

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 3786/Del/2019
(Assessment Year: 2016-17)

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| Narinder Pal Singh, H. No. 25, Laxmi Garden, Opp ITI, Yamunanagar, Haryana-135001 (Appellant) PAN: AJEPS1966L | Vs. ACIT, Circle-2(1), Faridabad (Respondent) |
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| Assessee by : | Ms. Priti Goel, AR |
| Revenue by: | Shri Sanjay Kumar, Sr. DR |

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| Date of Hearing | 14/02/2023 |
| Date of pronouncement | 07/03/2023 |

O R D E R

PER ANUBHAV SHARMA, J. M.:

1. The appeal has been preferred by the Assessee against the order dated 27.02.2019 of Ld. Commissioner of Income Tax (Appeals), Faridabad (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No. 10137/2018-19 arising out of an appeal before it passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the Id AO, ACIT, Circle-II, Faridabad (hereinafter referred as the Ld. AO).

2. Brief facts of the case are that the assessee is an individual employed with Ingersoll Rand Climate Solutions Pvt. Ltd. The assessee was on long term assignment to PT Trane Indonesia (Ingersoll Indonesia) in Indonesia effective 9 November 2015 (during Assessment Year (AY) 2016-17) and was working wholly and exclusively for Ingersoll Indonesia, since 09 November 2015. The Appellant was considered a Resident and Ordinarily Resident in India during AY 2016-17 as per the domestic tax

laws of India as he was present in India for more than 181 days and more than 729 days in the last 7 years. While on assignment to Indonesia, the Appellant continued to receive his salary through India payroll by credit to his bank account in India for administrative convenience. As the payroll of the Appellant continued in India, Ingersoll Rand Climate Solutions Private Limited (Ingersoll India) had deducted and deposited the taxes section 192 of the Income Tax Act, 1961 (the 'Act') and had issued a Form 16 to the Appellant for the AY 2016-17. The Appellant filed his return of income in India offering total income of INR 51,50,320 on 22 July 2016. Appellant had claimed that as he was rendering services for PT Trane Indonesia, the Appellant was subject to tax in Indonesia on his employment income for the year 2016 and accordingly the Appellant has duly filed his tax return in Indonesia for Calendar Year 2016. It was claimed before Ld. AO that the Appellant qualified as a Resident of Indonesia for the Year 2016 (relevant for the period 1 January 2016 to 31 March 2016) as per domestic tax laws of Indonesia and as per Article 4(2) of India- Indonesia Double Tax Avoidance Agreement (hereinafter referred as 'relevant DTAA') given that for the above period he had a permanent home available only in Indonesia and his family accompanied him to Indonesia. As the Appellant was tie breaking to Indonesia for the Year 2016 (relevant to the period 1 January 2016 to 31 March 2016) as per the Treaty, the salary for the overseas assignment duration for the period January 2016 to 31 March 2016 was not to considered by the assessee as taxable in India. Hence, in the India tax return filed by the Appellant for AY 2016-17 on 22 July 2016, he had availed the benefit of the Article 15(1) of the Treaty and claimed a refund of INR 24,92,190/ and received the refund on 14 November 2016. The Appellant's return of income was selected for scrutiny and the assessment was completed under Section 143(3) vide order dated 16 November 2018 issued by the Income Tax Officer. The assessment was completed and order was passed assessing the income at INR 1,18,32,680/- making an addition of INR 66,82,358 (salary income

earned in Indonesia for the period January 2016 to March 2016) and accordingly, demand of INR 28,79 430/- was raised.

3. Aggrieved by the said assessment order dated 16 November 2018, the Appellant proceeded with an appeal before the Learned Commissioner of Income Tax, Appeals. The Appellant's appeal was disallowed by the Learned Commissioner of Income Tax(Appeals). Aggrieved the Appellant has filed present appeal on following grounds;

"1. That on facts and in the circumstances of the case and in law, the Assessing Officer (AO) erred in completing assessment of the Appellant at an income of INR 1,18.32.678 as against the returned income of INR 51,50,320. The CIT(A) has further erred in arbitrarily confirming the addition made in the assessment order passed by the id AO.

2. That on facts and in the circumstances of the case and in law, the CIT(A) has grossly erred in concluding that the Appellant has a permanent home available in India for the period January 01, 2016 to March 31, 2016 and that he is Resident of India for the above period as per Article 4(2) of the Treaty.

3. That on facts and in the circumstances of the case and in law, the CIT(A) has erred in not considering personal and economic relationship, habitual abode for concluding on the residential status as per Article 4(2) of Treaty That on facts and in the circumstances of the case and in law, the CIT(A) erred by ignoring the fact that the Appellant had applied the provisions of Article 4(2) of the Treaty dated February 04, 1988 and has erred in concluding that Treaty dated February 04,1988 need to be applied.

5. That on facts and in the circumstances of the case and in law, the CIT(A) has erred in concluding that the Appellant is not eligible for exemption of his salary income for the period January 01, 2016 to March 31, 2016 in terms of the Article 15(1) of the Treaty.

6. *That on facts and in the circumstances of the case and in law, the CIT(A) has erred in concluding that the AO was justified in bringing into tax the global income of the Appellant for the period January 01, to March 31, 2016 in India, with no credit for the taxes paid in Indonesia on the doubly taxed income as per Article 23 of the Treaty."*
4. Heard and perused the record.
5. The Id AR reasserted the fact and referred to the relevant documents available in the Paper Bok while the Id DR supported the orders of the Ld Tax Authorities Below.
6. It can be appreciated from the matter on record that the Ld. Tax Authorities Below have primarily focused on the fact that the assessee has a house in India therefore, the assessee cannot be considered to be resident of Indonesia.
7. Relevant here itself will be to reproduce the relevant Article 4 of relevant DTAA;

"ARTICLE 4

RESIDENT

1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State.

2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows :

*(a) he shall be deemed to be a resident of the State in which he has **a permanent home available** to him; if he has a permanent home*

available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);

(b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;

(c) if he has an habitual abode in both States or in neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall settle the question by mutual agreement keeping in view its place of incorporation, place of effective management and other relevant factors.”

8. As for convenience the relevant findings of Id AO in para 2.2 are reproduced below:-

"2.2 Since, the remuneration received by the assessee in India he was given a query vide this office show cause notice dated 03.11.2018 in the light of residential status and taxation of the income earned for the relevant period. The same is reproduced for ready reference:

"Shri Narinder Pal Singh 2016-17

- 1. On careful perusal of your reply dated 3rd September, 2018, the undersigned has reached on the conclusion that the income earned by you from 1st January 2016 to 31st March 2016 should be treated as your income, income in India, and should be a part of your Indian ITR.*
- 2. Facts of the case clearly indicate that you have been a resident of India till December, 2016. The four following points need a brief mention here:*
 - (i) Permanent House: Since you have been a permanent resident of India for most of your life and also own a residential property which used to be your residence till Dec, 2016, merely renting out an accommodation*

for work purposes, that too far a small period of 3 months in the concerned F.Y. does not make it your permanent house.

ii) Social and economic ties: Merely changing your work place, does not change your social and economic ties. You have been an Indonesian resident for 3 months in the concerned F. Y. and this is too short a period to form social and economic bonds.

(iii) Habitual Abode:

On perusal of your residential history it is clearly proved that India is your habitual Abode.

(iv) Nationality: Since you are an Indian passport holder, your nationality automatically becomes Indian.

3. So, based upon these facts, a careful reading of the DTAA between India and Indonesia and OECD Commentary, this office is of the opinion that you are an Indian resident for A. Y. 2016-17 and the income from 1st January, 2016 to 31st March 2016 which accrued in Indonesia, shall be taxed in India.

4. Since you have also filed return with Indonesian tax authorities for the period from 1st January 2016 to 31st March 2016, the tax paid on income accrued during this period, you shall be given credit for according to the provisions of DTAA.

5. Hence, Rs.66,82,358/- shall be added to your returned income for A.Y. 2016-17 and a credit for the tax paid on this income shall be given in calculation of income tax. Please show cause."

9. Further, it can be appreciated from the findings of the Id CIT(A) in para 6.2 that he has also considered the fact that the assessee is owning a house in India and considered it to be conclusive to determine the residential status and taxed the global income.

The Id CIT(A) further observes that *"the fact of the case have not been examined on the other criteria of personal and economic relations, habitual abode, as the appellant has been found resident of India on the basis of permanent home"*.

10. Thus the point for determination is whether for the purpose of determining the residential status as per Article 4 of the relevant DTAA, the 'permanent home available' is mere availability of residential property in India or the phrase 'permanent home available' has a wider connotation.

11. At the outset the bench is of considered opinion that Ld. CIT(A) seems to have decided the matter with restricted approach to determine tax residency only on the basis of fact that assessee owned a residential property in India and if it is possessed by assessee or vacant or rented is immaterial. It seems the Id CIT(A) has fallen an error in not taking into consideration the evidence produced by the assessee in the form of copy of passport of all the family members of the appellant relocated to Indonesia with appellant, copy of tax residency certificate issued by Indonesia in Calendar Year 2016, bank account of Indonesia, international medical insurance plan, job assignment letter, school fee receipts for children of the appellant studying in Indonesia and lease agreement of the property occupied by the appellant in Indonesia during the Financial year 2015-16 to 2017-18. Same should have been commutatively taken into consideration to determine the question of permanent home available to the assessee.

12. On the part of the revenue there is nothing before the bench to show that if 'permanent home available' has been defined in a manner that if an individual holds of a residential property in India it has to be considered to be 'permanent home available' for the purpose of Article 4 of the relevant DTAA. If that be the case then the benefit of the Article 4 for the purpose of 'permanent home available' can be given to assessee only if he does not own a residential house in India or if he has his own residential house in the contracting state. Such seems to be not the intention of law.

13. The Ld. Tax authorities have fallen in error in giving a literal interpretation to words '*permanent home available*' referred in Article 4 of relevant DTAA, which certainly is not '*permanent house*' as understood by the Ld. Tax authorities. Owning a residential unit and having a permanent home available are two patently different things, for determining the tax residency status. While the former is just existence of the right to property (*corpus possessionis*). It is owner holding a legal title and his

physical relation to the object and to the rest of the world. The later indicates the real intention to possess the property (*animus possidendi*). It implies the intention to appropriate to oneself the exclusive use and enjoyment of the house. It is a conscious intention of the owner in possession to exclude others from interfering with his title and right of possession.

14. It can be observed that Article 4(2)(a) refers to the fact that while attributing the tax residency of resident to one of the contracting States, it is to be seen if he has a permanent home available to him, then he shall be deemed to be resident of that contracting State only where he has a permanent home available to him and the other factors become irrelevant. The Id CIT(A) has proceeded on this premises alone that as assessee owns a residential home in India he is to be considered tax resident of India. But admittedly assessee is not a person having permanent home available to him in Indonesia as he has occupied a leased premises provided by local employer there. House located in India is under lease and rent received is submitted as rental income. Therefore, as per Article 4(2)(a) the assessee has to be assumed to be a person who does not have a permanent home available to him.

15. So, the concept of the centre of vital interest referred in Article 4 (2) (a) is not relevant and for that reason Article 4(2)(b) becomes applicable and the status of assessee had to be determined on the basis where he has a habitual abode. In the case in hand the evidence on record about the assignment of job at Indonesia, shifting of family by the assessee to Indonesia, children getting education at Indonesia, submitting income earned from foreign assignment for taxable purposes in Indonesia and having economic communication on the basis of holding a bank account and insurance in Indonesia are sufficient to show that the habitual abode of the assessee is at Indonesia. The period is irrelevant and what is relevant was the income earned on the job assigned at Indonesia cannot be considered to be global income of the assessee to be taxable in India.

16. The coordinate bench in **Sameer Malhotra Vs. ACIT** in ITA No. 4040/Del/2019 vide order dated 28.12.2022 has decided a similar controversy surrounding 'permanent home' clause in India-Singapore DTAA, of which Article 4 is *para materia* and has made following relevant observation in para 7, which squarely apply to facts of present case:-

"7.4 Further, as per UN Model Commentary, the concept of home has been defined as under :

"13. As regards the concept of home, it should be observed that any form of home may be taken into account (house or apartment belonging to or rented by the individual, rented furnished room). But the permanence of the home is essential; this means that the individual has arranged to have the dwelling available to him at all times continuously, and not occasionally for the purpose of a stay which, owing to the reasons for it, is necessarily of short duration (travel for pleasure, business travel, educational travel, attending a course at a school, etc.). "

7.5 Further, as per UN Model, the facts to which the special rules will apply are those existing during the period when the residence of the taxpayer affects tax liability, which may be less than an entire taxable period.

7.6 We observe that specific provisions made in DTAA having importance and would prevail over the general provisions contained in the Income Tax Act unless and until the same are in derogation of the laws of the land. The Appellant along with his family members shifted to Singapore on 06.12.2014 and thereafter remained there during the period under consideration and earned the income while serving in Singapore itself.

7.7 It is a fact that in the Tie-Breaker Questionnaire, the Appellant specifically mentioned to have apartment on rent in Singapore as well and his wife and two daughters were also living along with him in the country of assignment, i.e., Singapore. The Appellant also held Driving License in both the countries and both the countries have been shown as country of residence on various official Forms and documents for the period from December, 2015 to June, 2016, further paid taxes in Singapore while working there from. Further mentioned that all income which will be paid in future (i.e., bonus for period Jan. 2016 to June 2016) for the work period in Singapore, will be taxable in Singapore.

7.8 In our considered view, no doubt the tie-breaker questionnaire having importance in determining the residency of a person, but cannot be exclusively taken into consideration as a base for deciding the residency. The permanence of home can be determined on qualitative and quantitative basis. It is not in controversy that the Appellant for the period under consideration has shown the income earned in Singapore and paid the taxes in Singapore. Therefore, as per Treaty, he cannot be subjected to tax in India in order to avoid double taxation.

7.9 The Co-ordinate Bench of Tribunal in the case of Raman Chopra vs. DCIT (2016) 69 taxmann.com 452 (Delhi-Trib.) has also dealt with the identical issue wherein, the Appellant had worked outside India for a certain period and therefore, claimed the exclusion of income earned outside India. The Hon'ble coordinate Bench after analysing the factual position of the case held that the Appellant is also the resident of USA for the period 01.04.2010 to 30.06.2010. As the Appellant is considered liable to tax both in India and US as per the tax laws in each jurisdiction, a determination of the residential status as per the India-USA Double Taxation Avoidance Agreement (Treaty) has to be done based on the tie breaker analysis as contained in Article 4(2) of the Treaty.

7.10 It is pertinent to mention herein that both the authorities below have not doubted the tax residency certificate issued by the Singapore authorities for the period under consideration and on the basis of that, the Income tax has already been paid by the Appellant in Singapore. Further, may be, the Appellant has stayed more than 182 days in India, however, he also qualified as resident of both India and Singapore under Article 4(1) of the Treaty. As per clause (a) of Article 4(2) of the Treaty, a person shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests). The Id. Commissioner on the basis of tie-breaker questionnaire held that there is no doubt that even the centre of vital interest of the appellant are with India only and not with Singapore, as the majority of the savings, investments and personal bank accounts are in India, whereas it is a fact that the appellant has worked in Singapore during the period under consideration and stayed therein only. Therefore, his personal and economic relations (Centre of vital interests) at that particular time/period cannot be brushed aside, as the Appellant went to Singapore along with his family for earning income and consequently his personal and economic relations remained in Singapore only.

7.11 As per Article 4(2)(b), habitual abode is also available for consideration in deciding the residency of a person. Habitual abode does not mean the place of permanent residence, but in fact it means the place where one normally resides. During the period under consideration, the Appellant resided in Singapore and had habitual abode therein only. Therefore, on this reason as well, the Appellant could be treated as resident of Singapore. Section 90(2) of the Act says clearly where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the Appellant to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to the Appellant. Further, sub-section (4) of section 90 of the Act prescribes, an Appellant, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory. It is not the case here

that the provisions of section 90(2) of the Act are not applicable to the instant case and the provisions of the Treaty and actions of the Appellant are contrary to the laws of the land and the Appellant has failed to produce the Tax Residency Certificate issued by the Singapore Authorities and not paid the relevant taxes in that country for the income earned during the period under consideration.

7.12 On the aforesaid deliberations and analyzations and in the cumulative effects, we are unable to sustain the addition under challenge. Consequently, the addition is deleted and the Assessing Officer is directed to accept the revised return of income filed by the appellant.

17. So the Bench is of firm opinion that the concept of 'permanent home available' has been wrongly interpreted by the Ld. Tax Authorities. Ld CIT(A) has further fallen in error to not consider the applicability of other parameters of Article 4 (2)(b), which Ld. AO had infect taken note of and determined against the assessee. The findings of the Tax Authorities below in regard to taxing the income of assessee earned from foreign assignment are liable to be reversed. The grounds are sustained and the **appeal is allowed.**

Order pronounced in the open court on 07/03/2023.

-Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated: 07/03/2023
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi