

SATURDAY INTERNATIONAL TAX GYAN !!!

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Neeraj Badaya v. Assistant Director of Income-tax, (International Taxation), Jaipur¹

Receipt of salary in India for service rendered in USA from sister concern of US employer, exempt from Indian taxation.

Facts:

- The assessee was transferred from Indian company to its American sister concern and, accordingly, he left India on 30-5-2007 in connection with his US employment. However, for internal facilitation, his salary for relevant period was paid by Indian company in India.
- The assessee filed his return claiming status of a non-resident and claimed his salary income as exempt from tax in view of article 16(1) of the DTAA between India and USA.

Assessee's contention:

- Assessee is a non-resident in the relevant year. Further salary is charged to tax on accrual basis and not on receipt basis.
- Hence, income which is not otherwise taxable in India cannot be brought to tax as per section 5 just because Income is received in India.
- As per Article 16 of India USA DTAA salary is considered to be accrued in the State where the employee exercises the employment and therefore, his salary accrued in USA.

Revenue's contention:

- The Assessing Officer held that since **salary was received in India by the employee through a credit to his salary account and TDS was also deducted thereon in India, the same would be taxable in India** irrespective of his residential status, in accordance with section 5 and the claim of exemption on the basis of article 16(1) by the assessee was not correct.
- The Commissioner (Appeals) confirmed the order of the Assessing Officer and further held that the assessee would be a resident of India in accordance with the DTAA between India and USA and the right of taxation in respect of salary income of the employee would remain with the India whether or not the right of taxation in respect of this sum vest with USA

¹ [2016] 67 taxmann.com 240 (Jaipur - Trib.

Ruling:

- From the material available on record it can be seen that assessee's residential status as non-resident has been accepted by the Id Assessing Officer, therefore, there is no justification on the part of the Ld. CIT (A) to hold that the assessee was a resident.
- It has not been disputed that the services in question was rendered by the assessee in US and taxed in the USA, which is evident from the relevant record filed on the paper book. The applicability of article 16(1) of Indo-USA DTAA depends on the country where services are rendered which in this case is undisputedly USA.
- **The application of article 16(1) of Indo-USA DTAA cannot be denied to assessee merely because the salary check was paid by an Indian entity** and the undisputed fact that no service was rendered by assessee for the impugned period in India.
- **The Hon'ble Supreme Court in the case of Kedar Nath Jute Mfg. Co. Ltd. v. CIT (Central) [1971] 82 ITR 363 has held that actual and legal nature of the transaction will decide the taxability and not mere book entries or assumptions.**
- In view thereof, I hold that the nonresident assessee is not liable for tax in India on the impugned amount.

Our comments:

- Based on the principle laid down in above judgement and considering section 9 and Article 16 of DTAA it can be said that salary will be taxable in the country where the services are rendered which means that salary income will be taxable in the country where assessee is physically providing his/her services irrespective of where the amount of salary is received.
- In the current scenario of pandemic wherein many people are doing work for home for companies outside India by staying in India, in such case the entire salary income will be taxable in India as the services are rendered in India irrespective of whether the salary income is received outside India.
- Till date no amendment has been brought in the Act or DTAA to consider the work from home culture in new digital era rather than considering only the physical existence of a person.

Section	Section 5, Article 16
DTAA/Country	India-USA
Court	Jaipur Tribunal
Date of Decision	22.01.2016

Note: Case law name in **Red**- in favour of the Revenue, **Green**- In favour of the Assessee, **Orange** = Partial.

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