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

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER

AND

SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

ITA No.726/DEL/2022
[Assessment Year: 2018-19]

Arijit Ranjan Sarker, 20-15, Silversea Tower-3, 50 Marine Parade Road East Coast, Tanjong Katong, Singaopore-449307	Vs	The Assistant Commissioner of Income Tax, International Taxation, Gurugram, Haryana
PAN-AVCPS8611A		
Assessee		Revenue

ITA No.1848/DEL/2022
[Assessment Year: 2019-20]

Arijit Ranjan Sarker, 20-15, Silversea Tower-3, 50 Marine Parade Road East Coast, Tanjong Katong, Singaopore-449307	Vs	The Assistant Commissioner of Income Tax, International Taxation, Gurugram, Haryana
PAN-AVCPS8611A		
Assessee		Revenue

Assessee by	Shri Vishal Kalra, Adv. & Ms. Sumisha Murgai, CA & Sh. Kailsah Gupta, CA
Revenue by	Shri Vijay B. Vasanta, CIT-DR

Date of Hearing	**10.12.2024**
Date of Pronouncement	**19.02.2025**

ORDER

PER BRAJESH KUMAR SINGH, AM,

These two appeals by the assessee are directed against the orders of the Assessing Officer, dated 23.02.2022 and dated

22.06.2022 passed u/s 143(3) r.w.s.144C(13) of the Income Tax Act, 1961 (hereinafter 'the Act') arising out of directions of Dispute Resolution Panel, New Delhi, dated 04.01.2022 and 27.04.2022 for Assessment Years 2018-19 and 2019-20, respectively.

2. This bunch of two appeals relating to same assessee on similar issues were heard together and are being disposed of by this consolidated order for the sake of convenience. In order to adjudicate the issue, first, we take up the appeal of the assessee in ITA No.726/Del/2022, pertaining to Assessment Year 2018-19.

3. Grounds of appeal raised by the assessee in ITA No.726/Del/2022 for AY 2018-19 are as under:-

> *1. That on the facts and in the circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant at INR 2,14,13,795, in pursuance to the directions issued by the DRP, as against the returned income of INR 66,65,112.*
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> *2. That on the facts and in the circumstances of the case and in law, the directions issued by the DRP are bad in law, void ab initio and liable to be quashed as the same have been passed in violation of the provisions of sub-section (8) to section 144C of the Act.*
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> *2.1. That on the facts and in the circumstances of the case and in law, the DRP has erred in directing the AO to pass a speaking order after conducting further enquiry and examination of the facts, furnished by the Appellant during proceedings before the DRP, pertaining to Permanent Establishment ("PE").*
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> *3. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in making an addition of INR 1,47,48,683 by holding that the Appellant is not eligible for claiming exemption under Article 15(2) of India-Singapore Double Taxation Avoidance Agreement ("DTAA").*

4. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in not granting the salary exemption claimed in respect of the services rendered from India without appreciating that all the conditions, specified under Article 15(2) of the DTAA, were satisfied by the Appellant.

4.1. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in holding that the Appellant does not satisfy the condition laid down by clause (b) of Article 15(2) of the DTAA without appreciating that the entire salary cost of the Appellant relating to the assignment period was cross charged to Mastercard Asia Pacific Pte Ltd. ("Mastercard Singapore").

4.2. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in holding that the Appellant does not satisfy the condition laid down by clause (c) of Article 15(2) of the DTAA without appreciating that Mastercard Singapore did not have any PE in India during the subject assessment year.

5. Notwithstanding and without prejudice to the above grounds, the AO/ DRP have erred in the wrongly computing and considering the salary of INR 1,47,48,683 as taxable in India instead of INR 1,17,66,947.

6. That on the facts and circumstances of the case and in law, the Assessing Officer has erred in initiating penalty proceedings under section 270A of the Act."

4. The additional ground of appeal raised by the assessee ITA No.726/Del/2022 for AY 2018-19 filed vide letter dated 09.10.2023 is as under:-

"That on the facts and circumstances of the case and in law, the directions passed by the Dispute resolution Panel ("DRP") dated April 27, 2022 is bad in law and liable to be quashed as the same was passed manually without issuance of Document Identification Number (DIN) as mandated by CBDT Circular No. 19/2019, and the entire proceedings based on such order is bad in law, void ab initio and liable to be quashed."

5. Ground no.1 is general in nature.

6. In Ground No.2, the assessee submits that the directions of the DRP are in violation of the provisions of sub-section -8 to section 144C of the Act and was liable to be quashed. Further, in ground no.2.1, it was submitted that the DRP has not passed a speaking order pertaining to PE of the assessee. However, these grounds were not pressed by the assessee and therefore the same are dismissed.

7. Further, the assessee filed an additional ground vide letter dated 09.10.2023 on DIN, which was again not pressed. Therefore, the same is dismissed.

8. Brief facts of the case:- The assessee is an individual employed with Master Card India Services Private Limited (Master Card India). The assessee submits that he was sent on international assignment to M/s Mastercard Asia Pacific Pte. Ltd. from Master Card India effective from August 2015 and since then he was working in Singapore. During the year, the assessee submitted that he was present in India for 54 days (35 workdays) and claimed that the salary for this period as non-taxable under Article-15(2) of India Singapore DTAA. It was submitted by the assessee that he was receiving part of his salary from Master Card India during the overseas assignment for administrative convenience. Regarding his claim and its rejection by the Assessing Officer in the draft assessment order, the assessee in its written submission dated 26.05.2021 submitted before the Ld. DRP as under:-

During the Financial Year ("FY") 2017-18, my presence in India was only 54 days (35 workdays) and therefore I qualified as a non-resident as per section 6(1) of the Income Tax Act, 1961 ("the Act").

Accordingly, I electronically filed return of income on August 09, 2018, admitting an income of Rs. 66,65,110/- after claiming exemption of salary under Article 15 of the Double Taxation Avoidance Agreement between India and Singapore ("DTAA") amounting to Rs. 15,38,07,697/-. The tax liability including interest under the normal provisions of the Act amounted to Rs. 18,88,037/-. During the subject AY, I had claimed credit of Tax Deduction at Source ("TDS") of Rs. 5,50,36,677/- while computing the tax liability, resulting in a refund of Rs. 5,31,48,640/-.

Thereafter, the return of income was picked up for scrutiny assessment proceedings by the learned Assistant Commissioner of Income-tax, International taxation, Gurgaon. During the course of the assessment proceedings for AY 2018-19, the Assessing Officer ("AO") asked me why income arises from working in India for 35 workdays should not be taxable in India.

Based on the information and explanations filed during the assessment proceedings, the learned AO issued a Draft Assessment Order ("DAO") under the provisions of section 143(3) read with section 144C of the Act, dated 12 April 2021.

As per the draft assessment order, the AO has determined the total income at Rs. 2,14,13,795/-after denying the exemption claimed under Article 15(2) of the India - Singapore DTAA.

8.1. The DRP after considering the submission of the assessee noted in para 4.4 of its directions that vide letter dated 19.11.2021 of the assessee, new facts have emerged in respect of applicability of PE in this case and also a judicial pronouncement dated 21.09.2021 made by the Hon'ble Delhi High Court in the case of Mastercard Asia Pacific Pte. Ltd. vs Union of India in W.P.(C) No.10944/2018. In view

of these facts, the DRP was of the view that the same facts need to thoroughly examined by the Assessing Officer and therefore directed the Assessing Officer to examine the new facts and do the necessary verification as submitted by the assessee and pass a speaking order under the extant law and rules.

8.2. The Assessing Officer during the final assessment proceedings u/s 144C r.w.s. 144(13) of the Act considered the letter dated 19.11.2021 filed by the assessee before the DRP which is a letter issued by Mastercard Asia Pacific Pte. Ltd. to the assessee informing that the said company did not have any Permanent Establishment in India as per Article -5 of DTAA between India and Singapore and its income was not chargeable to tax in India. It also referred to the contents of the said letter, wherein, it was stated that though the Authority for Advance Ruling ("AAR") had ruled that Mastercard Asia Pacific Pte. Ltd. had a PE in India but the Hon'ble Delhi High Court vide order dated 21.09.2021 had directed the Income Tax Department not to pass final assessment orders in accordance with said AAR Ruling in the case of Mastercard Asia Pacific Pte. Ltd. and therefore Mastercard Asia Pacific Pte. Ltd. maintains that it has no PE in India. The Assessing Officer held that the said document does not support the case of the assessee because he has been paid salary by Mastercard India Services Private Ltd. and in order to claim benefit of Article-15(2)(b) of the tax treaty, the remuneration should have been

paid by the employer in India, (the other state) by a non-resident employer which is not the case as the employer of the assessee was a tax resident of India which is M/s Mastercard India Services Private Ltd.

8.3. The Assessing Officer further held that in order to claim the benefit of Article 15(2)(c) of the tax treaty, remuneration should not have been borne by a Permanent Establishment (PE) or a fixed base which the employer has in India. The Assessing Officer further held that Article 15(2)(c) of the India Singapore DTAA was also not applicable in the case of the assessee as the assessee is an employee of a tax resident of India i.e. M/s Mastercard India Services Private Ltd. The Assessing Officer further noted that no evidence was submitted by the assessee to show that he was an employee of Mastercard Asia Pacific Pte. Ltd. The Assessing Officer further observed that even for the sake of argument he is an employee of M/s Mastercard Asia Pacific Pte. Ltd. then also the benefit of Article 15(2)(c) is not available to him as M/s Mastercard Asia Pacific Pte. Ltd. has a PE in India as per the decision of the Hon'ble Authority of Advance Ruling in the case of M/s Mastercard Asia Pacific Pte. Ltd. Accordingly, the Assessing Officer held that the assessee was not eligible for claiming exemption of the salary of 35 days under Article-15(2) of the tax treaty and made an addition of Rs.1,47,48,683/- to

the total income of the assessee. The relevant extract of the assessment order is reproduced as under:-

> *"The above document filed by the assessee has been considered in the light of provisions of article 15(2) of India-Singapore DTAA and it is noted that the above document does not help the case of the assessee. The assessee is resident of Singapore during the year for tax purposes and he has been paid salary by M/s Mastercard India Services Private Limited during the year. Therefore, in order to claim benefit of article 15(2)(b) of the tax treaty, remuneration should have been paid by the employer in India (the other state) by a non-resident employer which is not the case as employer of the assessee is a tax-resident of India i.e. M/s Mastercard India Services Private Limited. The same has already been discussed in preceding paragraphs of this order.*
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> *Further, in order to claim benefit of article 15(2)(c) of the tax treaty, remuneration should not have been borne by a permanent establishment (PE) or a fixed base which the employer has in India (the other state). This provision is also not applicable as the assessee is an employee of a tax-resident of India i.e. M/s Mastercard India Services Private Limited. No evidences have been submitted by the assessee to show that he is an employee of M/s Mastercard Asia Pacific Pte Ltd. in the light of detailed discussion in the order in preceding paragraphs. Even if for the sake of argument, it is assumed that he is an employee of M/s Mastercard Asia Pacific Pte Ltd., then also benefit of article 15(2)(c) is not available to him as M/s Mastercard Asia Pacific Pte Ltd has a PE in India as per decision of Hon'ble Authority for Advance Ruling. Thus, the assessee is not eligible for article 15(2) of the tax treaty."*

9. Against the above order, the assessee is in appeal before us.

10. In the paper book filed, a letter dated 1st April, 2021 by the assessee to his Assessing Officer is placed at page no.14 to 16 of the paper book. Further, two documents being copy of confirmation on salary cross charged to Mastercard Asia Pacific Ptd. Ltd. vide letter dated 25.03.2021 and letter dated 19.11.2021 by Mastercard Asia Pacific Pte. Ltd. to assessee confirming that Mastercard Asia Pacific

Pte. Ltd. did not have any PE in India were placed at page no.17 and 18 of the paper book. Apparently, the letter dated 19.11.2021 was filed before the Assessing Officer after the completion of the draft assessment order on 12.04.2021 but before the completion of the Final Assessment order u/s 143(3) r.w.s. 144C(13) of the Act dated 23.02.2022. It may be mentioned that the similar documents relevant for Assessment Year 2019-20 were filed as additional evidence before the Ld. DRP vide letter dated 02.02.2022 placed at page nos. 4 and 5 of the paper book for AY 2019-20 alongwith a letter dated 02.02.2022 to the DRP requesting that the additional evidences filed may be admitted by the Hon'ble DRP.

11. The Ld. AR also made submissions on merit and mainly reiterated its submissions made before the Ld. DRP and various case laws to submit that if salary was received in India for employment exercised outside India will not be taxable in India.

12. The Ld. DR supported the order of the Assessing Officer.

13. We have considered the rival submissions and perused the materials available on record. The Assessing Officer disallowed the claim of the assessee mainly on two grounds. Firstly, that the assessee was not eligible to claim benefit of Article-15(2)(b) of the Tax Treaty because the remuneration should have been paid by the employer in India (the other state) by a non-resident employer which

is not the case as the employer of the assessee is a tax resident of India i.e. Mastercard India Services Pvt. Ltd. Secondly, the Assessing Officer held that no evidence was submitted by the assessee to show that the assessee was an employee of Mastercard Asia Pacific Pte. Ltd. to claim the benefit of Article 15(2)(c) of the tax treaty and that even for the sake of argument he is an employee of M/s Mastercard Asia Pacific Pte. Ltd. then also the benefit of Article 15(2)(c) is not available to him as M/s Mastercard Asia Pacific Pte. Ltd. has a PE in India as per the decision of the Hon'ble Authority of Advance Ruling in the case of M/s Mastercard Asia Pacific Pte. Ltd..

13.1. In the letter dated 1st April, 2021, the assessee submitted an explanation for the condition 'b' of Article-15(2) of India-Singapore DTAA to show that how M/s Mastercard Asia Pacific Pte. Ltd. was his economic employer during the assignment period. The assessee submitted that term 'employer' is not defined under the Act or the tax treaty and as per the OECD commentary in order to determine the meaning of 'employer' the following factors should be considered as relevant to determined who the employer was.

- Who has authority to instruct the individual regarding the manner in which the work has to be performed;
- Who controls and the responsibility for the place at which the work is performed;

- Whether the remuneration of the individual is directly charged by the formal employer to the enterprise to which the services are provided;
- Who puts the tools and materials necessary for the work at the individuals disposal;
- Who determines the number and qualifications of the individual performing the work;
- Who has the right to select the individual who will perform the work and to terminate the contractual arrangement entered into with the individual for that purpose;
- Who has the right to impose disciplinary sanctions related to the work of that individual; and
- Who determines holiday and work schedule of that individual.

13.2. It was submitted that in the present case, since the supervision, guidance and control rest with M/s Mastercard Asia Pacific Pte. Ltd. for the work performed by the assessee and therefore M/s Mastercard Asia Pacific Pte. Ltd. ought to be considered the economic employer of the assessee during the material period. It was further submitted in the said letter that during the entire assignment period, he continued to be paid by Mastercard India and was on India payroll and hence it was imperative for Master Card India to withhold and deposit taxes to the government of India. Regarding clause(b) of Article-15(2) of India Singapore DTAA, providing that 'remuneration is paid by or on behalf of an employer who is not a resident of India' the assessee submitted a certificate from Mastercard stating that his remuneration was cross charged to M/s Mastercard Asia Pacific Pte. Ltd. It was submitted

that since he qualified to be a resident in Singapore for the year, the entire salary income received during the financial year was subject tax in Singapore and any tax implications in India would tantamount to double taxation which was against the principles of the tax treaty. As regards, clause(c) of Article-15(2) of India Singapore DTAA, that 'the remuneration is not borne by a Permanent Establishment or a fixed base which the employer has in the other state' the assessee submitted that the salary income paid by the Indian employer for the entire financial year was cross charged to the Singapore entity and therefore the third condition for claiming and exemption would also be considered as satisfied and he was eligible for an exemption for the salary income accrued during India visit for 35 days. As referred above, a letter dated 19.11.2021 by Mastercard Asia Pacific Pte. Ltd. to the assessee confirming that Mastercard Asia Pacific Pte. Ltd. did not have any PE in India was also filed by the assessee appearing at page no.18 of the paper book.

13.3. As noted above the Assessing Officer did not allow the benefit of the India Singapore DTAA in respect of Article-15 of the tax treaty on the ground that no evidence was submitted by the assessee to show that the assessee was an employee of Mastercard Asia Pacific Pte. Ltd. to claim the benefit of Article 15(2)(c) of the tax treaty and secondly that even for the sake of argument he is an employee of M/s Mastercard Asia Pacific Pte. Ltd. then also the benefit of Article

15(2)(c) is not available to him as M/s Mastercard Asia Pacific Pte. Ltd. has a PE in India as per the decision of the Hon'ble Authority of Advance Ruling in the case of M/s Mastercard Asia Pacific Pte. Ltd. From the perusal of the final assessment order, it is seen that the Assessing Officer was not correct in stating that no evidence was submitted by the assessee to show that the assessee was an employee of Mastercard Asia Pacific Pte. Ltd.. The assessee had submitted the said evidence in his letter dated 01st April, 2021 but the AO did not took any cognizance of the said letter and offered any comments with respect to the claim of the assessee in para no.1 of the letter dated 01st April, 2021 to contend that M/s Mastercard Asia Pacific Pte. Ltd. was his economic employer during the assignment period and cited the conditions laid down to qualify as an 'employer' as per the OECD commentary. The said conditions have been reproduced earlier in para no.13.1 of this order. However, it is seen that the assessee did not produce any evidence in support of his claim that in his case the above conditions were satisfied either by submitting a declaration by the M/s Mastercard Asia Pacific Pte. Ltd. or by the assessee himself by giving a suitable undertaking or by way of any other evidence to support that the said conditions were satisfied favourably in his case and M/s Mastercard Asia Pacific Pte. Ltd was his economic employer during the material period. This fact goes to the root of the claim of the assessee for claiming of exemption in respect of his salary

accrued during India visit for 35 days under Article 15(2) of the India Singapore DTAA. Further, the claim of the assessee that taxing the same in India would amount to double taxation, which was against the principles of the tax treaty was also not examined and commented by the Assessing Officer. Further, the Assessing Officer also did not examine and offer any comments with respect to the evidence filed by the assessee vide letter dated 25.03.2021 that for the sake convenience, the payroll of the assessee was in India during the assignment period but the entire salary cost income of INR 15,38,10,197/- as reported in Form No.16 was cross charged to Singapore entity and such expenses were not borne by the Indian entity.

13.4. In view of the above facts, we are of the considered view that the claim of the assessee and the evidences filed by him need factual verification by the Assessing Officer in respect of the issues as observed in para no.13.3 as above, as it was not done either in the draft assessment proceedings or in the final assessment proceedings. We, therefore, set-aside the final assessment order and restore the issue of taxability of income in India arising from the working of the assessee in India for 35 workdays and assessee's claim that the same was not taxable under the provisions of Article-15(2) of the India Singapore DTAA to the AO for *de novo* determination keeping in view the above observations after giving due opportunity to the assessee in

accordance with law. Grounds nos.3 to 4.2 of the assessee are allowed for statistical purposes.

14. Ground no.5 is a without prejudice ground to submit that the Assessing Officer/DRP have erred in wrongly computing in considering the salary of INR1,47,48,683/- as taxable in India instead of INR1,17,66,947/-. This ground is consequential in nature in view of the issue of taxation of salary being set-aside and the Assessing Officer is directed to verify the claim of the assessee as per law.

15. Ground no.6 is against the initiation of penalty proceedings u/s 270A of the Act. This ground of the appeal is premature and hence the same is dismissed.

16. In the result, the appeal of the assessee is allowed for statistical purposes.

ITA No.1848/Del/2022 (AY 2019-20)

17. The grounds of appeal raised in ITA No.1848/Del/2022 are as under:-

> *1. That on the facts and in the circumstances of the case and in law, the AO has erred in assessing the total income of the Appellant at INR 1,06,21,367, in pursuance to the directions issued by the DRP, as against the returned income of INR 35,45,450.*
>
> *2. That on the facts and in the circumstances of the case and in law, the directions issued by the DRP are bad in law,*

void ab initio and liable to be quashed as the same have been passed in violation of the provisions of sub-section (8) to section 144C of the Act.

2.1. That on the facts and in the circumstances of the case and in law, the DRP has erred in directing the AO to pass a speaking order after conducting further enquiry and examination of the facts, furnished by the Appellant during proceedings before the DRP, pertaining to Permanent Establishment ("PE").

3. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in making an addition of INR 70,75,917 by holding that the Appellant is not eligible for claiming exemption under Article 15(2) of India-Singapore Double Taxation Avoidance Agreement ("DTAA").

4. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in not granting the salary exemption claimed in respect of the services rendered from India without appreciating that all the conditions, specified under Article 15(2) of the DTAA, were satisfied by the Appellant.

4.1. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in holding that the Appellant does not satisfy the condition laid down by clause (b) of Article 15(2) of the DTAA without appreciating that the entire salary cost of the Appellant relating to the assignment period was cross charged to Mastercard Asia Pacific Pte Ltd. ("Mastercard Singapore").

4.2. That on the facts and in the circumstances of the case and in law, the AO/ DRP have erred in holding that the Appellant does not satisfy the condition laid down by clause (c) of Article 15(2) of the DTAA without appreciating that Mastercard Singapore did not have any PE in India during the subject assessment year.

5. Notwithstanding and without prejudice to the above grounds, the AO/ DRP have erred in the wrongly computing and considering the salary of INR 70,75,917 as taxable in India instead of INR 28,41,296.

6. That on the facts and circumstances of the case and in law, the Assessing Officer has erred in initiating penalty proceedings under section 270A of the Act."

18. The additional ground of appeal raised by the assessee in ITA No.1848/Del/2022 is as under:-

> *"That on the facts and circumstances of the case and in law, the directions passed by the Dispute resolution Panel ("DRP") dated April 27, 2022 is bad in law and liable to be quashed as the same was passed manually without issuance of Document Identification Number (DIN) as mandated by CBDT Circular No. 19/2019, and the entire proceedings based on such order is bad in law, void ab initio and liable to be quashed."*

19. Ground No.1, 2, 2.1, 3 to 4.2, 5 and 6 and additional ground in ITA No.1848/Del/2020 are similar to grounds No.1, 2, 2.1, 3 to 4.2, 5 and 6 raised in ITA No.726/Del/2020 (except for the amount of the salary income of Rs.70,75,917/- in ground no.3 and the period of stay being 43 days in India and further the amount of Rs.70,75,917/- being taxable instead of Rs.28,41,296/- in ground no.5) decided by us in earlier part of this order. Therefore, our above decision would apply *mutatis-mutandis* to these grounds of the appeal also. Accordingly, this appeal of the assessee is also allowed for statistical purposes.

20. Finally, both the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 19th February, 2025.

Sd/-	**Sd/-**
[VIKAS AWASTHY]	**[BRAJESH KUMAR SINGH]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated 19.02.2025.

Shekhar

Copy forwarded to:

1. Assessee
2. Respondent
3. PCIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi