SITG No. 125

SATURDAY INTERNATIONAL TAX GYAN !!!

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Rajat Dhara v. Deputy Commissioner of Income-tax (International Taxation)

Section 90 does not bar resident from taking benefit of Article 16 where Government has entered into DTAA

[2022]138 taxmann.com 478

Date: 29.10.2022

Fact of the Case

- The assessee filed his return of income. He had received salary income from US company and claimed that as his total stay during year was 165 days only, salary income earned by him as per aforesaid provisions of article 16 was taxable in USA and not in India.

- The Assessing Officer noticed that the assessee had received salary income from US company and claimed it exempt under article 16(1) of the Double Taxation Avoidance Agreement (DTAA) between India and USA. The Assessing Officer relied upon clause (c) of section 5 and held that the global income of any individual resident is taxable in accordance with section 5(1). Hence, the salary received by the assessee from his foreign employer was chargeable to tax in India. The Assessing Officer placing reliance on the provisions of section 90, held that since the assessee qualified as resident and ordinarily resident in India for the year under consideration, DTAA was not applicable to the assessee in respect of salary income earned in USA.

- Commissioner (Appeals) confirmed the addition so made by the Assessing Officer.

Assessee's Contention

- Assessee contended that as per article 16 of India – USA DTAA, salary earned by assessee in USA shall be taxable only in USA as the employment is exercised there and the conditions mentioned in clause 2 of Article 16 are not fulfilled.

Revenue's contention

- Revenue contended that since assessee is an ordinary resident of India, hence as per section 5 of the Income tax act his global income should be taxed in India and no benefit of DTAA is available when the global income is to be taxed in India as per section 90.

Legal provisions related to DTAA

ARTICLE 16
DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 17 (Directors' Fees), 18 (Income Earned by Entertainers and Athletes), 19 (Remuneration and Pensions in respect of Government Service), 20 (Private Pensions, Annuities, Alimony and Child Support), 21 (Payments received by Students and Apprentices) and 22 (Payments received by Professors, Teachers and Research Scholars), salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if :

(a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year;
(b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State ; and
(c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business which the employer has in the other State.

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operating in international traffic by an enterprise of a Contracting State may be taxed in that State.

RULING

- Sub-section (2) to section 90 provides that where the Central Government has entered into an agreement (DTAA) with the Government of any other country, then in relation to the assessee to whom such agreement applies, the provisions of the Act shall apply to the extent they are more beneficial to the assessee.

- So, as per the provisions of section 90 the assessee have an option to choose either the DTAA or the provisions of the Act whichever is beneficial to him for the purpose of taxation of his income.

- In this case, the assessee, right from the very beginning, has claimed that since article 16 of the DTAA is applicable to him, the salary income earned by him during the stay in USA was chargeable in that country and not in India.

RULING

- As per the aforesaid article 16 of the DTAA with USA, the salary income of a resident earned by him in other State shall be taxable in that State if such a resident is present in that other State for a period not exceeding 183 days in the relevant taxable year. The case of the assessee is that his total stay during the year was 165 days only and, therefore, the salary income earned by him as per the aforesaid provisions of article 16 was taxable in USA and not in India.

- This claim of the assessee has not been rebutted or denied by any of the lower authorities. Both the lower authorities have simply relied upon the provisions of section 5 and section 90 to state that since the assessee was a resident and ordinarily resident in India during the year, the provisions of DTAA would not apply in the case of the assessee.

- However, a perusal of section 90 read with article 16 of the DTAA would show that section 90 does not bar in any manner the operation of the relevant provision of DTAA in respect of income earned by the assessee in other country, with whom the Central Government has entered into a DTAA.

OUR COMMENTS

- In our humble opinion on reading Article 16 of DTAA between India and USA, clause 2 states the conditions for taxability of salary income only in first mentioned state i.e. resident state of the assessee. Hence, according to the clause if the conditions are fulfilled the salary shall be taxable only in resident state.

- However, if the conditions as mentioned in clause 2 are not fulfilled it should not mean that salary shall be taxable only in the source country. The phrase states that "remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if" and thus if conditions are not fulfilled it could also be read as "remuneration may be taxable in both the state" because the opposite of shall could be read as "may" and not necessarily "shall not be", as it is in very rare scenario that resident country will loose it's rights to tax the income earned by it's resident.

- Hence, we need to careful while taking such an interpretation.

Section/Article	Article 16
DTAA/Country	India-USA
Court	Kolkata - Trib.
Date of decision	02.03.2022

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

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