SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 173

Narinder Pal Singh
Vs
ACIT (IT)

An assessee can be considered as a resident of a country for a part of a year and Non Resident for other part of year based on a tie breaker rule

[2023] 152 taxmann.com 356 (Delhi - Trib.)[07-03-2023]

30.09.2023

Jain Shrimal & Co.

Facts of the Case

- The assessee is an individual employed with Ingersoll Rand Climate Solutions Pvt. Ltd. (Ingersoll India). He was on long term assignment to PT Trane Indonesia (Ingersoll Indonesia) in Indonesia effective from 9-11-2015 and was working wholly and exclusively for Ingersoll Indonesia, since 9-11-2015.
- He was considered a Resident and Ordinarily Resident in India during assessment year 2016-17 as per domestic tax laws of India.
- While on assignment to Indonesia, the assessee continued to receive his salary through India payroll by credit to his bank account in India for administrative convenience. As the payroll of the assessee continued in India, Ingersoll India had deducted and deposited the taxes section 192 and had issued a Form 16 to the assessee for the assessment year 2016-17.
- The assessee filed his return of income in India and claimed that he qualified as a Resident of Indonesia for the year 2016 (relevant for the period 1-1-2016 to 31-3-2016)
- The ITO however, made an addition of salary income earned in Indonesia for the period January 2016 to March 2016 and accordingly, raised demand.

Assessee's Contention

The Ld. Counsel submitted the reasons as to why the salary income should not be taxable in India for the period 01/01/2016 to 31/03/2016.

- The assessee was considered Ordinary Resident in India during assessment year 2016-17 as per the domestic tax laws of India. And was considered as Resident of Indonesia for the calendar year 2016.

- For purpose of determining residential status as per article 4 of relevant DTAA, phrase 'permanent home available' has a wider connotation and it should be determined on basis where assessee has a habitual abode.

- In the instant case, record clearly showed shifting of family by assessee to Indonesia, children getting education at Indonesia, submitting income earned from foreign assignment for taxable purposes in Indonesia and having economic communication on basis of holding a bank account and insurance in Indonesia, therefore, it could be said that habitual abode of assessee was at Indonesia.

- The evidence produced by the assessee in the form of copy of passport of all the family members of the appellant relocated to Indonesia with appellant, copy of tax residency certificate issued by Indonesia in Calendar Year 2016, bank account of Indonesia and lease agreement of the property occupied by the assessee in Indonesia during the Financial years 2015-16 to 2017- 18.

Revenue's Contention

The revenue in response to the assessee's ; submitted the following :

- The revenue contended that assessee has a permanent home available in India, and revenue is not satisfied with the permanent home available defined by the assessee.

- The ld CIT(A) has also considered and accepted the contention of ld A.O. as mention above to determine the residential status and taxed the global income.

Legal Provisions

According to **Article 4,** of India – Indonesia DTAA,

"ARTICLE 4 - RESIDENT

1. For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature. But this term does not include any person who is liable to tax in that State in respect only of income from sources in that State.

2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows :

a) he shall be deemed to be a resident of the State in which he has a **permanent home available** to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);
b) if the State in which he has his **centre of vital interests** cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an **habitual abode** ;
c) if he has an habitual abode in both States or in neither of them, the competent authorities of the Contracting States shall settle the question **by mutual agreement.**

Legal Provisions

3. Where by reason of the provisions of paragraph 1, a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall settle the question by mutual agreement keeping in view its place of incorporation, place of effective management and other relevant factors."

Ruling

- The concept of the centre of vital interest referred in Article 4 (2) (a) is not relevant and for that reason Article 4(2)(b) becomes applicable and the status of assessee had to be determined on the basis where he has a habitual abode.

- In the case in hand the evidence on record about the assignment of job at Indonesia, shifting of family by the assessee to Indonesia, children getting education at Indonesia, submitting income earned from foreign assignment for taxable purposes in Indonesia and having economic communication on the basis of holding a bank account and insurance in Indonesia are sufficient to show that the habitual abode of the assessee is at Indonesia. The period is irrelevant and what is relevant was the income earned on the job assigned at Indonesia cannot be considered to be global income of the assessee to be taxable in India.

- The coordinate bench in Sameer Malhotra v. ACIT [2023] 146 taxmann.com 158/199 ITD 317 (Delhi - Trib.) has decided a similar controversy surrounding 'permanent home' clause in India-Singapore DTAA, of which Article 4 is para materia and has made relevant observation, which squarely apply to facts of present case.

- The Bench is of firm opinion that the concept of 'permanent home available' has been wrongly interpreted by the Ld. Tax Authorities. Ld CIT(A) has further fallen in error to not consider the applicability of other parameters of Article 4 (2)(b), which Ld. AO had in fact taken note of and determined against the assessee. The findings of the Tax Authorities below in regard to taxing the income of assessee earned from foreign assignment are liable to be reversed. The grounds are sustained and the appeal is allowed.

Our Comments

- In Indian Income Tax Return , there is no column to mention if an assessee is a tax resident as per IT Act, but not as per DTAA. Due to this it is difficult to practically apply tie breaker, where the Tie breaks in favor of a foreign nation.

- Adequate proofs should be kept for claiming residency as it would be handy during the assessment time. Nothing can be uploaded while filing the return of income in India.

- Normally there is no concept of split residency in Indian Income tax law. However, considering the above decision it can be said that we need to check the residency as per the period of stay/ residency and financial year followed in different countries and assessee can be a resident of two country at the same time but for the different periods like in current case assessee is a resident of India for 9 months and resident of Indonesia for 3 months.

- Further, there could be a situation where in a country a person becomes a resident because of reason other than number of days he stayed in such country, if an assessee moves out in November 2022 to such country from India. In such a case if the foreign country considers him as a resident for whole 2022 and it will be interesting to see how tie breaker would work and which income will be taxed in which country.

- Various case laws supporting split residency are as under:
  - Sameer Malhotra v. ACIT [2023] 146 taxmann.com 158 (Delhi - Trib.)
  - Raman Chopra v. Deputy Commissioner of Income-tax, Circle 48 (1) New Delhi [2016] 69 taxmann.com 452 (Delhi - Trib.)

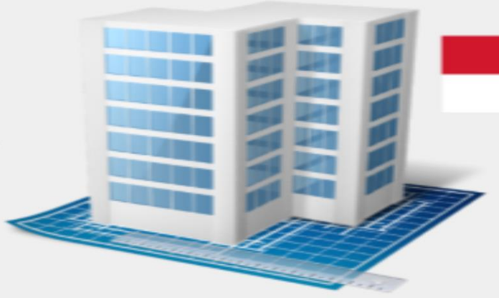
Narinder Pal Singh

Earned income form Ingersoll India from period 01/04/2015 to 31/12/2015, **Resident in India for this period**

Earned income form Ingersoll Indonesia from period 01/01/2016 to 31/03/2016, **Resident in Indonesia for this period. Hence salary earned in Indonesia not taxable in India**

Payroll of assessee is continued in India and payment of salary is made into Indian bank account

Ingersoll India



Ingersoll Indonesia

AO

AO contended that his assessee has a permanent home available in India, and revenue is not satisfied with the permanent home available defined by the assessee.

Hence, global income should be taxable in India

ITAT Judgment

According to the tribunal, Assessee has satisfied the conditions of tie breaker rule by having a habitual abode in Indonesia and revenue could not bring any evidence on record to prove the habitual abode in India. Accordingly the income earned by the assessee for the period for which he was in Indonesia cannot be taxed in India.

Section/Article	Article 4 & 13 of DTAA
DTAA/Country	India- Indonesia DTAA
Court	Delhi Tribunal
Date of decision	07.03.2023

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