SATURDAY INTERNATIONAL TAX GYAN !!!
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SITG No. 203

Somnath Duttagupta

v.

ACIT [Circle-2(1)]

Where a resident assessee exercises his employment in US, and stays in US for more than 183 days in the relevant taxable year, such income of the assessee will not taxable in India.

27.04.2024

[2024] 160 taxmann.com 576 (Kolkata - Trib.)[01-03-2024]

Jain Shrimal & Co.

Facts of the Case

- Assessee is an individual, filed his revised return of income for the Assessment Year under consideration i.e. A.Y 2019-20 declaring a total income of Rs.191370/-.

- Assessee was employed with PricewaterhouseCoopers Private Limited ('PWC'), India. During the previous year relevant to assessment year under consideration, the assessee was on an international assignment to USA. During the year, the assessee stayed and exercised his employment in USA and had been in India for 16 days only.

- Therefore, assessee had not shown salary income from employment exercised in USA in his Income Tax Return filed in India.

Assessee's Contention

- Assessee contended that as he had stayed in India only for 16 days, salary income earned by him was not taxable in India but was taxed in USA as per the provisions of article 16 of the Indo-US Double Taxation Avoidance Agreement (DTAA).

- Further, assessee contended that as per the provisions of Income Tax Act, if the assessee's total stay in the relevant financial year is less than 60 days then the assessee becomes non-resident in that financial year. That, in such case, the requirement of stay of not more than 365 days in four years would not arise.

Revenue's Contention

- The revenue referring to the provisions of section 90(4) contented that since the assessee had failed to submit tax resident certificate of USA, the claim of exemption from taxation of the salary in India could not be allowed.

- Assessee had earned salary income from PWC, India and further the PWC, India had claimed deduction of expenditure in respect of remuneration paid to the assessee while computing profit chargeable to tax in India. Hence, income of the assessee was chargeable to tax in India.

- Further, the revenue contended that they have observed from the employment contract that the assessee's entire control was at all times with his Indian Employer, with salary/other emoluments also been paid in India in the assessee's bank account in India and it would continue to be governed by Indian conditions and laws.

Revenue's Contention

- The revenue further referred to Article 16 of Indo-US DTAA and contended that even otherwise, the assessee did not quality from exemption of tax in India even though he is treated as a non-resident as the assessee does not satisfy the conditions laid down in clause (b) of para 2 of Article 16 of the DTAA.

Legal provisions

Section 6 of the Act:

6. For the purposes of this Act,—

(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

(b) [***]

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.“(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.”

Legal provisions

Article 16 of India USA DTAA read as under:

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.

Ruling

- Hon'ble Tribunal first commented on the residential status of assessee that the claim of the assessee is that his stay in India was only for 16 days in that relevant year, therefore, he was not only covered under clause (a) but also under clause (c). As observed above, the stay in India of less than 60 days has to be coupled with total cumulative stay of less than 365 days in preceding four years to that relevant year. However, the assessee is silent about the first part of the clause (c) which provides that the assessee for the purpose of the Act would be a resident in India if his total cumulative stay in four years preceding the year under consideration is 365 days or more. The aforesaid provisions of the Act **are to be read and interpreted to check the status of residents of assessee in India and not for the purpose of checking the non-resident status of the assessee.** If any of the conditions as mentioned in clause (a) or clause (c) to section 6(1) is attracted then the assessee would be treated as a resident of India. The ld. Counsel for the assessee has **not made any submissions relating to the status of the assessee of cumulative stay of less than 365 days in four years preceding the year in question. Therefore, the assessee by virtue of provisions of section 6(1) of the Act has failed to establish his status of non-resident.**

- The facts show that the assessee during the year did not have a permanent home in US, whereas, he had a permanent home in Kolkata. Therefore, under the circumstances, even as per the Article 4 of DTAA, the assessee would be treated as a resident of India.

Ruling

- Further, Hon'ble ITAT stated that the moot point before us is as to whether the clause (a), (b) & (c) to article 16(2) of the Indo-US DTAA are to be read together and that all of the three clauses have to be simultaneously applied to see as to whether the salary income of a resident is liable to be taxed in the state of which the assessee is the ordinary resident or in the other contracting state where he has exercised his employment.

- A perusal of the provisions of article 16(2) reveals that clause (a), (b) & (c) have been written together in conjunction to each other. These clauses are not separated with the word "or", hence there is no impression given that they can be applied severally, independent of each other or to say either of these clauses can be applied. Even, clause (b) & (c) have been conjuncted with the word "and".

- Though, the word "and" has not been mentioned between clause (a) and (b), however, that does not make a difference until and unless clause (a) is not separated from clause (b) with the word "or". Therefore, these clauses have to be read together.

- Therefore, the reasonable interpretation would be that all of the conditions mentioned in clause (a), (b) & (c) are to be satisfied simultaneously to attract the provisions of article 16(2) of the Indo-US DTAA.

Ruling

- In the case in hand, though provisions of clause (a) are not attracted, however, the provisions of clause (b) & (c) are applicable to the case of the assessee for the purpose of deciding the State of taxation of assessee's income. On reading article 16 of the DTAA as a whole, the reasonable interpretation which would come is that the salary and other similar remuneration derived by resident of a contracting state in respect of an employment exercised in the other.

- **As observed in this case, the assessee is a resident of India, however, he has exercised employment and received remuneration in United States, therefore, at the first instance, as per the provisions of article 16(1) of the Indo-US DTAA, such salary/remuneration of the assessee is liable to tax in the United States only.**

Our Comments

- In our humble understanding, sub-section (c) of section 6 of the income Tax Act laid down 2 conditions which are to be read simultaneously to check the residential status of the assessee. Conditions are as follows:

1. Assessee should be present in India for a period of **60 days** or more during the relevant year
2. Assessee should be present in India for a period of **365 days** or more within the four preceding the year.

- In the above case law, facts shows that the during the year under consideration, assessee **stayed in India** for a period of **16 days**. However, counsel for the assessee did not make any submissions relating to the status of the assessee of cumulative stay of less than 365 days in four years preceding the year in question. Therefore, Hon'ble ITAT in the order stated that the assessee by virtue of provisions of section 6(1) has **failed to establish his status of non-resident**. Hence, assessee was declared as resident.

- However, as per our understanding, assessee stayed in India **for a period of 16 days only** which is less than 60 days, hence, assessee should not be covered under sub-section (c) of section 6 and accordingly assessee should be **treated as Non-resident**.

Our Comments

- Further, if an assessee is considered as resident then as per section 5 of the Income Tax Act, **total income of a resident assessee should include his global income.**

- In the above case law, Hon'ble ITAT considered the residential status of assessee as resident Indian and stated that since all the 3 conditions of Article 16(2) of India US DTAA are not satisfied, Article 16(2) will not be applicable in the case of assessee, therefore, **as per the provisions of article 16(1) of the Indo-US DTAA, such salary/remuneration of the assessee is liable to tax in the United States only.**

- **Hence, Hon'ble ITAT has relied on the principle that the word "may" shall be read as "shall" which was also followed in case of Natasha Chopra Vs. DCIT, Circle-17(2), New Delhi which in our humble opinion is different from the view taken by CBDT in notification no. 91/2008.**

Section/Article	Section 6 of IT Act and Article 16
DTAA/Country	India USA
Court	Kolkata Tribunal
Date of decision	01.03.2024

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

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