



SATURDAY INTERNATIONAL TAX GYAN !!!

#taxmadeeasy

SITG No. 201

Unnikrishnan V S

v.

ITO (Int Tax) - 4(3)(1), Mumbai

ESOP/ RSU shall be taxable in the country where employee was exercising his employment during the period for which ESOP is granted.

13.04.2024



Facts of the Case

- ❖ Assessee is an individual. He is an employee of HDFC Bank Limited, Mumbai, and currently on deputation to HDFC Bank Representative Office in Dubai.
- ❖ He is stated to be working in Dubai, U.A.E., since 1st October 2007. The status of the assessee, so far as the present assessment year is concerned, is of the non-resident.
- ❖ During the relevant financial period, the assessee exercised the options granted to the assessee by the HDFC Bank Limited on 27th June 2007, which vested on 27th June 2008 (50%) and on 27th June 2009 (50%).
- ❖ It was in this backdrop that the HDFC Bank Limited deducted tax at source on the said perquisite value in respect of exercise of options.
- ❖ While filing the return of income assessee claimed a relief under section 90 of the Act in relation to taxability of a portion of ESOP allotted to assessee.

Assessee's Contention

- ❖ Assessee contended that the year in which assessee had earned ESOP perquisite he was a non-resident in India for tax purposes and accordingly as per Section 5(2) of Income tax act only income which is either “accrue or deemed to accrue” in India or “received or deemed to be received in India” is taxable in India. Thus, in this case such ESOP perquisite shall not be taxable in India.
- ❖ Accordingly, assessee had included such income in his return of income in India and then claim relief under section 90(2) of Income tax act considering India UAE DTAA.
- ❖ As per article 15 of India UAE DTAA and considering the commentary of Model Tax Convention and 2011 edition of UN Model Double Taxation Convention wherein India in its comments to the aforesaid commentary on the subject has not raised any reservations.
- ❖ Accordingly as per the DTAA also, such income shall be taxable in the country where the employment is exercised as since during the year under consideration since assessee was physically present in UAE such income cannot be taxed in India.

Revenue's Contention

- ❖ Ld. AO noted that the options were granted to the assessee in consideration were services rendered in India, way back in 2007, when the assessee was a resident in India.
- ❖ Thus, the claim of assessee that the income reflected by the ESOP benefit did not accrue or arise in India, was rejected.
- ❖ Further, CIT(A) also accepted the view of AO and did not provide any relief to assessee.

Legal provisions

Sub-section 2 of section 17 read as under and include ESOP as perquisite:

“(vi) the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee.

Explanation.—For the purposes of this sub-clause,—

(a) "specified security" means the securities as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and, where employees' stock option has been granted under any plan or scheme therefor, includes the securities offered under such plan or scheme;”

Article 15 of India UAE DTAA read as under:

Subject to the provisions of Articles 16, 17, 18, 19, 20 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.

Ruling

- ❖ Hon'ble Tribunal first commented on the position of Section 5(2) that in case of non-resident only the income which accrue in India or deemed to accrue in India or received in India or deemed to be received in India can only be taxable.
- ❖ Then it relied on the judgement of Hon'ble Supreme court in case of E D Sassoon & Co Ltd. v. CIT [1954] 26 ITR 27, wherein the term "income accruing or arising in India" was discussed.
- ❖ Hon'ble ITAT held that accrual or arising of an income cannot be equated with receipt of an income.
- ❖ The common thread in the connotations of these expressions is that both of these expressions, i.e., accrual or arising of an income, to borrow the words quoted with approval in ED Sassoon & Co. Ltd.'s case (supra), represent a state anterior to the point of time when the income becomes receivable and connote a character of income which is more or less inchoate.

Ruling

- ❖ Thus, applying the above principle in present case, hon'ble ITAT held that while the income has arisen to the assessee in the current year, admittedly the related rights were granted to the assessee in 2007 and in consideration for the services which were rendered by the assessee prior to the rights being granted- which were rendered in India all along.
- ❖ All that section 17(2)(vi) decides is the timing of an income, but it does not dilute or negate the fact that the benefit, in which is being sought to be taxed, had arisen much earlier.
- ❖ Thus, the income in respect of ESOP grant benefit accrued and had arisen at the point of time when the ESOP rights were granted, even though the taxability in respect of the same, on account of the specific legal provisions under section 17(2)(vi), has arisen in the present in this year. Further, Hon'ble ITAT considers that such ESOP shall be taxable in jurisdiction, where the option was granted and where the qualifying services are rendered.

Our Comments

- ❖ As far as ESOP is concerned it is taxable in the hands of employee as perquisite at full FMV if received free of cost or at differential amount of FMV and amount recovered from employee and it shall be taxable under the head salary.
- ❖ Such ESOP shall also be taxable in India if they have received shares of foreign holding company, as an employee of it's subsidiary company while exercising employment in India.
- ❖ This case law also discusses about the term exercise of employment which is a question in various cases especially today in the era of work from anywhere that employment shall be considered to be exercised at a place where the employee is physically present.
- ❖ Further, there is another judgement of hon'ble Delhi Tribunal in case of Assistant Commissioner of Income-tax, Circle -48(1) v. Robert Arthur Keltz **[2013] 35 taxmann.com 424 (Delhi - Trib.)** wherein proportionate taxation of ESOP has been discussed in a case where employment has been exercised at different location by employee.

Section/Article	Section 5(2), 17 of IT Act and Article 15
DTAA/Country	India UAE
Court	Delhi Tribunal
Date of decision	13.01.2021

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



Visit our website blog for previous case laws.-

<https://jainshrimal.com/blog/#taxgyaan>



Join Whatsapp group for discussion on International taxation
By scanning the QR-



Disclaimer

- ❑ This presentation has been prepared on the basis of information available in the public domain and is intended for guidance purposes only.
- ❑ Jain Shrimal & Co. has taken reasonable care to ensure that the information in this presentation is accurate. It however accepts no legal responsibility for any consequential incidents that may arise from errors or omissions contained in this presentation.
- ❑ This presentation is based on the information available with us at the time of preparing the same, all of which are subject to changes which may, directly or indirectly impact the information and statements given in this presentation.
- ❑ Neither Jain Shrimal & co., nor any person associated with us will be responsible for any loss however sustained by any person or entity who relies on this presentation. Interested parties are strongly advised to examine their precise requirements for themselves, form their own judgments and seek appropriate professional advice.