

| आयकर अपीलीय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, KOLKATA

BEFORE DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER
&
SHRI SONJOY SARMA, HON'BLE JUDICIAL MEMBER

I.T.A. No. 354/Kol/2021
Assessment Year: 2012-13

Gautam Arora Flat No. 052, Block 40 DLF Garden City Near PSBB Millenium School OMR, Thalambur Chennai - 603103 [PAN : AERPA7725B]	Vs	DCIT, (International Taxation)- 1(1), Kolkata
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अपीलार्थी/ (Appellant)	प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Ketan K. Ved, C.A.
Revenue by :	Shri G. Hukugha Sema, CIT D/R

सुनवाई की तारीख/Date of Hearing : 12/04/2023
घोषणा की तारीख /Date of Pronouncement: 10/07/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the assessee against the order of the Learned Commissioner of Income Tax (Appeals) - 22, Kolkata (hereinafter the "ld. CIT(A)") dt. 17/03/2021, passed u/s 250 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2012-13.

2. The Registry has pointed out that there is a delay of 128 (one hundred twenty eight) days in filing the present appeal before the Tribunal. Petition for condonation of delay is placed on record by assessee explaining the reasons for delay, owing to Pandemic of Covid-19 during that time. It is noted that the period of delay falls during the time of Pandemic of Covid-19 which has been excluded by

the Hon'ble Supreme Court in the case of *suo moto* Writ Petition (C) No. 3 of 2020 dated 10.01.2022 by which the period from 15.03.2020 to 28.02.2022 has been directed to be excluded for the purpose of limitation. Vide this order a further period of 90 days has been granted for providing the limitation from 01.03.2022. Accordingly, we condone the delay and proceed to admit the appeal for hearing.

The assessee has raised the following grounds of appeal:-

"1:0 General:

1: 1 The Assessing Officer ("AO") has erred in assessing the total income of the Appellant at Rs. 52,44,210/- as against the income of Rs. 10,83,317/- as per the revised return of income. The Commissioner of Income-tax (Appeals), Kolkata ("CIT(A)") has further erred in confirming the additions made in the impugned Order passed by the AO.

1:2 The Appellant craves leave to add, alter, amend, substitute and / or modify in any manner whatsoever all or any of the foregoing grounds of appeal at or before the hearing of the appeal.

2:0 Denial of the beneficial provisions under Article 15 of India-Morocco tax treaty:

2:1 The CIT(A) has erred in confirming the Order passed by the Assessing Officer in denying the benefits available to the Appellant under Article 4 r.w Article 15 of the Morocco Double Taxation Avoidance Agreement between India and Morocco [India DTAA], thereby making an addition of Rs. 40,40,448/- to the returned income.

2:2 The CIT(A) while denying the benefits under the India-Morocco DTAA has erred in ignoring the fact that the Appellant was a resident of Morocco for the years 2011 and 2012 and was therefore eligible to claim benefits under the said DTAA.

2:3 *The Appellant submits that considering the facts and circumstances of the case and the law prevailing on the subject, the Appellant is entitled to benefits under the India- Morocco DTAA and thus, the salary received by the Appellant in India pertaining to services rendered in Morocco is not taxable in India in terms of Section 5(2) of the Income-tax Act, 1961 r.w. Article 15 of the India-Morocco DTAA and the stand taken by the CIT(A) is misconceived, erroneous, illegal and bad in law.*

2:4 *The Appellant submits that the Assessing Officer be directed to allow the benefits under the India-Morocco DTAA to the Appellant, delete the addition so made and to re-compute his total income and tax liability accordingly. "*

3. At the outset, the Id. Counsel for the assessee stated that the assessee is a Non-Residential Indian and had worked at a assignment at Morocco and salary for doing this service was though received in India, but the same was subjected to tax as per the Income-tax laws of Morocco and tax was paid thereof and that the credit for the said tax ought to have been provided by the Assessing Officer. In support, reliance was placed on the decision of this Tribunal in the case of *Mr. Debabrata Datta vs. ACIT in ITA No. 453/Kol/2021; Assessment Year 2014-15; order dt. 10/01/2023.*

On the other hand, the Id. D/R, vehemently argued supporting the orders of both the lower authorities further stating that the assessee has not been able to place tax residency certificate of being a resident of Morocco and consequently the assessee has not been able to prove that the assessee was a resident in Morocco.

Further, the Id. Counsel for the assessee has contended that Morocco does not have the provision of issuing tax residency

certificate and, therefore, the assessee will be unable to obtain the same and file before the revenue authorities.

4. We have heard rival contentions and perused the material placed before us. We observe that the assessee is an individual and is an employee working with M/s. Dell International Private Limited. Income of Rs.51,01,460/-, declared in the return of income filed on 20/07/2012 claiming Nil refund but later on return was revised on 27/02/2013 declaring income of Rs.10,83,320/- and claiming refund of Rs.12,41,606/-. The return selected for scrutiny through CASS followed by issuance of notice u/s 143(2) & 142(1) of the Act. During the course of scrutiny proceedings, the Id. Assessing Officer noticed that the assessee has claimed benefit under DTAA of Rs.40,40,448/- and also claimed to be a non-resident Indian. The said benefit under DTAA has been claimed on the ground that the salary income received by the assessee was taxed as per the taxation laws of Morocco and, therefore, the assessee is eligible for benefit under Article 15(1) of the India Morocco Double Taxation Avoidance Agreement. However, the Id. Assessing Officer has observed that the assessee has not been able to prove that he is a resident of Morocco and, therefore, Article 15(1) of the India Morocco Double Taxation Avoidance Agreement, is not applicable and accordingly disallowed the benefit of DTAA under Article 15.

5. When the matter came up before the Id. CIT(A), he confirmed the action of the Id. Assessing Officer observing that as per Section 5(2) of the Act, any income received or is deemed to be received in India by an assessee or on behalf of such a person, would be taxable in India unless of course the income was covered by the DTAA and was taxable in Morocco and the assessee failed to demonstrate the same. Before us, the Id. Counsel for the assessee has placed a copy of the statement which though are not in English, but were referred to as the quarterly return statement filed at Morocco and tax having been paid thereon. We notice that during the course of assessment proceedings though the Id. Assessing Officer accepted that the assessee is a NRI but did not accept that he is a resident of Morocco given reference to the calendar year and period of stay in Morocco. We, however, fail to find any merit in the observation, since residential status of the person has to be examined as per the Indian Income Tax Act and since during the FY 2011-12, undisputedly the assessee only stayed for 117 day in India in other words, he was staying in Morocco for 248 days during the financial year 2011-12 and thus fulfilled the condition of being a non-resident.

Now, since the assessee is a non-resident and he performed the services outside India the income accrued outside India but the same was received in India. Now in case the assessee has been subjected to income tax in another country then whether the assessee will be

eligible to claim DTAA benefit if any, available? We notice that there is a treaty between India and Morocco under the Article 15(1) of the India Morocco DTAA which provides that:-

“1. Subject to the provisions of Articles 16, 17, 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 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 State.

2. 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 State, if:

(a)	<i>the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant fiscal year;</i>
(b)	<i>the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and</i>
(c)	<i>the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the other State.</i>

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic, by an enterprise of a Contracting State shall be taxable only in that State.”

6. On going through, Article 15(1) of the India Morocco DTAA, which provides that remuneration received in respect of salary from employment in Morocco shall be taxable in Morocco. As per the Organisation for Economic Cooperation & Development (OECD), employment is exercised in the place where the employee is physically present when performing the activities for which the employment income is received. Therefore, under Article 15(1) of the India Morocco DTAA, salary received by the assessee in India for services rendered in

Morocco would not be taxable in India. Our this view is supported by decision of this Tribunal in the case of *Mr. Debabrata Dutta (supra)*, wherein also the facts of the case were identical and in that case, the assessee was working in Tanzania having NRI status. Salary for performing the work in Tanzania was received in India. Further tax at source was deducted in Tanzania as per the income tax laws of Tanzania. Dealing with the same issue this Tribunal observed as follows:-

“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 ld. 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 ld. 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.

7. Since the issues raised before us are identical, and the decision of the Tribunal is squarely applicable on the facts of the present case, we are inclined to hold that since the assessee is a NRI and stayed more than 182 days outside India, and has provided services as an employee outside India and since the salary for the period working outside India at Morocco has been claim to be subjected to tax as per the income tax laws of Morocco we hold that assessee is eligible for DTAA benefit as per Article 15(1) of the India Morocco DTAA.

8. However, we direct the ld. Assessing Officer to examine the quarterly income tax statement of Morocco placed before us in another language. Assessee is directed to get the same converted into English language and place the same before the ld. Assessing Officer. The ld. Assessing Officer shall give sufficient opportunity to the assessee to show that the said documents are towards the tax paid in Morocco on the income from salary received for performing his duties for the employee M/s. Dell International Private Limited. In case the ld. Assessing Officer is satisfied with these documents indicating that the assessee has offered the alleged salary income to tax under the income

tax laws of Morocco, and had paid taxes thereon, necessary relief may be granted to the assessee by not taxing the alleged salary income of Rs.40,40,448/-under the Indian Income Tax Act.

9. In the result, appeal of the assessee is allowed for statistical purposes as per terms indicated hereinabove.

Order pronounced in the Court on 10th July, 2023 at Kolkata.

Sd/-

**(SONJOY SARMA)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 10/07/2023

SC Sarma

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata