

आयकर अपीलीय अधिकरण “ए” न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH, CHENNAI

माननीय श्री एबी टी. वर्की, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य के समक्ष।
BEFORE HON'BLE SHRI ABY T. VARKEY, JM AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं. ITA No.1317/Chny/2023
(निर्धारणवर्ष / Assessment Year: 2020-21)

Shri Sanjay Ajit Flat No.69, Sri Vari Gardens, VKK Menon Road, New Sidhapusur, Coimbatore South-641 044.	बनम/ Vs.	ITO International Taxation Ward, Coimbatore.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. FCGPS-0088-P		
(अपीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थीकी ओरसे/ Appellant by	:	Shri G.C.Srivastava (Advocate)(Virtual) - Ld.AR
प्रत्यर्थीकी ओरसे/ Respondent by	:	Dr. Samuel Pitta (JCIT) -Ld. Sr. DR

सुनवाईकी तारीख/ Date of Hearing	:	22-08-2024
घोषणाकी तारीख / Date of Pronouncement	:	03-09-2024

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2020-21 arises out of order passed by Learned Commissioner of Income Tax (Appeals), Chennai-16 [CIT(A)] on 20-10-2023 in the matter of an assessment framed by the Ld.AO u/s.143(3) r.w.s.144C(3) of the Act on 31-05-2022. The grounds raised by the assessee read as under:-

1. That the Ld. AO has erred in law and on facts in determining the assessed income of INR 38,61,140 as against Nil income declared in the ITR (filed by the Appellant, thereby resulting in

additional tax liability of INR 84,486 as against refund of INR 10,08,960 claimed in the ITR filed by the Appellant.

2. The Ld. AO has erred in law and on facts in not granting benefit of exemption claimed by the Appellant under section 90 of the Act read with Article 16(1) of India-UK Treaty in the ITR stating that the situs of employment is in India and the salary was accrued/ earned in India, though services were rendered by the Appellant in UK during the entire AY 2020-21.

3. That the Ld. AO has erred in ignoring the applicability of Article 16(1) of the India-UK Treaty by taxing the salary income earned in UK by a Resident of UK and a NR of India merely because the salary income has been received in India.

4. The Ld. AO has erred in law and on facts in not granting benefit of exemption claimed by the Appellant under Article 16(1) of India-UK Treaty on the ground that the salary received from OFSS is not offered to tax in UK. While holding so, the Ld. AO failed to appreciate that there is no condition in Article 16(1) of India-UK Treaty that in order to claim Treaty exemption in India, it will be dependent upon taxability of salary income in UK. In any case, the Appellant has duly submitted the copy of UK tax return before the AO, wherein this salary paid by OFSS has been offered to tax in UK.

5. The Ld. AO has erred in law and on facts in ignoring the provisions of section 15 read with section 5(2) and section 9(1)(ii) of the Act, which clearly provides taxability of salary on the basis of accrual and not on the basis of receipt of salary income. Accordingly, the Ld. AO has erred in not appreciating that even under provisions of Income-tax Act, 1961, salary received in India for services rendered in UK will be taxable in UK only and hence not taxable in India.

6. The Ld. AO has erred in law and on facts in determining the taxability of salary income of the Appellant relying only on the provisions of section 5(2)(a) of the Act, though the said section has to be read with other relevant provisions of the Act which is section 9(1)(ii) and section 15, which provides for taxability of salary on the basis of accrual and not on the basis of receipt of salary income.

7. The Ld. AO has erred in law and on facts in considering the treatment of the salary cost in the books of the employer and taxes deducted on the same to decide on the taxability of salary income in the hands of Appellant as being earned in India ignoring the provisions of section 15 read with section 5(2) and section 9(1)(ii) of the Act.

8. The Ld. AO has erred in relying on few judicial precedents in concluding that the Appellant is not eligible to claim exemption of salary income under Article 16(1) of India-UK Treaty and is taxable on the salary income received in India. The Appellant would like to mention that the facts of the said cases are not identical to the facts of his case. Also, the Ld. AO is erred in not considering the judicial precedents mentioned during the course of proceedings/ submissions, where the facts involved were identical to the facts of Appellant's case.

9. That the Ld. AO has erred in levying the interest under section 234D amounting to INR 83,771 in the Assessment Order. Accordingly, levy of interest under section 234D of the Act amounting to INR 83,771 is bad in law and void-ab-initio.

10. That the Ld. AO has further erred in initiating penalty proceedings under section 270A of the Act. The Appellant prays for any consequential relief, to which the Appellant may be entitled under the law in pursuance of the aforesaid grounds of appeal, or otherwise. The Appellant may kindly be given an opportunity of being heard under the principles of natural justice.

2. The Ld. AR advanced arguments assailing the stand of lower authorities and relied on various decisions of Tribunal, the copies of which has been placed on record. The Ld. Sr. DR supported the orders

of lower authorities. Having heard rival submissions and upon due consideration of material facts, our adjudication would be as under.

3. Upon perusal of assessment order dated 31-05-2022, it could be seen that the assessee being non-resident individual filed return of income declaring income of Rs.2295/- and claiming refund of Rs.10.08 Lacs. The assessee earned salary of Rs.39.47 Lacs from his employer M/s Oracle Financial Services Software Ltd. (OFSSL) and claimed salary to be exempt to the extent of Rs.39.41 Lacs under Article 16(1) of India-UK DTAA. It transpired that the assessee was working under administrative control of OFSSL and he was sent on an international assignment to UK. The salary amount was received in Indian Bank Account of the assessee and OFSSL issued Form 16 to the assessee. The assessee stated that the salary earned from international assignment was offered to tax in UK Tax Return. However, Ld. AO observed that the assessee did not furnish any evidence of foreign tax payment. The tax was paid by the employer. The Ld. AO held an opinion that India being the source state and considering the fact that no tax has been paid by the assessee to UK Tax Authorities, the salary income would be taxable in India. Finally, considering Article 16 of India-UK Tax Treaty as well as the provisions of Sec.5(2), Ld. AO rejected the claim of the assessee and brought to tax entire salary of Rs.39.47 Lacs while computing the income of the assessee.

4. The Ld. CIT(A) upheld the same on the ground that this expenditure was claimed by OFSSL and as per Tax Residency Certificate (TRC), no remittance tax was paid by the assessee in UK. Aggrieved as aforesaid, the assessee is in further appeal before us.

5. It is quite clear that the assessee is non-resident during impugned assessment year. The substantial salary has been received by the assessee for international assignment to UK. The prime observation of lower authorities is that the assessee has not paid any tax in UK. The UK Tax Return as filed by the assessee has been placed on Page Nos.46 to 64 of the paper-book. Upon perusal of Page No.62, it could be seen that the assessee's net earnings are £27042. After grossing-up for tax, the same aggregates to £30677. The assessee has paid tax of £3635. The certificate of residence has been placed on Page No.67 of the paper book. Upon perusal of the same, it is quite clear that the assessee is resident of UK during the period 06-04-2019 to 05-04-2020. Therefore, lower authorities have erred in noting that the assessee has not paid any taxes in UK. Though the tax may have been paid / reimbursed by the employer, nevertheless, the assessee has offered income on gross basis and subjected to tax in UK. Therefore, the claim of the assessee is to be allowed.

6. We find that similar issue has been decided by co-ordinate bench of this Tribunal, in assessee's favor in ITA No.2936/Chny/2018 dated 07-09-2022 in the case of Shri Kangaraj Shanmugam. On identical facts, it was held by the bench as under: -

Our findings and Adjudication

5. From the fact it emerges that the assessee has stayed in India for 63 days during this year and his status, as per law, is non-resident. The assessee has worked in India for 21 days and offered proportionate salary to that extent to tax. For remaining period, the work has been performed in UK though the salary has been received in India from existing employer. It is also a fact on record that this salary, for work performed in UK, has been offered to tax in UK which is evident from Tax Returns filed in UK. The assessee submit the as per Article 16(1) of DTAA, this income would be taxable in UK only. Alternatively, the assessee relies on the provisions of Sec.15 read with Sec.5(2) and Sec.9(1)(ii) which provides for taxability of salary on accrual basis and not on receipt basis. However, Ld. CIT(A) has held that the assessee would not be eligible for the benefit of DTAA since DTAA relief is to be given by resident country which is UK in the present case.

6. We find that an identical issue has been addressed by coordinate bench of Chennai Tribunal in **Shri Paul Xavier Antonyamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020)**. In this decision, the bench has held that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), salary income could be deemed to accrue or arise in India only if it is earned in India in respect of services rendered in India. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016) was held to be factually distinguished on the ground that in that case the assessee was claiming foreign tax credit relief for taxes paid on doubly taxed income which was not the case in that appeal. In para-7, the bench found the issue to be covered in assessee's favor by various judicial precedents including the decision of Hon'ble Karnataka High Court in DIT V/s Prahlad Vijendra Rao (198 Taxman 551); decision of Hon'ble Bombay High Court in CIT V/s Avtar Singh Wadhawan (247 ITR 260); decision of Hon'ble Calcutta High Court in Sumanabandyopadhyay V/s DDIT (TS-281-HC-2017) as well as CBDT Circular No.13/2017 dated 11/04/2017.

7. We find that facts are pari-materia the same before us and the ratio of this decision is squarely applicable to the present case. Therefore, we would hold that salary income as accrued to the assessee for work performed in UK would not be taxable in India. However, the salary received for work performed in India would be taxable in India. Accordingly, we direct Ld. AO to re-compute the income of the assessee. The above proposition is also supported by the fact that upon perusal of UK tax return, it could be seen that the assessee has offered earnings from employment for £24184 on net basis which has been tax grossed up for £6046. This is in view of the fact that OFSSL has paid provisional payment of £9062 to UK revenue authorities since the employer has undertaken to meet the UK income tax liability arising from employee's earnings in UK. Accordingly, the assessee has claimed refund of £3016. On the basis of the above, it could be seen that separate tax payment has been made by OFSSL to UK revenue authorities to discharge the tax liability of the assessee in that country.

8. The assessee has also placed on record Tax Residency Certificate (Page nos. 192-193 of paper book). As per this certificate, the assessee has claimed relief for foreign earning not taxable in UK for £7952. The same shall be considered by Ld. AO while computing the quantum of income taxable in India as directed by us in preceding para-7.

9. The appeal stands partly allowed in terms of our above order.

Facts being pari-materia the same, we direct Ld. AO to exclude the foreign assignment salary earned by the assessee while re-computing the income of the assessee.

7. The appeal stand allowed in terms of our above order.

Order pronounced on 3rd September, 2024

Sd/-
(ABY T. VARKEY)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखासदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated :03-09-2024
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF