

**IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCH 'SMC-A', HYDERABAD**

SHRI A. MOHAN ALANKAMONY, ACCOUNTANT MEMBER

ITA No. 1463/Hyd/2018
Assessment Year: 2014-15

Sreenivasa Reddy Cheemalamarri, Hydereabad. PAN – AGIPC 8725A	vs.	Income-tax Officer, International Taxation – 1, Hyderabad.
Appellant		Respondent

Assessee by: Shri Nageswara Rao
Revenue by: Shri N. Murthy Naik

Date of hearing: 12/12/2019
Date of pronouncement: 05/03/2020

ORDER

This is an appeal filed by the assessee against the order of CIT(A) – 10, Hyderabad in appeal No. 0163/CIT(A)-10/2016-17, dated 24/04/2018 for AY 2014-15.

2. The assessee has raised several grounds in his appeal however, the crux of the issue is that the Ld. CIT (A) erred in upholding the order of the Ld. AO who had brought to tax the salary income and the foreign allowance received by the assessee for services rendered outside India ignoring the Article 15(1) of India – Austria DTAA agreement and section 90 and section 5(2) of the Act.

3. Brief facts of the case are that the assessee, a non-resident individual, filed his return of income for the AY 2014-15 on 30/07/2014 admitting Nil income. Subsequently, the case was selected for scrutiny under CASS, Notices u/s 143(2) and 142(1) were issued to the assessee and finally assessment was completed on 09/09/2016 wherein the Ld.AO brought to tax the salary income and the foreign allowance received by the assessee for services rendered outside India.

4. During the course of scrutiny assessment on verification of the Form No. 16 issued by the employer, IBM India Pvt. Ltd., for the AY 2014-15, the Ld.AO noticed that the gross salary of the assessee was Rs. 36,63,763/- and accordingly, the employer had deducted tax at source of Rs. 8,92,659/- on the said gross salary, however the assessee had claimed double taxation relief u/s 90 of the IT Act and declared Nil income and further claimed refund of TDS of Rs. 8,92,659/-.

5. In order to examine the velocity of the claim of deduction U/s.90 of the Act the Ld.AO directed the Ld.AR of the assessee to furnish the following details:-

a) Tax Residency Certificate to claim the relief under section 90 for the salary received outside India with respect to the services rendered outside India,

b) Reconciliation of salary income received by the assessee in India and in United Kingdom along with documentary evidences,

c) Copy of bank account of Austria to verify the receipts in abroad or any other documentary evidences for any other mode of payment in abroad.

d) Copy of Assignment letter between Employer and employee.

6. In response, the Ld.AR submitted his reply vide his letter on 09.09.2016 which is reproduced here as under for reference:

"As the assessee has spent less than 60 days in India during the FY 2013-14. he qualifies as a Non-resident under section 6(1) of the Act. Therefore, the foreign allowance of Rs.26,93,062/- was not offered to tax in India in the return of income as the same was received by him outside India for the services rendered outside India and shall not form part of total income under section 5(2) of the Income tax Act, 1961.

Also, as the assessee qualifies as a tax resident of Austria, exemption under Article 15(1) of the India- Austria Double taxation Avoidance Agreement (DTAA) has been claimed in the return of income for the employment income.

Based on the above, any salary income earned by a tax resident of Austria for services rendered in Austria is taxable only in Austria. In case services have been rendered in India the income for workdays spent in India is taxable in India. The Assessee wishes to submit that for the captioned AY, he was a tax resident of Austria and a non- resident in India. Hence, the salary received with respect to the services rendered in Austria is not taxable as per article 15(1) of the India-Austria DTAA.

In view of the above, in the return of income filed, the Assessee has claimed exemption of the salary income of INR 20,41,907 under Article 15(1) of India- Austria DTAA.

In view of the above facts, we wish to inform your good-self that the salary income as disclosed in Part B of Total Income (II) in income tax return is less than the salary income as disclosed in Annexure 2 of TDS return filed by the employer as the assessee has claimed DTAA relief and exemption under section 5(2) of the Act in the return of income filed by him.

We shall not be able to produce Austrian TRC as issuance of the same is dependent on the Austria tax authorities."

7. However, Ld. AO observed that on verification of the submission made by the assessee, the claim of the assessee cannot be allowed due to the following reasons:

1. The assessee could not produce the Tax Residency Certificate of Austria for claiming the Double Taxation relief under section 90 as it is statute u/s 90(4) of the Income tax Act, 1961 w.e.f. from A.Y. 2013-14.

2. The assessee has failed to furnish the supporting evidences for receiving the foreign allowances outside India to come under purview of section 5(2) of the Income tax Act, 1961.

3. Moreover the assessee has neither produced any bank account outside India to prove any credits received outside India nor any mode of receiving the receipts outside India.

4. Further the assessee has also failed to prove the receipts that are reflecting in Form -16 are the salary receipts earned outside India within the purview of Article 15(1) of India-Austria DTAA.

5. Further the Employer in Form No. 16 has stated that the total TDS of Rs. 12,40,618/- was made on the gross salary i.e. Rs. 47,96,211/- received by assessee in India. The employer has not stated of paying any allowances outside India.

8. In view of the above, the Ld. AO held that the entire salary and allowance received by the assessee during the year under consideration is taxable in India and the exemption claimed by the assessee is to be disallowed.

9. Aggrieved by the order of Ld. AO, the assessee preferred an appeal before the CIT(A). However, the Ld. CIT (A) dismissed the appeal of the assessee by agreeing with the view of the Ld. AO. Hence the assessee is in appeal before the Tribunal.

9. The Id. AR of the assessee submitted before me that the assessee had been taxed in Austria in respect of the salary income and allowances paid to him by IBM on account of employment rendered in Austria. It was further submitted that the entire salary income of the assessee has been taxed in India as well and taxes at source have been deducted u/s 192(1) of the Act, which has resulted in double taxation. It was therefore clarified that since there is an incidence of double taxation on the same income the assessee had claimed exemption u/s 90 of the Act read with Article 15(1) of the India-Austria DTAA in respect of the doubly taxed income which is appropriate.

10. The Id. AR further argued that since the assessee qualifies as tax resident of Austria for the period April 01, 2013 to March 31, 2014, the salary income amounting to INR 36,63,763/- earned for the said period has been claimed as not taxable in India as per the provisions of Article 15(1) of India-Austria DTAA. It was also argued that the assessee qualifies as non-resident in India for the relevant PY 2013-14 and therefore the foreign allowances received outside India for the services rendered outside India has been claimed as not taxable in India as per section 5(2) of the Act. Hence it was pleaded that the tax imposed by the Revenue may be deleted and the tax deduced at source may be refunded. The Id. DR, on the other hand, relied on the orders of revenue authorities and argued in support of the same.

11. I have considered the rival submissions and carefully perused the material on record. From the Orders of the Ld. Revenue Authorities, I find that the Ld. AO has disallowed the exemption claimed by the assessee under Article 15(1) of the India-Austria DTAA only for want of Tax Residence Certificate (TRC) from Austria. The submission of the assessee in this regard was that despite best possible efforts he was not able to procure TRC from country of residence and the situation may be treated as "impossibility of performance". I find merits in the submission of the assessee. Normally it is a herculean task to obtain certificates from alien countries for compliance of domestic statutory obligations. In such circumstances the taxpayer cannot be obligated to do impossible task and penalized for the same. If the assessee provides sufficient circumstantial evidence in such cases, the requirement of section 90(4) ought to be relaxed. Further, it is obvious that where there is a conflict between the Treaty and the Act, the Treaty shall overrule the Act. In the case of the assessee, by virtue of the Treaty, the assessee is liable to tax in Austria for the services rendered in Austria and not in India. Therefore, though the Act mandates Tax Residency Certificate of Austria, non-production of the same before the Ld. Revenue Authorities shall not enable the Ld. Revenue Authorities not to grant the benefit of the Treaty to the assessee. Therefore, the Ld. Revenue Authorities have erred in not granting the benefit of the Treaty to the assessee just for the reason that the assessee has not submitted the Tax Residency Certificate from Austria. The Ahmedabad Bench of the Tribunal in the case of Skaps Industries India (P.) Ltd vs. ITO,

International Taxation, Ahmedabad reported in 171 ITD 723 taking cue from the decision of the Hon'ble P & H High Court in the case of Secro BPO (P.) Ltd vs. Authority for Advance Ruling reported in 379 ITR 256 had held that *"Whatever may have been the intention of the lawmakers and whatever the words employed in Section 90(4) may prima facie suggest, the ground reality is that as the things stand now, this provision cannot be construed as a limitation to the superiority of treaty over the domestic law. It can only be pressed into service as a provision beneficial to the assessee....."*. Therefore, the stand of the Ld. Revenue Authorities on this issue is devoid of merits.

12. As per Article 15(1) of the India-Austria 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 therefore may be taxed in that other state."* Further, Article 4(1) the India-Austria DTAA defines the term resident as under:

"For the purposes of this convention, 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, and also includes that state and any political sub-division or local authority thereof."

13. Therefore, in the case before me the following conditions are required to be satisfied to claim exemption under Article 15(1) of the India-Austria DTAA:

- The person should be a resident of Austria and
- The salary and other remuneration should be earned in respect of employment exercised in Austria.

14. From the facts of the case it is apparent that during the previous relevant to AY 2014-15, the assessee qualifies as a non-resident in India and as a tax resident in Austria. The salary and allowances are earned by the assessee in respect of employment rendered in Austria due to his foreign assignment. Hence, the first two conditions enumerated under Article 15(1) of the India-Austria DTAA stands satisfied. Therefore, the assessee's claim of exemption in regard to his salary income as per the provisions of Article 15(1) of the India-Austria DTAA in the return of income filed by him is appropriate.

15. Further in the case of ITO Vs. Sunil Chitranjan Muncif (2013 58 SOT 356 – ITAT, Ahmedabad), on which reliance placed by the assessee, it was held that there was no dispute about the fact that the assessee is a NRI and the salary income received by him in India for employment exercised in UK has been offered by him for taxation in UK in pursuance of Article 16 of DTAA with UK. Hence, the salary received by the assessee was not taxable in India in pursuance of DTAA between India and UK.

16. In the case of DIT Vs. Prahlad Vijendra Rao (239 CTR 107), on which reliance placed by the assessee, the Hon'ble Karnataka High Court held that under section 15 of the Act even on accrual basis salary income is taxable i.e. it becomes taxable irrespective of the fact whether it is actually received or

not; only when services are rendered in India it becomes taxable by implication. However, if services are rendered outside India such income would not be taxable in India.

17. The other objections raised by the Ld. AO that evidence was not produced for receiving the foreign allowance outside India and the bank account of the assessee maintained abroad was not produced is not relevant because the facts of the case establishes that the salary and the foreign allowance was received in India for the services rendered abroad and by virtue of DTAA and the Act, there is no bar in law for receiving the money in India. For the above-mentioned reasons, I hereby direct the Ld.AO to delete the tax imposed on the assessee with respect to his salary income of Rs. 12,90,846/- and the foreign allowances of Rs. 22,48,501/- aggregating to Rs. 3539347/- earned by him outside India during the relevant assessment year.

18. In the result, appeal of the assessee is allowed.

Pronounced in the open court on 05th March, 2020

Sd/-
(A.MOHAN ALANKAMONY)
ACCOUNTANT MEMBER

Hyderabad, dated 05th March, 2020.

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Copy forwarded to:

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2. *ITO, International Taxation - I, 5th Floor, Aayakar Bhavan, Basheerbagh, Hyderabad.*
3. *CIT(A) -10, Hyderabad.*
4. *The CIT (IT & TP), Hyderabad.*
5. *The DR, ITAT, Hyderabad*
6. *Guard File*