IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad SMC Bench, Hyderabad
(Through Video Conferencing)
Before Smt. P. Madhavi Devi, Judicial Member

ITA No.55/Hyd/2021		
Assessment Year: 2014-15		
Sri Vamsee Krishna Kundurthi, Hyderabad PAN:APLPK3693P	Vs.	Income Tax Officer (International Taxation)-1, Hyderabad
(Appellant)		(Respondent)
Assessee by:	Smt. Shery Goyal	
Revenue by:	Smt. Kanika Agarwal, DR	
Date of hearing:	08/04/2021	
Date of pronouncement:	22/04/2021	

ORDER

This is assessee's appeal for the A.Y 2014-15 against the order of the CIT (A)-10, Hyderabad, dated 3.11.2020.

2. Brief facts of the case are that the assessee, a Non-resident individual, filed his return of income for the A.Y 2014-15 on 31.07.2014 admitting "Nil" income. During the assessment proceedings u/s 143(2) of the Act pursuant to selection of his return of income for scrutiny under CASS, the assessee was required to furnish certain information and the said information was furnished by the assessee.

3. On verification of Form-16 issued by the assessee's employer i.e., IBM India (P) Ltd for the A.Y 2014-15, the Assessing Officer found that during the relevant A.Y, the gross salary of the assessee was Rs.36,61,667/- and the exempt income u/s 10 of the I.T. Act was Rs.53,676/-. The Assessing Officer observed that

the employer had deducted the tax at source of Rs.8,61,345/-. Further, on verification of the total income filed by the assessee along with the return of income for the A.Y 2014-15, the Assessing Officer found that the assessee has claimed double taxation relief under section 90 of the I.T. Act and admitted NIL total income but claimed TDS of Rs.8,61,345/- in his return. Therefore, the assessee was required 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 evidence,

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

d) Copy of Assignment letter between Employer and employee.

2.1 In response, the assessee submitted a reply dated 9.9.2016 given as under:

> *"As the assessee has spent less than 60 days in India during the FY 201314, he qualifies as a Non resident under section 6(1) of the Act. Therefore, the foreign allowance of Rs.19, 79, 072/- 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 work days 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 16,28,920 under Article 15(1) of India- Austria DTAA.

In view of the above facts, we wish to inform your goodself that the salary income as disclosed in Part B of Total Income (Tl) 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 DT AA 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."

2.2 The Assessing Officer, however, held that the claim of the assessee could not be allowed for the following reasons:

"I. 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. 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. 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. 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, as there is no evidence of assessee being resident of Austria.

II. Further the Employer in Form No. 16 has stated that the total TDS of Rs. 8,61,345/- was made on the gross salary i.e. Rs. 36,61,667/- received by assessee in India. The employer has not stated of paying any allowances outside India".

2.3 The learned Counsel for the assessee while reiterating the submissions made before the authorities below have submitted that the same issue had arisen in the case of similar employees of IBM Ltd before the Tribunal and the Tribunal has granted relief to the assessee in support there several orders of the decisions of the Coordinate Bench of the Tribunal are placed before the Tribunal.

2.4 The learned DR was also heard who supported the orders of the authorities below.

3. Having regard to the rival contentions and the material on record, I find that in the case of Sreenivasa Reddy Cheemalamarri vs. ITO in ITA No.1463/Hyd/2018, the Coordinate Bench of the Tribunal at Hyderabad vide order dated 5.3.2020 had considered similar issue and at Paras 11 to 17 has held as under:

> *"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 Treat 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 establish es 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".

4. Similar view was taken in many other employees of IMB India Ltd. Respectfully following the same, the appeal of the assessee is allowed. The Assessing Officer is directed to allow exemption under DTAA.

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

Order pronounced in the Open Court on 22nd April, 2021.

Sd/-

(P. MADHAVI DEVI)
JUDICIAL MEMBER

Hyderabad, dated 22nd April, 2021.

Vinodan/sps

Copy to:

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2	Income Tax Officer (International Taxation-1) 5th Floor, Aayakar Bhavan, Basheerbagh, Hyderabad
3	CIT (A)-10, Hyderabad
4	CIT (IT & TP) Hyderabad
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order