

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'D', NEW DELHI**

Before Shri Challa Nagendra Prasad, Judicial Member

&

Dr. B. R. R. Kumar, Accountant Member

ITA No. 2171/Del/2022 : Asstt. Year: 2018-19

Vishal Gulati, Bellary 317, Jal Vayu Tower, Sector-56, Gurgaon-122011 (APPELLANT)	Vs	ACIT, International Taxation, Circle-1(3)(1), New Delhi (RESPONDENT)
PAN No. ACZPG1635N		

Assessee by : Ms. Shivani, Adv.

Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 01.02.2024

Date of Pronouncement: 14.02.2024
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ORDER

Per Dr. B. R. R. Kumar:-

Delay Condoned:

2. The present appeal has been filed by the assessee against the order of Assessing Officer dated 30.06.2022 for the A.Y. 2018-19.

3. The assessee has raised the following grounds of appeal:-

"1. That on the facts and circumstances of the case & in law, the impugned assessment order passed under section 143(3) r.w.s. 144C(b) by Learned Income Tax Officer, Circle Int. Tax 1(3)(1) ("Ld. AO") in pursuant to directions of Ld. Dispute Resolution Penal ("Ld. DRP") is wrong and bad in law and liable to be quashed.

2. That on the facts and circumstances of the case & in law, the Ld. AO erred in not following the specific direction of the Ld. DRP in the impugned assessment order, hence liable to be quashed.

3. That on the facts and circumstances of the case & in law, the Ld. AO erred to make the addition of salary income of INR 80,41,012 ignoring the provisions of section 15 read with section 5(2) and section 9(1)(ii) of the Act.

4. That on the facts and circumstances of the case & in law, the Ld. AO erred in not appreciating the applicability of Article 16(1) of the India-UK Double Taxation Avoidance Agreement (DTAA). The Ld. AO also erred in determining the residential status of the assessee as non-resident in the UK based on remittance-based taxation system.

5. That on the facts and circumstances of the case & in law, the Ld. AO erred in law in proposing the initiation of penalty proceedings under section 270A of the Act for underreporting of income.”

4. The assessee had filed his return of income u/s 139 of the Income-tax Act, 1961 on 30.08.2018 declaring an income of Rs.27,98,600/-. The assessee has received following amounts in the year:

Particulars	Amount (INR)
Gross salary	1,21,23,294
Less: exemption under section 10 of the act	13,00,000
Taxable Salary	1,08,23,294
Less: relief under article 16(1) of the India-UL DTAA	92,85,786
Taxable salary as per part B-TI of ITR	15,37,508

Salary and Allowances:

5. The Assessing Officer after going through the after details determined the income from salary of the assessee as under:-

S. No	Particulars	Amounts (in Rs.)
1.	Return income declared	27,98,600
2.	Add: under the head income from salary	80,41,012
	Total	1,08,39,612

6. The undisputed facts are that:

- The assessee is a NRI
- The assessee received salary for services rendered outside India

7. Under these facts, the taxability of the salary paid by the Indian company to a non-resident is examined with reference to the provisions of Section 5, Section 9, Section 15 of the Income Tax Act, 1961. Section 5 Income Tax Act reads as under:

"Scope of total income.

5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes 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 ; or
- (c) accrues or arises to him outside India during such year :

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of [section 6](#), the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.*

(2) 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—

- (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.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.”

8. This section deals with the scope of total income and subjected to the other provisions of this Act. The taxable income includes income from all sources received, deemed to be received accrues and deemed to have accrued is taxable in India in case of a non-resident. Hence, it is imperative to examine the provisions of taxability of salary received by non-resident from an Indian company as per the provisions of section 9 of the Income Tax Act. Section 9 Income Tax Act reads as under:

"Income deemed to accrue or arise in India.

9. (1) *The following incomes shall be deemed to accrue or arise in India :—*

²²*(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.*

Explanation 1.—For the purposes of this clause—

- (a) in the case of a business, other than the business having business connection in India on account of significant economic presence, of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India ;*
- (b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export ;*
- (c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India ;*
- (d) in the case of a non-resident, being—*
 - (1) an individual who is not a citizen of India ; or*

(2) a firm which does not have any partner who is a citizen of India or who is resident in India ; or

(3) a company which does not have any shareholder who is a citizen of India or who is resident in India,

no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;

(e) in the case of a foreign company engaged in the business of mining of diamonds, no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to the display of uncut and unsorted diamond in any special zone notified by the Central Government in the Official Gazette in this behalf.

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(ii) income which falls under the head "Salaries", if it is earned in India.

Explanation.—For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) service rendered in India; and

(b) 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 ;

(iii) income chargeable under the head "Salaries" payable by the Government to a citizen of India for service outside India ;

9. As per the provision of Section 9 (1)(ii), the income earned under head "Salaries" is taxable in India "if it is earned" in India. The explanation issued for removal of doubts declares that 'salaries if it is earned' meets services rendered in India.

10. In the instant case the assessee neither had any rest period nor leave period which is preceded and succeeded by the services rendered outside India. Since, the assessee has rendered services outside India, the salary cannot be taxable in India. The definition of salary as per the Income Tax Act is as under:

"Salaries.

15. *The following income shall be chargeable to income-tax under the head "Salaries"—*

- (a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;*
- (b) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;*
- (c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year.*

Explanation 1.—For the removal of doubts, it is hereby declared that where any salary paid in advance is included in the total income of any person for any previous year it shall not be included again in the total income of the person when the salary becomes due.

Explanation 2.—Any salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from the firm shall not be regarded as "salary" for the purposes of this section."

11. As per the definition the salary paid or the advances received are to be included in the total income of the person when the salary becomes due.

12. From the concurrent reading of Section 5 dealing with scope of total income, Section 15 dealing with computation of total income under the head salary and chargeability thereof and Section 9 dealing with income arising or accruing in India with reference to the salaries and the services rendered in India, we hold that no taxability arises on the salary/allowances received by the assessee since the assessee is a non-resident and has rendered services outside India.

13+. In the result, the appeals of the assessee are allowed.

Order Pronounced in the Open Court on 14/02/2024.

Sd/-
(C.N Prasad)
Judicial Member

Sd/-
(Dr. B. R. R. Kumar)
Accountant Member

Dated: 14/02/2024

NV, Sr. PS

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, DELHI