable under the head "salaries" under section 15 shall be deemed to accrue or arise in India if it is earned in India, i.e., if the services under the agreement of employment are or were rendered in India. In the instant case, the

employment services were entirely rendered outside India. Hence, the salary is not earned for rendering services in India. Therefore, salary for the entire year is not taxable. In this connection, reliance is placed on the following decisions:-

DIT (Intl. Taxation) v Prahlad Vijendra Rao (2011) 198 Taxman 551 (Kar.)/(2011) 24 CTR Kar.) 107;

Ranjit Kumar Bose v ITO (1986) 18 ITD 230 (Calcutta ITAT);

CIT v Avtar Singh Wadhwan (2001) 247 ITR 260 (Bom.);

Sreenivas Kumar Sistla (AAR No.514 of 2000).”

10. From perusal of the above decisions and examining the facts of the instant case in light thereof, we find that the same is squarely applicable in favour of the assessee and further, to test the same in light of relevant provisions of the Act we observe that in the instant case where the assessee is a non-resident Indian, as per the provisions of Section 5(2) of the Act in case of non-resident Indian “*all income from whatever source derived which—(a) is received or is deemed to be received in India in such year by or on behalf of such person; or (b) accrues or arises or is deemed to accrue or arise to him in India during such year.*” Further, “income deemed to accrue or arise in India” is defined in Section 9 of the Act and for the income falling under the head “Salaries” an income deemed to accrue or arise in India as per Section 9(1)(ii) of the Act is that “*salary which is earned for rendering services in India and the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment, shall be regarded as income earned in India.*” Further Section 15 of the Act provides for the income chargeable to income-tax under the head “Salaries” and Clause (a) of Section 15 of the

Act provides that *“any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not.”*

11. Now, testing the facts of the instant case in light of the above provisions, we notice that the assessee is a non-resident Indian and the employment services are rendered outside India in Tanzania, therefore, salary is accrued and arose outside India. In the instant case since the salary is accrued in Tanzania and not in India and it is only the accrued salary which is paid to the assessee in India, therefore, we can safely conclude that the assessee being a non-resident Indian the salary income though received in India but it arises or accrues outside India in Tanzania and such salary paid to the assessee has already been subjected to tax in Tanzania and therefore, as per Section 5(2) of the Act read with Explanation (1) & (2) of Section 9(1)(ii) and Section 15 of the Act the alleged sum of salary of Rs. 25,62,622/- is not liable to be taxed in India. We, therefore, reverse the finding of ld. CIT(A) and allow ground nos. 1.1, 1.2 & 1.4 of the appeal raised by the assessee.

12. Remaining ground nos. 1.3, 1.5 & 1.6 being alternative grounds are rendered infructuous as we have allowed the main grounds and deleted the addition of Rs. 25,62,622/-.

13. As regards ground no. 2 raised regarding not allowing carry forward of short term loss, we find that no details in support of this ground has been filed and nor any specific submissions have been made before us. Copy of original computation of income is not placed before us. We, therefore, find no infirmity in the finding of ld. CIT(A). Thus, ground no. 2 raised by the assessee is dismissed.

14. Other grounds are general in nature which need no adjudication.

15. In the result, the appeal filed by the assessee is partly allowed.

Kolkata, the 10th January, 2023.

Sd/-
[Sonjoy Sarma]
Judicial Member

Sd/-
[Manish Borad]
Accountant Member

Dated: 10.01.2023

Bidhan (P.S.)

Copy of the order forwarded to:

- 1. Mr. Debabrata Datta, 10/1W, Swinhoe Street, Kolkata-700019**
- 2. ACIT, (IT), Circle-1(1), Kolkata.**
3. CIT(A)-22, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata