

SATURDAY INTERNATIONAL TAX GYAN !!!



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Anjali Puri

Vs

Deputy Commissioner of Income Tax

Salary received by a Non-Resident Person in relation to employment exercised outside India would not be considered as income accrued or arise in India as per section 9 and Article 15 of India-Ireland DTAA

Facts of the Case

- ❖ During the year, assessee, a tax resident of Ireland, exercised employment outside India and also had Tax Residency Certificate of Ireland.
- ❖ While on deputation, for administrative convenience and on behalf of BA PLC, Ireland, the assessee received salary in India by the associated enterprise of Ireland company in respect of the services rendered outside India i.e., in Ireland to BA PLC, Ireland for the purpose of convenience.
- ❖ Further, to ensure withholding compliance laid down under section 192 of the Act, BA PLC, India deducted tax at source on the salary paid in India and deposited with the government. The company was reimbursed in full by the BA PLC, Ireland.
- ❖ The assessee claimed the income to be exempt from tax in India. AO issued the draft Assessment Order under section 144C(1) holding that services were rendered in India and made addition on account of salary received.

Assessee's Contention

- ❖ The assessee is an individual employed with British Airways PLC, a company incorporated under the laws of United Kingdom. The assessee was deputed on a long term-term assignment from April 01, 2019 to British Airways PLC , Ireland branch ("BA PLC , Ireland").
- ❖ During the year, the assessee rendered services outside India (i.e. in Ireland) and was a tax resident of Netherlands by virtue of the Tax Residency Certificate ("TRC") as submitted by the assessee during the assessment proceeding.
- ❖ Further, assessee was in India for less than 60 days in the relevant P.Y. and the services are rendered outside India.
- ❖ Hence, assessee contended that as per the section 6(1) of the Income Tax Act 1961, the assessee qualified as Non resident and merely because salary was received in India does not make the income taxable in India as the employment was exercised outside India.

Revenue's Contention

Opposing the arguments presented by the Ld. Counsel of the assessee, the counsel for the Revenue, submitted the following:

- ❖ The Ld. AO/DRP contended that the income belongs to the contracting state where it is received not where it is accrued.
- ❖ The salary received by the Appellant from his international assignment shall be deemed to accrue or arise in India u/s 9 of the Act, because as per the AO the assessee was based in India and the salary is taxable in India.
- ❖ The Ld. AO/DRP disregarded the documents and evidence furnished by the Appellant and proceeded to make the addition on account of salary received.

Legal provisions

As per section 9(1)(ii) of Income Tax Act, 1961,

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

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 ;

As per Article 15 of India-Ireland DTAA,

- 1. Subject to the provisions of Articles 16, 18, 19 and 21, 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.*

Legal provisions

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 any 12-month period commencing or ending in the fiscal year concerned, and*
- 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 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 operated in international traffic by an enterprise of a Contracting State may be taxed in that State.*

Ruling

- ❖ During the course of assessment proceedings, the assessee had provided relevant documents to substantiate the claims made, Letter of Assignment, Certificate/letter by the BA PLC, India in relation to salary received by her; Certificate/letter by the BA PLC, Ireland in relation to reimbursement of salary paid by BA PLC, India to the assessee; Tax residency certificate; Income Tax Return filed in Ireland; Income Tax Return filed in Ireland; Income Tax Return filed in India along with Income Tax computation, Ireland employment permit and Relevant extract of the passport.
- ❖ The DRP after perusing the documents submitted by the assessee erroneously noted that there is a failure on the part of assessee to provide agreement between Irish and Indian entity. Evidently, the DRP failed to appreciate certificate / letter of reimbursement issued by BA PLC, Ireland which substantiates the assessee's submission that during the impugned year, assessee was employed with BA PLC, Ireland and was paid salary in India merely for administrative convenience.

Ruling

- ❖ Salary income of the Assessee was not exigible in India under Article 15 of the DTAA, Assessing Officer was not correct in not granting relief under Article 15 of the DTAA and disregarding that income is accrued where employment is exercised. As per the Article 15 of the DTAA between India and Netherlands, the income earned by the person is exempt from tax if following conditions are satisfied :
 - (1) If the person has not stayed for more than 183 days in India, and
 - (2) If the employment is exercised outside India.

- ❖ In the present case, both the conditions prescribed in the article 15 are satisfied. The first condition has not been disputed by the Assessing Officer, whereas the second condition has been justified by various evidences furnished by the assessee . The Assessing Officer himself has accepted that the services were rendered outside India.

Ruling

- ❖ Salary income earned by the assessee for services rendered in Ireland cannot be said to be deemed to accrue or arise in India under section 9 of the Act. Thus, even in view of section 9(1)(ii), salary payment can be said to be earned in India only the corresponding services are rendered in India. In other words, if the services are rendered outside India, for which salary has been paid, then the income cannot be said to accrue or arise in India.
- ❖ Further, the contention of Assessing Officer that the assessee rendered services from India is incorrect in light of tax residency certificate for Ireland. The assessee for the year under consideration was a tax resident of Ireland. In light of above facts and legal position, since the employment was not exercised in India, such income cannot be held to be taxable in India and hence, the addition made by the AO on this issue is hereby directed to be deleted.

Our Comments

- ❖ When the services are consumed outside India then such services are deemed to accrue or arise outside India. In the mentioned case, the assessee is exercising employment outside India by providing services in Ireland. In general parlance employment is said to be exercised at a place where the employee is physically present to provide such employment.
- ❖ Further, under Section 5 of the Income tax act, 2 types of income of non-resident is said to be covered under Total income:
 - (1) accrues or arises or is deemed to accrue or arise to him in India or
 - (2) received or is deemed to be received in India
- ❖ In the current case the salary was received in India, although it accrued outside India. **Hence, in such a case will income not be taxable in India as per Section 5 of the Income tax act? When will income be taxable in India on receipt basis as mentioned in Section 5?**

Section/Article	9(1)(ii) of the Income Tax Act, Article 15
DTAA/Country	India – Ireland DTAA
Court	Delhi Tribunal
Date of decision	14.02.2024

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



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