SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 159

Prasanth Nandanuru

v.

Income-tax Officer (International Taxation)-2

Salary payable to an employee of Indian company who was deputed outside India, would be taxable outside India as per Article 16 of India USA DTAA.

[2023] 150 taxmann.com 183 (Hyderabad - Trib.) [28-02-2023]

Date: 24.06.2023

Facts of the Case

- Assessee is an Individual who was an employee of Wells Fargo (EGS) India Pvt. Ltd ("Wells India"), from where he was sent on a short-term assignment from 20.10.2017 to 18.10.2018 to Wells Fargo Bank N.A., USA (Wells USA).

- He was absorbed by Wells USA on 18.10.2018 and since he was physically present in the USA during the A.Y. 2019-20, therefore he was qualified to be a Non–Resident of India.

- During the period of short term assignment in Wells USA, the assessee was on the payrolls of Wells India, and his salary was credited to his Indian bank account by Wells India during that period, after deducting tax at source.

- For A.Y. 2019-20, the assessee received income of Rs. 59,07,221 on which TDS was deducted of Rs.12,44,487, the assessee filed ITR declaring his income in India of Rs. 6,936 as he claimed benefits of article 16(1) of India-USA DTAA & therefore asked for a refund of Rs. 12,44,490.

Assessee's Contention

❖Counsel of the assessee argued that the salary income pertaining to the assignment was received for rendering the services outside India and therefore the salary income received by the assessee does not accrue or arise in India as per the provisions u/s 9(1)(ii) and section 15 of Income-tax Act.

❖**Explanation to Section 9(1)(ii)** clarifies that income under the head "salaries" is considered as in India only if the services are rendered in India. Based on this, he submits that in as much as the services of the assessee are rendered outside India during such period, it shall be deemed to accrue or arise outside India.

❖ ***Non-obstante*** **clause u/s 5** brings the salary income to tax, however, such a receipt must satisfy the requirement of section 9(1)(ii) and section 15(1)(a), which provides that salary income is chargeable to tax in India only when the services are rendered in India.

❖**Explanation 1 to Section 5(2)** income accruing or arising outside India shall not be deemed to be received in India only by the reason of the fact that it is remitted into the Indian Bank A/c of the assessee.

❖Assessee had relied on the Article 16 of DTAA which were more beneficial for assessee wherein since the employment was exercised in USA only, such salary would be taxable in USA.

❖Further, assessee placed reliance on the decision of the **Authority for Advance Ruling, New Delhi (AAR) in the case of British Gas India (P.) Ltd. [2006] 157 Taxman 225,** where the case was decided in favour of assessee on the same facts.

Revenue's Contention

- The Learned DR submitted that till the assessee is absorbed as an employee of the foreign entity, the assessee was on the payrolls of the Indian entity, his salary was paid in India after deducting TDS, and therefore there was no contract between the assessee and the foreign entity, etc. and thus such salary was taxable in India.

- Revenue was of the contention that assessee is covered by section 5(2)(a) of the Act but not by 5(2)(b) of the Act. Learned DR believes that Article 16(1) is not applicable to this case, because, the assessee was exercising his employment pursuant to a contract with the Indian entity, therefore it shall be construed that such employment is exercised only in India.

Legal provisions

❖As per **Section 5 (2) of the Income-tax Act,** the total income of any P.Y. of a person who is a non-resident includes all income from whatever source derived which—
(a) is received or deemed to be received in India in such year by or on behalf of such person; or
(b) accrues or arises or deemed to accrue or arise to him in India during such year.

Explanation 1 to Section 5(2) suggests that income accruing or arising outside India shall not be deemed to be received in India, within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.
Explanation 2 to Section 5(2) says it is hereby declared that income included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

❖ **Clause (ii) of Section 9** deals with taxability of Salary Income in India which is as under:

(ii) income which falls under the head "Salaries", if it is earned in India.

Legal provisions

Explanation.—For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for—

(a) **service rendered in India; and**

(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the service contract of employment,

shall be regarded as income earned in India ;

❖**Article 16 (Dependent Personal Services)** suggests that subjected to the provisions of Articles 17, 18, 19, 20, 21, and 22, **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 employment is so exercised, such remuneration as is derived may be taxed in the other state.

Ruling

- Hon'ble Tribunal holds that the provision under section 5(2)(a) of the Act fastens tax liability on the assessee, but, since the overriding effect of Section 90, Article 16 of the DTAA would prevail over section 5(2)(a) of the Act.

- Respectfully, placing reliance on the decision for Hon'ble AAR in ***British Gas India (P.) Ltd. (supra),*** the Hon'ble tribunal in the present case, reached the conclusion that salary received by the assessee in India who is a non-resident, for the services rendered outside India (in the present case, USA) shall not be subjected to tax in India as the salary has been exercised outside India.

- Hence, although salary was received in India but the services were rendered outside India and accordingly such salary shall be outside the purview of Indian Income Tax Authorities.

Our Comments

- The assessee became Non-Resident during the year under consideration i.e., A.Y. 2019-20, and was rendering services outside India. Though he was under the payroll of Wells India till he was absorbed by Wells USA, Article 16(1) of India-USA DTAA mandates that in respect of the salaries derived by a resident of the USA during employment, tax shall be payable only in the USA.

- The scenario would be different if assessee was an ordinary resident because in such a case his global income would be taxable in India and accordingly assessee then would be liable to offer such income for tax in India and take credit of tax paid outside India, if any.

- However, there is still clarity required in the digital era for taxation of employees working from home in a case where they are having dual residency or in case where both countries follow different financial year and assessee becomes resident of both countries according to their respective financial year.

Section/Article	5(1) of the Income Tax Act, Article 16
DTAA/Country	India – USA DTAA
Court	Hyderabad Tribunal
Date of decision	28.02.2023

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