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Salary of NR for rendering service in US won't be taxed in India as per DTAA even if salary was received in India

Summary – The Jaipur ITAT in a recent case of Neeraj Badaya, (the Assessee) held that where during relevant assessment year, assessee rendered services in USA, salary received by him for such services in India from sister concern of US employer would be exempt from Indian taxation under article 16(1) of Indo-US DTAA

Facts

- The assessee was transferred from Indian company to its American sister concern FIS to act as a lead software engineer and, accordingly, he left India on 30-5-2007 in connection with his US employment. However, for internal facilitation, his salary for relevant period was paid by Indian company in India.
- The assessee filed his return claiming status of a non-resident and claimed his salary income as exempt from tax in view of article 16(1) of the DTAA between India and USA.
- The Assessing Officer held that since salary was received in India by the employee through a credit to his salary account and TDS was also deducted thereon in India, the same would be taxable in India irrespective of his residential status, in accordance with section 5 and the claim of exemption on the basis of article 16(1) by the assessee was not correct.
- The Commissioner (Appeals) confirmed the order of the Assessing Officer and further held that the assessee would be a resident of India in accordance with the DTAA between India and USA and the right of taxation in respect of salary income of the employee would remain with the India whether or not the right of taxation in respect of this sum vest with USA.
- On second appeal:

Held

- The assessee's residential status as non-resident has been accepted by the Assessing Officer and, therefore, there is no justification on the part of the Commissioner (Appeals) to hold that the assessee was a resident. It has not been disputed that the services in question were rendered by the assessee in USA and taxed in the USA. The applicability of article 16(1) of Indo-USA DTAA depends on the country where services are rendered which in this case is undisputedly USA. The application of article 16(1) cannot be denied to assessee merely because the salary was paid by an Indian entity in view of the undisputed fact that no service was rendered by assessee for the impugned period in India. The Supreme Court in the case of *Kedar Nath Jute Mfg. Co. Ltd.* v. *CIT (Central)* [1971] 82 ITR 363 has held that actual and legal nature of the transaction will decide the taxability and not mere book entries or assumptions. In view thereof, the non-resident assessee is not liable for tax in India on the impugned amount.