IN THE INCOME TAX APPELLATE TRIBUNAL
"I" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, VICE PRESIDENT &
MS PADMAVATHY S, AM

I.T.A. No. 4844/Mum/2024
(Assessment Year: 2013-14)

Mridula Jha Jena, E-1501, Llake Florence, Lake Homes, Powai, Maharashtra-400076. **PAN : ADMPJ2926R**	Vs.	**International Tax,** **Ward, 3(1)(1),** Kautilya Bhavan, Mumbai-400051.
Appellant)	:	**Respondent**)

Appellant /Assessee by	:	Shri Vishal Kalra/Ms. Snigdha Gautam/Ms. Reema Grewal, AR
Revenue / Respondent by	:	Shri Krishna Kumar, Sr. DR
Date of Hearing	:	19.12.2024
Date of Pronouncement	:	07.01.2025

O R D E R

Per Padmavathy S, AM:

This appeal by the assessee is against the order of the Commissioner of Income Tax (Appeals) – 57, Mumbai (in short "the CIT(A)") dated 26.07.2024 for assessment year 2013-14. The assessee raised the following grounds of appeal –

"1. That on the facts and circumstances of the case and in law, the Assessing Officer ("AO") vide order dated March 29, 2016 has erred in completing the assessment of the Appellant at an income of INR 53,07,765 as against the income declared by the Appellant of INR 6,89,690.

2. That on the facts and circumstances of the case and in law, the CIT erred in upholding Aos stand in making an addition of INR 45,08,074 in respect of salary received by the Appellant from her international assignment.

2.1. That on the facts and circumstances of the case and in law, the CIT erred in upholding AOs stand in denying salary exemption claimed under section 9(1)(ii) of the Act and concluding that the salary received by Appellant from her international assignment shall be deemed to accrue or arise in India under section 5(2) of the Act.

2.2. Without prejudice to the above grounds of appeal, the CIT erred in upholding AOs stand in making an addition of INR 45,08,074 in respect of salary received by the Appellant instead of INR 41,59,580 claimed exempt in the return of income.

3. That on facts and circumstances of the case, the AO has erred in not allowing deduction of INR 1,10,000 claimed as deduction under chapter VIA of the Act by the Appellant in return of income.

4. That on facts and circumstances of the case, the AO has erred in not granting the credit of taxes deducted at source ('TDS') amounting to INR 13,17,237 while computing the amount of demand payable by the Appellant.

5. That on facts and in circumstances of the case, the AO has erred in computing excess interest under section 234B and 234C of the Act while computing the amount of demand payable by the Appellant.

6. That on the facts and circumstances of the case and in law, the AO has erred in initiating penalty proceedings under section 270A of the Act mechanically and without recording any adequate satisfaction for such initiation."

2. The assessee is an individual and filed the return of income for AY 2013-14 on 29.07.2013 declaring an income of Rs.6,89,690/-. The case was selected for scrutiny and the statutory notices were duly served on the assessee. The Assessing

Officer (AO) issued notices to the assessee calling for various details. Since the assessee did not respond to the notices the AO passed an exparte order in which he made an addition of Rs.45,08,074 towards salary income as per Form 26AS and disallowed Rs.1,10,000 which the assessee has claimed as deduction under Chapter VIA.

3. Aggrieved the assessee filed further appeal before the CIT(A). Before the CIT(A), the assessee submitted that the assessee was sent on assignment to Cairo, Egypt with effect from 01.08.2012 and therefore the assessee was a non-resident for the year under consideration. The assessee further submitted that the salary earned towards services rendered in Egypt are not taxable as per the provisions of section 9(1)(ii) and therefore the same has not been offered to tax. The assessee also filed additional evidence in support of Chapter VIA deductions claimed. The CIT(A) deleted the disallowance made towards Chapter VIA deduction based on the evidence filed before him by the assessee. With regard to salary income, the CIT(A) upheld the addition made by the AO stating that the assessee continued receive salary in India and accordingly the same is taxable as per the provisions of section 5(2) of the Act. The CIT(A) however directed the AO to give corresponding credit towards TDS as per Form 16. The relevant findings of the CIT(A) in this regard is extracted below –

> *"5.3 The facts recorded and findings of the AO in the assessment order and the submissions made by the appellant has been considered.*
>
> *The facts of the case of the appellant are that the appellant was a non-resident for AY 2013-14. The appellant was employee of M/s. BG Exploration & Production India Limited. The appellant was sent on assignment to Egypt by the employer company by a letter dated 04.07.2012. The appellant was sent on assignment for a period of 24 months from 01.08.2012. From the form 26AS, it is seen that M/s BG Exploration &*

Production India Limited had paid salary of Rs. 45,08,074/-, on which TDS of Rs. 13,17,237/- was deducted. The appellant filed Retum of income in ITR-2 on 29.07.2013. As per the computation of total income, total salary of Rs.50,45,173/- was shown as income. The salary was shown as reflected in Form 26AS and Form No. 12BA issued by M/s. BG Exploration & Production India Limited. The salary of Rs.41,59,580/- was claimed as exemption under section 9(1)(ii) of the IT act. In the computation of total income, the appellant claimed deduction of Rs.1,00,000/- under section 80CC, 80CCC and 80CCD and of Rs. 10,000/- under section 80TTA.

During the appellate proceedings, the appellant has provided a copy of ITR, Form 26AS, Form no.12 BA issued by the employer, a copy of bank statements of Citibank and a copy of passport. Even though the appellant has claimed the salary of Rs. 41,59,580/- as exempt income as per section 90 of the IT act. The appellant did not provide any explanation or details regarding as to how the salary was claimed exempt under section 90 of the IT act. The appellant had not provided the tax residence certificate of Government of Egypt. The appellant had also not provided any details regarding the salary income of Rs.41,59, 580/- offered for taxation in Egypt.

It is a fact that appellant is an employee of M/s. BG Exploration and Production India Ltd. though she was on assignment for Employer Company's work done at Egypt but she remained the employee of M/s. BG Exploration and Production India Ltd. and accordingly the laws of India are applicable in the case of appellant. The appellant was paid salary in India and TDS was also deducted on such salary paid. The employer company send the appellant on assignment to Egypt for carrying out the work of the employer company and the appellant did not independently earn any salary income outside India. Even though services were rendered in Egypt and outside India, the generation of salary income took place in India and thus, the salary income was earned in India. An income of a non-resident earned from whatever sources in India is taxable as per section 5(2) of the Income-tax Act.

For ready reference, provisions of section 5(2) of the IT Act are reproduced as under.

> *"5(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.

In the case of the appellant, the appellant has not brought on record any evidence to prove that the salary was earned outside India. As per section 5(2) of the I.T. Act, 1961, the total income of a non-resident included all income from whatever sources, which was accrued or received or deemed to be accrued or received in India in such year by or on behalf of such person or accrue or arises to him in India during such previous year. Hence the total salary income earned by the appellant is taxable in India as per provisions of IT Act, 1962.

The appellant has also submitted that the appellant is a resident of the Egypt during the year under consideration, therefore, as per Article 16 of the India-Egypt Treaty, the salary income is taxable in Egypt. From perusal of the Article of the India- Egypt Treaty, it is seen that the salary derived by resident of Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in other Contracting State. If the employment is so exercised, such remuneration as is derived there from may be taxed in that other State. From the facts of the case of the appellant, the appellant has not brought on record that the employment was exercised in Egypt or not. Therefore, provisions of Article 16 are not applicable in the case of the appellant.

In view of the above facts and discussion, the adjustment of salary income of Rs. 45,08,074/-."

4. The ld AR submitted that the assessee has been deputed to Egypt w.e.f. 1st August 2012 as mentioned in the assignment letter (page 54 of PB) and has stayed in India only for 108 days during the previous year relevant to AY 2013-14. The ld. AR further submitted that the assessee accordingly is a non-resident for the year under consideration and therefore the salary income for services rendered outside India which accrues outside India is not taxable in India as per the provisions of section 9(1)(ii) of the Act. The ld. AR also submitted that the CIT(A) is not correct in confirming the addition made by the AO merely for the reason that the salary is

received in India by invoking the provisions of section 5(2)(a) of the Act. The ld AR placed reliance in this regard on the decision of the Delhi Bench of the Tribunal in the case of Pramod Kumar Sapra vs ITO (2017) 87 taxmann.com 98 (Del. Trib.)

5. The ld. DR on the other hand submitted that the assessee continue to be the employee of the Indian entity and that the Indian entity paid the salary for services rendered in Egypt directly to the Bank A/c of the assessee. Therefore, the ld. DR argued that the provisions of section 5(2)(a) of the Act is clearly applicable in assessee's case.

6. We heard the parties and perused the material on record. The assessee vide assignment letter dated 04.07.2012 (Page 54 of paper book) was sent on a long term assignment to Cairo, Egypt w.e.f. 01.08.2012. From the perusal of the Passport (page 21 to 48 of PB) it is noticed that the assessee has stayed in India for only 108 days during the previous year relevant to AY 2013-14. As per the provisions of Explanation 1(a) to section 6(1) of the Act if an Individual being a citizen of India, leaves India in any previous year for the purposes of employment outside India, then he or she will become resident only if his or her stay in India is more than 182 days. Section 2(30) of the Act defines "non-resident" as a person who is not a resident. Therefore the assessee who has left India during the previous for the purpose of employment and stayed in India for less than 182 days is not a resident i.e. non-resident. We notice that the assessee has filed the return of income in the status as a non-resident. We further notice that the AO while passing the exparte order has treated the assessee as a resident. We also notice that the CIT(A) however has not recorded any contrary finding with regard to the residential status

declared by the assessee as a non-resident. Therefore it is not in dispute that the residential status of the assessee is that of a non-resident.

7. The assessee while filing the return of income has offered to tax a sum of Rs. 8,84,993/- towards income from salary though as per Form 16 the salary income is Rs. 50,44,573/-. The assessee claims that the salary income earned from 01.08.2012 does not accrue in India since the services are rendered outside India. Once the residential status of the assessee is held to be non-resident then for the purpose of determining the taxability of salary income earned by the assessee the provisions of section 9(1)(ii) of the Act which read as under have to be looked into –

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

8. From the plain reading of the above provisions it is clear that the salary income earned for services rendered in India only are to be regarded as income earned in India. Therefore the argument of the ld AR is that the assessee has rendered services in Egypt from 01.08.2012 and the salary income attributable towards services rendered outside India cannot be taxed in India. The contention of the revenue is that the salary even for the services are rendered outside India, is

paid by Indian entity to assessee's bank account in India and that the assessee continued to be the employee of the Indian entity. Accordingly the revenue is contending that the provisions of section 5(2)(a) of the Act is applicable in assessee's case. Therefore the limited issue for our consideration is whether the provisions of the section 5(2)(a) of the Act has an over riding effect on section 9(1)(ii) of the Act.

9. We in this regard notice that the Hon'ble Calcutta High Court in the case of Smt. Sumana Bandyopadhyay & Anr vs DCIT (GA 3745 of 2016 With ITAT 374 of 2016 dated 13.07.2017) has considered a similar issue where it has been held that –

3. We had admitted the appeal on 11th July 2017 on the following question:-

> *"Whether on the facts and in the circumstances of the case and in law, income by way of salary which became due and has accrued to the assessee, a non-resident, for services rendered outside India and which is not chargeable to tax in India on the "due" or "accrual" basis, can be said to be chargeable to tax on the "receipt" basis merely because the foreign employers, on the instructions of the assessee, have remitted a part of amount of salary to the assessee's NRE bank account in India?"*

4. This judgment is assailed before us by Mr. Khaitan, learned Senior Counsel appearing on behalf of the appellant. His submission is that income of the assessee constituted earning outside India while the assessee was an NRI and mere receipt of the said sum in the assessee's NRE account would not subject it to tax under the 1961 Act. He has relied on a Bench decision of the Karnataka High Court Director of Income-tax (International Taxation) Vs. Prahlad Vijendra Rao (IT Appeal No. 833 of 2009) on this point. In this appeal, it was observed and held:-

> *"6.Having heard the learned advocates appearing for the parties and after perusing the orders passed by the authorities and after having given our anxious consideration to the contentions raised, we are of the considered view that there is no substantial question of law involved in this appeal for being formulated and the adjudicated for the following reasons:*

(a) The revenue does not dispute that assessee had worked as a Chief Engineer on the board of a ship bebnging to his employer "M/s. Live Stock Transport & Trading Company, Kuwait and during the relevant period the assesses had stayed outside India for a period of 225 days and the salary that was earned by him was on account of the work discharged by him on board during the said period which is outside the shores of India.

b) The CIT (A) has placed reliance in the case of CIT Vs. Avtar Singh Wadhwan [2001] 247 ITR 260 (Bom) wherein it has been held that salary received by the non resilient marine engineer for services rendered by him on a foreign going Indian ship which mainly remained away from the Indian coast during the relevant accounting year accrued outside India and was not taxable in India. While answering the question of law there under with reference to Section 9(1)(Xii) in the said case it has also been held that the salary which is earned in India will alone be regarded as income arising in India and not otherwise. The principles laid down in the said case are squarely applicable to the facts of present case also.

c) The criteria of applying the definition of Section 5(2)(b) would be such income which is earned in India for the services rendered in India and not otherwise.

d) Under section 15 of Act even on accrual basis salary income is taxable i.e., it becomes taxable irrespective of the fact whether it is actually received or not only when services rendered in India it becomes taxable by implication. However, if services are rendered outside India such income would not be taxable in India."

5. As regards the legal position in a similar situation, clarification has been given by the Ministry of Finance on 11th April 2017 under Circular No. 13/2017. This Circular specifies:-

"Subject: Clarification regarding liability to income-tax in India for a non-resident seafarer receiving remuneration in NRE (Non Resident External) account maintained with an Indian Bank.
Representations have been received in the Board that income by way of salary, received by non-resident seafarers, for services rendered outside India on-board foreign ships, are being subjected to tax in India for the reason that the salary has been received by the seafarer into the NRE bank account maintained in India by the seafarer.

2. The matter has been examined in the Board Section 5(2)(a) of the Income-tax Act provides that only such income of a non-resident shall be subjected to tax in India that is either received or is deemed to be received in India. It is hereby clarified that salary accrued to a non-resident seafarer for services rendered outside India on a foreign ship shall not be included in the total income merely because the said salary has been credited in the NRE account maintained with an Indian bank by the seafarer."

6. We concur with the ratio of the decision of the Karnataka High Court and in our opinion the interpretation be given to sub Section (b) of Section 5(2) of the Act would also apply to Section 5(2)(a) of the Act. The Circular is clarificatory in nature and is applicable for construing the aforesaid provision for the relevant assessment year. In our opinion the authorities under the Income Tax Act did not properly apply the provisions of law to the case of the assessee. We are of the view that the Assessing Officer was wrong in adding the aforesaid sum to the income chargeable to tax of the assessee for the relevant assessment year. We accordingly allow the appeal and answer the question framed by us in favour of the assessee.

10. A similar view has been held by the Delhi Bench of the Tribunal in the context of revision under section 263 in the case of Pramod Kumar Sapra (supra) and held that –

"7. We have heard the rival submissions; perused the relevant material referred to before us and also the finding given in the impugned order. The sole basis/ reason for exercising jurisdiction under section 263 by the Ld. Pr. CIT is that, the claim of deduction of salary amounting to Rs.40,04,830/- has not been properly examined by the Assessing Officer while allowing the said deduction. The assessee, who is employed with M/s Reliance Industries Limited, was deputed as Country Manager to Kurdistan, Iraq, w.e.f 16/4/2010 for the purpose of his employment in Iraq he has received salary. In the annual return of income filed in India on 14/7/2011, assessee has claimed exemption of salary earned outside India amounting to Rs.40,04,830/- out of total salary received at Rs.43,68,905/-. The said return though has been filed in the status of "nonresident", however, from the perusal of the assessment order, it is seen that the Assessing Officer has framed the assessment in the status of "resident". Be it that as may be, from the material facts which have been placed before the Ld. Pr. CIT and also before the Assessing

Officer during rectification proceedings u/s 154, post assessment proceedings, it is seen that the assessee has given entire details of number of days for which assessee had stayed outside India which has been computed at 203 days. Even if we accept the contention of the ld. CIT D.R. and also finding of the Ld. Pr. CIT that this issue has not been examined in detail or no proper enquiry has been conducted, then at the very threshold, one has to see, whether such a salary received under an employment outside India, the period of which has exceeded more than 182 days, can be taxed under the provisions of Income-tax Act or not. The order can be held to be erroneous in the absence of any proper enquiry at the stage of assessment proceeding, though examined subsequently by the AO which is also part of assessment record, but certainly one has to see that, whether it is prejudicial to the interest of the Revenue or not. Once before the Ld. Pr. CIT assessee has clearly brought on record that assessee's stay outside India was more than threshold limit of 182 days as prescribed under the provisions of section 6, then the Ld. Pr. CIT should have atleast considered the same and given his findings accordingly. The major thrust of the Ld. CIT D.R. as well as the Ld. Pr. CIT in his impugned order is that, firstly salary has been received in India as it has been credited in the bank account of the assessee in India; and secondly, such salary income credited to the bank account of assessee in India is deemed to be income received in India and, therefore, the same is chargeable to tax under the scope of total income under section 5. Section 5 only defines the scope of total income whereby all the income of a person from whatever source is received or accrued or deemed to be received or deemed to be accrued in India shall be taxable under the provisions of this Act. However, section 6 provides scope and ambit of taxability of an individual who can be reckoned as resident in India. Sub-section (1) of section 6 clearly provides that an individual is said to be resident in India in any previous year for the purpose of this Act if he is an India in that year for a period of or periods amounting in all to one hundred and eighty-two days or more; or having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year. So far as the second criterion of four years as given in clause (c) of sub-section (1) of section 6, the same is not applicable here. For the purpose of present case, only criterion, which is to be seen, is whether the assessee can be said to be resident in India in terms of clause (a) which clearly stipulates that assessee should have been resident in India for a period of 182 days or more. If the assessee in the previous year has not stayed

in India for more than 182 days, then ostensibly such an income cannot be taxed in the hands of the assessee individually as a resident of India. The assessee before the Pr. CIT and also before the Assessing Officer has given the following details of number of days which assessee has stayed outside India:-

"No. of days assessee stayed out of India i.e. in Kurdistan, Iraq

Date of leaving India	**Date of reporting to India**	**No. of days stayed out of India**
26/04/2010	25/05/2010	30
02/06/2010	29/06/2010	21
14/07/2010	09/08/2010	27
25/08/2010	17/09/2010	24
11/10/2010	15/11/2010	35
11/12/2010	11/01/2011	32
06/02/2011	08/03/2011	31
28/03/2011	31/03/2011	03
Total days stayed out of India		**203**

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 subsection (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 fulfill 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. Vs. CIT reported in [2000] 243 ITR 83 (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."

11. We notice that facts in assessee's case are similar where the assessee has received salary in her bank account in India for the services rendered outside India. Therefore respectfully following the above judicial precedence we hold that the salary received by the assessee for services rendered outside India though received in India is not taxable as per the provisions of section 9(1)(ii) of the Act. The AO is directed to delete the addition made in this regard.

12. During the course of hearing the ld AR submitted that the AO has not passed on order giving effect as per the directions of the CIT(A) for allowing deduction under Chapter VIA and TDS Credit. In this regard we direct the AO to allow credit to TDS and allow deduction claimed by the assessee in accordance

with law keeping in mind our decision with regard to taxability of salary income as adjudicated herein above.

13. In result, appeal of the assessee is allowed.

Order pronounced in the open court on 07 -01-2025.

Sd/-	***Sd/-***
(SAKTIJIT DEY)	**(PADMAVATHY S)**
Vice President	**Accountant Member**

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai