

SATURDAY INTERNATIONAL TAX GYAN !!! **#taxmadeeasy**

Income-tax Officer, Mumbai vs. Rajeev Suresh Ghai¹

Any Income of a Non-Resident which is considered as undisclosed but for which source is outside India cannot be Taxable in India

Facts:

- The assessee, 'RS' was a Non-Resident, settled in the United Arab Emirates and tax resident of UAE.
- During the year under consideration assessee had invested some amount in properties in Mumbai and AO had received information that during the relevant financial period, the assessee has paid cash amounts aggregating to Rs. 2.50 crores to builder which was not accounted by the builder in its books of accounts.

Assessee's contention:

- The assessee explained that it had never visited Indian in past few decades, thus his entire income was sourced in UAE and had invested a sum of Rs. 850 lakhs in residential flats in Mumbai, but all the related payments had been made by official channels and the assessee produced evidence in support of those remittances.
- Thus, none of the income is undisclosed.
- Further, even if any income is considered as undisclosed income then such income will be taxable as other income in his resident country as per Article 22 of India UAE DTAA.

Revenue's contention:

- Based on the information received from the investigation wing that assessee has paid on money to the builder in cash assessing officer treated the amount as unexplained investment u/s 69 of the Act and made addition to the income of assessee.
- AO also contended that this amount being related to immovable property being covered under Article 23 read with Article 6 of the India UAE DTAA can be taxed in India.

Ruling:

- Coming to the taxability under the Indo UAE tax treaty, such an income is not specifically taxed under any of the heads in the tax treaty in question. That brings us to the residuary head of

¹ [2021] 132 taxmann.com 234 (Mumbai - Trib.)

income, dealing with 'other income', which is covered by article 22. Under Article 22 (1) of the Indo UAE tax treaty, "Subject to the provisions of paragraph (2), items of income of a resident of a Contracting State, wherever arising, which are not expressly dealt with in the foregoing Articles of this Agreement, shall be taxable only in that Contracting State". It is not even anyone's case that income has arisen here; the case is that the income has been invested here.

- The unexplained investments, which are inherently in the nature of the application of income rather than earning of income, cannot thus be taxed in India under Article 22(1).
- As for the plea that the India- UAE treaty provides for taxability of income arising from immovable property, this plea is contextually irrelevant inasmuch as what we are dealing with right now is not an income from the immovable property, but an income said to have been invested in an immovable property.
- **Coming to the plea, embedded in the ground of appeal, that the "Indo UAE tax treaty provides for taxability of the income only not the computation of income, which falls in the domain of IT Act, 1961", we see no merits in this plea either. Classification of an income and taxation of an income is inherent part of the treaty mechanism, and unless an income fits in the treaty description of that income, it cannot be subjected to tax as such.**
- It is always useful to bear in mind the fact that, on the first principles, the trigger for taxation of an income in a source jurisdiction is either the economic activity or the linkage of an income with that jurisdiction, and that in the absence of such a linkage or economic activity nexus, there cannot be any source taxation.
- When the rights to tax the income in question, under the applicable tax treaty provisions, are allocated to the residence jurisdiction, it is wholly immaterial whether or not the source jurisdiction has the right to tax that income, and, in any event, India is not even a source jurisdiction for the income in question as no economic activities have been carried out in India- it is at best the jurisdiction in which earnings are invested.

Our comments:

- Considering the above judgement, where an income is considered undisclosed investment it is important to find source of such investment and if the source is not in India such investment cannot be taxed in India as per Income Tax Act.
- Further, even if such amount is considered as income under Income tax it will always be considered as other income and then as per Article 22 of DTAA it will be taxable only in resident country.

Section	Section 69, Article 22 and 23
DTAA/Country	India- UAE
Court	Mumbai – Trib.
Date of Decision	23.11.2021

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

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