



SATURDAY INTERNATIONAL TAX GYAN !!!

#taxmadeeasy

SITG No. 233
Sanjay Ajit

vs

Income-tax Officer (International Taxation)

Salary earned for project done outside India will not be taxable in India for a non resident irrespective of whether the tax paid outside India was borne by assessee or not

23.11.2024



Facts of the Case

- ❖ The assessee, a non-resident individual, was sent on an international assignment to UK. Salary was received in India. The assessee claimed that salary earned from international assignment was offered to tax in UK and claimed exemption under article 16(1) of India-UK DTAA.
- ❖ The assessee has **stayed in India for 63 days** during this year and his status, as per law, is non-resident. The assessee has **worked in India for 21 days** and offered proportionate salary to that extent to tax. For remaining period, the work has been performed in UK though the salary has been received in India from existing employer.
- ❖ His **salary Rs.39,47,000 was credited to his Indian bank account**, and the employer had issued **Form 16** for the same and claimed salary to be exempt to the extent of Rs.39.41 Lacs under Article 16(1) of India-UK DTAA
- ❖ **It could be seen that the assessee being non-resident individual filed return of income declaring income of Rs.2295/- and claiming refund of Rs.10.08 Lacs.**

Assessee's Contention

- ❖ The Assessee contended that the salary related to services performed exclusively in the UK, making it taxable only in the UK under Article 16(1) of the DTAA.
- ❖ Assessee also contended that he was a UK tax resident during the assignment, supported by a Tax Residency Certificate (TRC).
- ❖ The assessee claimed that:
 - Salary earned during the assignment period was **offered to tax in the UK**.
 - It qualified for exemption under **Article 16(1)** of the **India-UK Double Taxation Avoidance Agreement (DTAA)**.
- ❖ The assessee was working under administrative control of OFSSL and he was sent on an international assignment to UK, work has been performed in UK though the salary has been received in India from existing employer. It is also a fact on record that this salary, for work performed in UK, has been offered to tax in UK which is evident from Tax Returns filed in UK.

Revenue's Contention

❖ Contentions of revenue are as under:-

- i) The salary of assessee was **received in India**, the assessee did not furnish any evidence of foreign tax payment before the lower authorities.
- ii) AO was of the opinion that India being the source state and considering the fact that no tax has been paid by the assessee to UK Tax Authorities, the salary income would be taxable in India.
- iii) Tax was paid by the employer in India and considering the same it was taxable in India under **Section 5(2)** of the Income Tax Act.
- iv) The expenditure was claimed by OFSSL and as per Tax Residency Certificate (TRC), no remittance tax was paid by the assessee in UK therefore Article 16(1) of the DTAA could not apply.

Legal provisions

Section 5(2) of the Act:

- ❑ Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—
 - (a) is received or is deemed to be received in India in such year by or on behalf of such person ; or
 - (b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Section 15(a) of the Act:

The following income shall be chargeable to income-tax under the head "Salaries"—

- (a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;

Legal provisions

Section 9 (1)(ii) of the Act:

- ❖ The following incomes shall be deemed to accrue or arise in India :—
income which falls under the head "Salaries", if it is earned in India.

Article 16 of India-UK DTAA:

- ❖ 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

- ❖ Assessee has stayed in India for 63 days during this year and his status, as per law, is non-resident. The assessee has worked in India for 21 days and offered proportionate salary to that extent to tax. For remaining period, the work has been performed in UK though the salary has been received in India from existing employer. The assessee submitted that as per Article 16(1) of DTAA, this income would be taxable in UK only.
- ❖ Salary earned in the UK for work performed there was not taxable in India under Article 16(1) of the India-UK DTAA.
- ❖ Hon'ble Tribunal directed the AO to **exclude the foreign assignment salary** while recomputing the taxable income.

Our Comments

- ❖ As per our understanding salary income is taxable for Non-resident as per Section 9 of the Income tax act and accordingly salary will be taxable in the country where employment is exercised. Since, 21 days are served in India, part of service served in India should be taxable in India whole of the tax cannot be claimed as refund.

- ❖ Cases where similar view has been taken:
 - **Kangaraj Shanmugam v. ITO [IT Appeal No. 2936/Chny/2018]**
 - **DIT v. Prahlad Vijendra Rao [2011] 198 Taxman 551 (Karnataka HC)**
 - **CIT v. Avtar Singh Wadhawan [2001] 247 ITR 260 (Bombay HC)**

Our Comments

In computing the total income of a previous year of Non Resident, they have the option, if the remuneration is received by him as an employee of a foreign enterprise for services rendered by him during his stay in India to claim such salary as exempt, provided the following conditions are fulfilled—

- (a) the foreign enterprise is not engaged in any trade or business in India ;
- (b) his stay in India does not exceed in the aggregate a period of ninety days in such previous year ; and
- (c) such remuneration is not liable to be deducted from the income of the employer chargeable under this Act

Income will not be taxable in India if such condition applied to assessee

Section/Article	Section 9(1) (ii) of the Income-tax Act, 1961 and article 16 of DTAA
DTAA/Country	India UK DTAA
Court	ITAT of Chennai
Date of decision	03-09-2024

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.