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Salary paid in India to employee deputed abroad for rendering services not taxable in India: AAR

Summary – The Delhi ITAT in a recent case of Hewlett Packard India Software Operation (P.) Ltd., (the Assessee) held that where applicant, an Indian company, has sent two of its employees to Germany and USA on deputation for rendering services in their respective country of deputation, since assignees are non-residents in India during relevant period and they are rendering services abroad, salary would accrue to them in foreign countries during period of deputation and same would not be liable to tax in India

Once assignees became residents on return to India during financial year 2012-13, and nature of payments made to them by applicant was admittedly in nature of salaries, provisions of section 192(2) would apply, however, applicant could give credit for taxes deducted during their deputation outside India in view of article 25 of India-USA DTAA and article 23 of India-Germany DTAA respectively

Facts

- The applicant is incorporated in India and is engaged in the business of software development and IT Enabled Services. It has sent two of its employees 'R' and 'P' (assignees) on deputation to HP, US and HP Germany, respectively.
- During the period of deputation the assignees would continue to be on the payrolls of applicant and would regularly receive salaries in India from the applicant and would receive certain allowances in their respective country of deputation also for meeting their cost of housing, transportation etc. During relevant period of assignment, the employees would be rendering services in their respective country of deputation.
- It is stated in the application that the assignees would be non-residents in India during the financial year 2011-12, and in the year of arrival in India after completion of assignment *i.e.* financial year 2012-13 the residential status of the assignees would be Resident and Ordinarily Resident (ROR).
- The applicant has posed the following questions, seeking a ruling from the Authority:

  (i) Based on the above facts, salary paid by the applicant to the assignees is not liable to be taxed in India having regard to provisions of the Act and the Treaty.
  Whether applicant is obliged to withhold taxes on such salary paid in India?

  (ii) 'R' is expected to return to India during April 2012 and 'P' is expected to return to India during January 2013. The residential status of 'R' and 'P' in India for the financial year 2012-13 would be 'Resident and Ordinarily Resident (ROR).

- Whether while discharging its tax withholding obligations under section 192, applicant can take the credit for taxes paid in the US in terms of Article 25 of India-USA Treaty in the case of 'R' and in terms of Article 23 of India - Germany treaty in the case of 'P'.

Held

- The facts of the case are not in dispute. The assignees/employees of the applicant company, are non-residents for tax purposes during the financial year 2011-12, and are on deputation with 'HP' USA/Germany and are rendering services in the USA/Germany respectively. As far as question no. 1 is concerned, the only issue is whether with reference to the salaries received by them in India, there would be a liability on the employer, the applicant, to deduct tax therefrom.
- Section 4 states that tax shall be charged in accordance with and subject to the provisions of this Act in respect of the total income of the previous year of every person. 'Total income' as provided in section 2(45) means such total income as is referred to in section 5, computed in the manner laid down in this Act. Section 5 deals with the 'Scope of Total Income', and sub-section (2) relates to non-residents. Section 5(2) begins with the words 'Subject to the provisions of this Act', which brings Chapter IV into play, i.e., computation of total income. In this chapter, section 14 lists out the various heads of income and section 15 deals with the head 'Salaries'. Thus, chargeability to tax under the head 'Salaries' arises under section 5(2) read with section 15. Revenue's attempt to say that section 5(2) alone is the charging section and income received by the assignees should be taxed in India as it was received in India, cannot be accepted.
- Although the recipients' cases fall in clause (a) of section 15, being non-residents, since they were rendering services in the USA/Germany during that period, the salary accrued to them in the USA/Germany. Revenue's objection that since the assignees were paid and employed in India, and that the employer - employee relationship existed in India, they should be taxed in India, are also not acceptable, as income accrues where the services are rendered. Hence, since the income has not accrued in India, the same cannot be considered as chargeable to tax in India.
- A reading of the *Explanation* to section 9(1)(ii) of the Act also clearly indicates to the view held above.
- Further, since section 5(2) Act starts with the words 'Subject to the provisions of the Act', section 90 would also have to be considered, so as to allow any benefit arising thereunder to the applicant.
- It is clear therefore that the income earned by the assignees/employees from the services rendered in USA/Germany, respectively, would be chargeable to tax in the USA/Germany only, and not in India, for the period of their deputation.
- Coming to the question whether in the above circumstances, the applicant is obliged to withhold taxes on such salaries paid in India, it is seen that the provisions of section 192(1) are very clear. Tax is required to be deducted by the employer from the income payable which is chargeable to tax in India under the head salaries.
- Unless there is an obligation on the employee to pay tax on income from salaries, there would not be any liability to deduct tax under section 192 by the employer.
- To conclude, it is ruled that the salaries received in India by the assignees but accrued outside India for the Financial year 2011-12, would not be taxable in India, and, consequently, the employer,

Hewlett Packard Software Operation Private Limited i.e. the applicant, would not be obliged to withhold tax on the same at the time of payment, under section 192 of the Act.

- The second question raised by the applicant with regard to the Financial year 2012-13 is whether under section 192, the applicant can give credit to the assignees for the taxes paid in the USA/Germany. The cases of the assignees are clearly covered by the provisions contained in Articles 25 of the India-USA DTAA and Article 23 of India - Germany DTAA respectively. As such they are entitled to the credit for the foreign taxes deducted. Once they become residents on return to India during Financial year 2012-13, and the nature of payments made to them by the applicant is admittedly in the nature of salaries, section 192 applies. It follows that when payments are received by these employees from more than one source during a particular year, the provisions of section 192(2) will apply, and the present employer can give credit for the taxes deducted during their deputation outside India.
- Question no. 1: As the assignees are not liable to be taxed in India in respect of their income during the financial year 2011-12, the Applicant is not obliged to withhold taxes on the salary paid to them in India for such period.

  Question no. 2 : While discharging its obligation under section 192 the Applicant may take into account the credit for the taxes paid in the USA for 'R' in view of article 25 of the India-USA DTAA and for 'P' in view of Article 23 of India-Germany DTAA, after making proper verification as required by section 192(2) of the Act.