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Tenet Tax Daily
June 12, 2014

Salary earned from employment in US isn't taxable in India if employee resides in India for less than 60 days

Summary – The Hyderabad ITAT in a recent case of N.V. Srinivas, (the Assessee) held that where assessee, an employee of Indian Company, was sent to USA on Job assignment for 306 days, in terms of article 16 of India - USA DTAA, salary income offered to tax in USA, was to be granted exemption from Indian taxable income of assessee. In view of provisions of sub-section (2) of section 5, per diem paid in USA was not income received or deemed to be received in India; neither did it accrue or arise in India as it was towards working in USA and, therefore, it could not form part of assessee's taxable income in India.

Facts

- The assessee, a Software Engineer, on payrolls of 'M' Ltd. filed his return of income claiming his status as that of a non-resident on the ground that he was in USA on job assignment for 306 days and hence, his salary income was exempt from tax under Article 16(1) of the (DTAA) between India and the USA.
- The Assessing Officer found that the certificate issued by US company merely certified that the amount paid in India was considered for taxation in USA and nowhere mentioned that the said amount was brought to tax by US tax authorities and that the said amount was not taxed by both US and Indian Authorities, *i.e.* not taxed twice.
- The Assessing Officer, thus, rejected assessee's claim.
- The Commissioner (Appeals) confirmed the order passed by Assessing Officer.
- On second appeal:

Held

- The short point of the assessee is that an interpretation of Article 16(1) of India-US DTAA would lead to the conclusion that taxation rights for the salary earned for work done in the USA vests only with USA and that amount cannot be considered for Indian tax purposes, in other words this is the 'exemption' regime (as opposed to 'credit' regime) under the DTAA. For this, the assessee placed reliance on the decision of the Supreme Court in *CIT* v. *P.V.A.L. Kulandagan Chettiar* [2004] 267 ITR 654/137 Taxman 460.
- As per the *prima facie* facts on record, assessee is working in the USA for 306 days and it is clear at the outset that the exercise of employment was in the USA and, hence, the remuneration derived therefrom may be taxed in the USA as per Article 16 of India-USA DTAA. In *P.V.A.L. Kulandagan Chettiar & case's* (*supra*), the expression "may be taxed" was held to mean that the once tax was paid in the foreign country, India loses its right to tax *i.e.,* the 'exemption' regime of DTAA was upheld. The assessee following this has pleaded that the salary income offered to tax in the USA should be exempted from the computation of taxable income in India.

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- Section 90(3) introduced with effect from Assessment year 2004-05 was specifically introduced to address issue in dispute.
- Subsequently there was a Notification No.91/2008 dated 28-8-2008 which has clarified that when the phrase 'may be taxed' is used in a DTAA, then India can include such income taxed in the other country in the total taxable income in India.
- With the insertion of section 90(3) and the subsequent Notification referred to above, it is clear that the 'exemption' regime sought by the assessee cannot come into play. However, the fact is that the Notification cannot apply for the impugned assessment year, *viz.* 2002-03, as even if the notification were said to be clarificatory it could be retrospectively applicable only from assessment year 2004-05 onwards when section 90(3) was introduced. A similar view was taken by the Mumbai Bench of the Tribunal in the case of *Essar Oil Ltd.* v. *Addl. CIT* [2014] 42 taxmann.com 21 wherein it was held that the Notification No.91 of 2008 was clarificatory and applicable from assessment year 2004-05 onwards only.
- In view of the above, considering the totality of facts and circumstances of the instant case, and following the decision of the Apex Court in the case of *P.V.A.L. Kulandagan Chettiar* (*supra*), the interpretation of the phrase 'may be' in Article 16(1) of DTAA is applied in the impugned assessment year so as to exempt from the Indian taxable income of the assessee, his salary income which has been offered to tax in USA. Therefore, this ground of the assessee is allowed.

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