

आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

**IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI**

श्री चंद्र पूजारी, लेखा सदस्य एवं श्रीजी. पवन कुमार, न्यायिक सदस्यकेसमक्ष

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SHRI G. PAVAN KUMAR, JUDICIAL MEMBER**

आयकर अपील सं./I.T.A. No.293/Mds/2016.

निर्धारण वर्ष /Assessment year : 2011-2012.

Shri. Ganesh Chandrasekaran,
New NO.25, Old No.11,
Flat B2, Lalitha Flats,
Mylai Ranganathan Street,
T. Nagar, Chennai 600 017.

Vs. The Income Tax Officer,
International Taxation I(1)
Chennai 600 034.

[PAN AQTPC 4210D]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/ Appellant by

: Shri. Raghunathan Sampath, Adv

प्रत्यर्थी की ओर से /Respondent by

: Shri. A.V. Sreekanth, IRS, JCIT

सुनवाई की तारीख/Date of Hearing

: 07-04-2016

घोषणा की तारीख /Date of Pronouncement

: 23-06-2016

आदेश / ORDER

PER G. PAVAN KUMAR, JUDICIAL MEMBER:

The appeal filed by the assessee is directed against order of the Commissioner of Income-tax (Appeals)-16, Chennai in ITA No.40/CIT(A)-16/2014-2015, dt 06.11.2015 for the assessment year 2011-2012 passed u/s.143(3) and 250 of the Income Tax Act, 1961 (herein after referred to as 'the Act').

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

1 On the facts and in the circumstances of the case, the impugned order passed by the learned Commissioner of Income Tax (Appeals) is erroneous based on the facts of the case, contrary to the principles of natural justice and bade in law.

2 The learned CIT(A) erred in not providing adequate opportunity of being heard to the Appellant thereby violating the principles of natural justice.

3 The learned CIT(A) erred in concluding that Fujitsu Network communication, Inc ("the company" or "Fujitsu Inc") had a Permanent Establishment ("PE") in India without providing an opportunity of being heard to the Appellant and hence the given order is in gross violation of the principles of natural justice.

4 The learned CIT(A) erred on facts and in law by failing to appreciate that the local address in India was provided by Fujitsu Inc only for obtaining the Tax Deduction Account Number.

5 The learned CIT(A) erred on facts and in law in concluding that the Fujitsu Inc had a local address from where the company was carrying out managerial aspects needed for functioning the company.

6 The learned CIT(A) erred on facts and in law by failing to appreciate that the Permanent Account Number and Tax Deduction Account Number was that of Fujitsu Inc and not of any entity in India.

7 The learned CIT(A) erred on facts and in law by confirming the action of the Assessing Officer in taxing the salary income received by the Appellant in India.

8 The learned CIT(A) erred on facts and circumstances of the case and in law in not allowing the claim of Short Stay Exemption as per Article 6(2) of the Treaty on the premise that Fujitsu Inc had a PE in India.

9. The learned Commissioner of Income Tax (Appeals) erred on facts and circumstances of the case and in law for failing to appreciate that the Appellant has satisfied the conditions specified in Article 16(2) of Treaty and consequently, the salary income received by the appellant was eligible for tax exemption in India.

10 The learned CIT(A) erred on facts and in law by failing to appreciate that the activity carried out by the Appellant is supervisory in nature and no managerial services were rendered in India.

11 The Appellant prays that directions be given to grant all such relief arising from the grounds of appeal mentioned supra as also all consequential relief thereto.

12 The Appellant craves leave to add, alter, amend and/or withdraw any of the above grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the hearing of this appeal as per law”.

3. The Brief facts of the case is that the assessee is an individual and filed return of income electronically on 29.07.2010 admitting Nil total income and the assessee is having income from salary, house property and interest income. The assessee is also a non-resident and citizen of USA and filed return of income with refund claim of ₹20,05,973/- and the return of income was processed u/s.143(1) of the Act on 13.06.2012 determining refund including interest ₹21,37,650/- was issued but the cheque remained undelivered due to change of the assessee's address. Subsequently, under scrutiny norms, the case was selected and notice u/s.143(2) of the Act was issued. Since there was no response, show cause notice was issued for proposing to complete the assessment u/s.144 of the Act with the available information on record. In response to the notice, the Id. Authorised Representative of assessee appeared and produced documents, supporting the proof of non-resident status with copy of passport with immigration stamping in support of assessee's travel in and out of India and stay in India. The assessee in the said financial year stayed in India for a period of 138 days and the determined

status as non resident for income tax purpose. The assessee is an employee of M/s.Fujitsu Network Communications Ind(Fujitsu Inc.) USA and work in vendor locations at Wipro Limited, Aricent Technologies Pvt. Ltd, India for providing supervising services in India as per assignment dated 29.06.2010 and continued till August, 2012. During his stay the salary of the assessee including other benefits were paid outside India as directed by M/s. Fujitsu Inc. USA and the assessee under Income Tax laws filed return of income for the assessment year 2011-12 and has not admitted salary income but claimed credit of ₹20,05,973/- deducted by the employer in India M/s. Fujitsu Network Communications Inc. The facts being that the assessee is on pay rolls of USA company and resident of USA. But form No. 16 for salary was issued by the Indian Company and same was claimed as exemption. The Id. Authorised Representative explained the status were the assessee was resident in India in financial year 2010-2011 for 138 days being less than 182 days, and non-resident as per the provisions of Sec. 6(1) of the Act. The Id. Assessing Officer considered the facts that the assessee has left India for the purpose of employment in USA and staying in India for assisting an overseas entity on assignment under supervision of US Company. The assessee has a dual employment in USA and India. In India assessee was working for M/s. Fujitsu Network Communications Inc., and the Id.

Assessing Officer relied on the provisions of DTAA for the claim of relief of double taxation between India and USA under Article 16 and further observed that the assessee was resident of USA filed his return of income in USA admitting income earned in India because of employment in Indian origin. The Id. Assessing Officer finally observed the employment status of India and income earned in India is taxable and dealt on the provisions of Sec.5(2) of the Act with the explanations and concluded that the salary income received in India is taxable and completed assessment taxing the salary as per form No.16 issued by the employer in India for the assessment year 2011-12 and observed that the income of the assessee is taxable in India and the relief claimed u/s.90 & 91 of the Act in accordance with the provisions of Article 16 of DTAA are rejected and assessed the salary income ₹69,78,492/-. Aggrieved by the order, the assessee filed an appeal before Commissioner of Income Tax (Appeals).

4. In the appellate proceedings, the Id. Authorised Representative argued the grounds and objected the action of Id. Assessing Officer erred in not allowing claim of benefit of short stay exemption of DTAA between India and USA treaty and there is no employer in the name of M/s. Fujitsu Network Communications Inc., Tamil Nadu (TN) and was wrongly considered whereas actual form

No.16 was issued by M/s. Fujitsu Inc. USA with TAN Number allotted in India and the claim of the assessee was rejected on denial of benefit under Article 16(2) where assessee has satisfied the conditions and the salary income is eligible for exemption under 16(2) of the treaty. Further, the tax refund determined by the Id. Assessing Officer u/s.143(1) of the Act ₹24,38,150/- including interest was not paid to the assessee. The Id. CIT(A) considered the submissions and the arguments of the assessee and the finding of the Id. Assessing Officer and has dealt on the written submissions of the assessee at para 4 of his order on DTAA and also pointwise clarification on the taxes, treaty, assessment order and Tabular chart explaining the transaction criteria of benefits available under Article 16(2) of the Act and exhaustively dealt on the resident provisions and judicial decisions, on the crux of the issue being permanent establishment (PE) in India. The Id. Commissioner of Income Tax (Appeals) based on the ITAT decisions and documents filed in respect of TAN allotment discussed elaborately in his order at para 6 to 10 and concludes that the assessee substantiate the facts of employer M/s. Fujitsu Inc. USA company has no permanent establishment in India and the local address was used for obtaining TAN No for Income Tax purpose and the Id. Commissioner of Income Tax (Appeals) concludes that the assessee is not eligible for concession under treaty Article

16(2) as employer company has a permanent establishment in India and concurred with the findings of the Id. Assessing Officer and dismissed the ground and gave direction to The Id. Assessing Officer in respect of refund and partly allowed the appeal. Aggrieved by the Commissioner of Income Tax (Appeals), the assessee assailed an appeal before Tribunal.

5. Before us, the Id. Authorised Representative reiterated the grounds and explanations made in the assessment and appellate proceedings and emphasized that THE assessee is a non-resident and citizen of USA and in the financial year 2010-2011, the status is non resident for income tax purpose. The Id. Commissioner of Income Tax (Appeals) has erred in concluding that the assessee employer M/s. Fujitsu Inc. USA having a permanent establishment in India without providing an opportunity of being heard and thus gross violation of principles of natural justice and on the disputed issue of addition, the Id. Authorised Representative expressed that local address in India was provided to obtain Tax Deduction Account Number (TAN) and the company was not carrying out any managerial aspects and functioning as alleged. The employer M/s. Fujitsu Inc. USA has applied for PAN and TAN due to compliance of Income Tax Act and Rules and does not have any establishment in India. The Id. Commissioner of Income

Tax (Appeals) has concurred with the findings of the Id. Assessing Officer in taxing the salary income and denial of concession of short stay exemption as per Article 16(2) of treaty. M/s. Fujitsu Inc. USA has no permanent establishment (PE) in India and the assessee satisfies the conditions as per Article 16(2) of DTAA and eligible for tax exemption in India and the activities of the assessee are of supervisory in nature and being assignee of M/s. Fujitsu Inc. USA but not managerial services and prayed for allowing the appeal.

6. Contra, the Id. Departmental Representative relied on the orders of Commissioner of Income Tax (Appeals) and vehemently opposed the grounds.

7. We heard the rival submissions, perused the material on record. The crux of the issue lies were the assessee being a non-resident and citizen of USA has come on assignment to supervise the works on behalf of M/s. Fujitsu Inc. USA for a period of two years. During financial year 2010-2011, the assessee received salary income and tax was deducted and form No. 16 was issued by M/s. Fujitsu Inc. USA. The Id. Authorised Representative explained that employer company has no permanent establishment in India and the assessee filed return of income by claiming concession under Article 16(2) and complied with the conditions of DTAA. The fact remains that the

assessee has disclosed salary income in his return of income filed in USA as observed by the Id. Assessing Officer in his assessment order at page 4 para 14 and on availing the concession of short stay under Article 16(2) of DTAA and filed return of income in India for claim of refund of tax ₹20,05,973/-. Further, the assessee stayed in India for a period of 138 days as per passport endorsements being less than 182 days and the assessee qualified for non resident status. The disputed issue arised were the Id. Assessing Officer treated the income of the assessee as taxable in India irrespective of the fact that the assessee has come to India as assignee for a period of two years on agreement with USA employer. The Id. Assessing Officer has rejected the claim of the assessee under Article 16(2) of DTAA and levied tax. The Id. Authorised Representative mentioned that the assessee has not received the refund cheque as it was undelivered due to change of address. But the Id. Assessing Officer has treated the refund of tax as paid in his assessment order u/sec. 143(3) of the Act which is not in accordance with law. The Id. Commissioner of Income Tax (Appeals) has discussed on permanent establishment (PE) being a new dimension brought to the assessment proceedings of the employee. The employer company M/s. Fujitsu Inc. USA applied for TAN and PAN Nos. for compliance of Income Tax Provisions with local address. The Id. Authorised Representative explained that there is no

establishment of USA company in India and the local address was used only for the purpose of obtaining Tax Deduction Account Number (TAN) which is mandatory for payment of TDS and issue of form No.16. The Id. CIT(A) elaborately discussed on this aspect and confirmed the order of the Id. Assessing Officer. The Id. AR filed voluminous paper book and vehemently argued that the assessee was prevented from submitting information on permanent establishment(PE) which was highlighted in the Appellate proceedings and no proper and fair opportunity was provided to the assessee to prove with bonafide evidence that there is no permanent establishment of M/s. Fujitsu Inc. USA in India. The Id. Commissioner of Income Tax (Appeals) has passed the order dismissing the appeal in gross violation of principles of natural justice. The principles of natural justice is a concept of common law and represents higher procedural principles developed by the Courts, which every judicial, quasi-judicial and administrative authority must follow while taking any decision adversely affecting the rights of the assessee and implies fairness, equity and equality. It is a elementary principle of Natural Justice in the Law of Taxation is that the assessee should have knowledge of the material which is being used against him which assessee can defend his case and fair opportunity to rebut the facts. Considering the apparent facts, provisions of law and principles of

natural justice, material evidences and Article of DTAA treaty, we are of the opinion that assessee should not be deprived to present the case with material evidence and proper opportunity of hearing should be provided before deciding the case. Accordingly, we remit entire file to the Id. Commissioner of Income Tax (Appeals) to adjudicate the case afresh after providing adequate opportunity of hearing to the assessee before passing the order. The appeal of the assessee is allowed for statistical purpose.

8. In the result, the appeal of the assessee is allowed for statistical purpose

Order pronounced on Thursday, the 23rd day of June, 2016, at Chennai.

Sd/-

(चंद्र पूजारी)

(CHANDRA POOJARI)

लेखा सदस्य /ACCOUNTANT MEMBER

Sd/-

(जी. पवन कुमार)

(G. PAVAN KUMAR)

न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated:23.06.2016

KV

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant

3. आयकर आयुक्त (अपील)/CIT(A)

5. विभागीय प्रतिनिधि/DR

2. प्रत्यर्थी/Respondent

4. आयकर आयुक्त/CIT

6. गार्ड फाईल/GF