



Employee seconded outside India can be said to have left India for the purpose of employment.

Background

The Income-tax Appellate Tribunal, New Delhi¹ has held that the employee of the Indian Company seconded outside India to a Foreign Company can be said to have left India for the purpose of employment. Further, it has been held that salary paid during the period of secondment to the said employee, who is a non-resident, is not liable to tax in India.

Facts of the case

- Oil and Natural Gas Corporation ('the Indian Company') seconded its employee ('assignee') to ONGC Nile Ganga B.V, a Dutch Company ('the Foreign Company').
- The assignee was present in India for 98 days during the tax year 2003-04².
- While on secondment, the assignee was paid part salary in India and part salary outside India by the Foreign Company.
- The entire cost of the salary paid to the assignee during the secondment was borne by the Foreign Company.

Issue before the Tribunal

Whether the salary received by the assignee during the period of secondment is liable to tax in India?

¹ Deputy Commissioner of Income-tax, Dehradun v. Shri Ashok Kumar (ITA No. 2398/Del/2007)

² India tax year: 01 April to 31 March.

Tax payer's contention

- The assignee contended that he had left for the purpose of employment outside India.
- The residential status of the assignee was that of a 'non-resident' in view of Explanation (a) to Section 6(1)(c)³ of the Income-tax Act, 1961 ('the Act'), as he had spent only 98 days in India. As per the said Explanation, the threshold number of days for calculating the residency in a tax year is 182 days and not 60 days.
- Accordingly, the salary received by a non-resident from a Foreign Company is not taxable in India.

Assessing officer's contention

- The assignee has been sent outside India to perform the work of the Indian Company.
- The terms and conditions (eg payment of salary, moving with/without family while going overseas etc) under which the assignee has been seconded outside India are in line with the terms and conditions of the employees of the Indian Company working in India.
- The Foreign Company does not have any control and management over the assignee while on assignment.
- Based on the above, the assignee did not leave India for employment outside India.
- Accordingly, the assignee is a resident in India under the Act and Explanation (a) to Section 6(1)(c) of the Act is not applicable in the instant case. Therefore, the salary paid to the assignee during the deputation period is taxable in India.

³ Section 6 (1): An individual is said to be resident in India in any previous year, if he-
(a)....

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.

Explanation : In the case of an individual :

(a) being a citizen of India, who leaves India in any previous year.....for the purpose of employment outside India „the provisions of sub-clause (c) shall apply in relation to that year as if for the words “sixty days”, occurring therein, the words “one hundred and eighty-two days” had been substituted.

Decision of CIT(A)

- The Certificates given by the Indian Company and the Foreign Company respectively clearly stated that the entire cost of the salary paid during the secondment period was borne by the Foreign Company, including the Indian Rupees component of the salary.
- The Certificates clearly indicate that no salary was paid to the assignee by the Indian Company while on assignment.
- The assignee left India for the purpose of employment. Hence, he was clearly a non-resident in view of Explanation (a) to Section 6(1)(c) of the Act . The test of residency would be a period of 182 days and not 60 days in India.
- Accordingly the salary received by the assignee from the Foreign Company is not taxable in India

The Tribunal Ruling

- The assignee left India to join the Foreign Company, which is a separate entity from the Indian Company.
- The assignee can be said to have left India for employment outside India with the Foreign Company. Therefore, Explanation (a) to Section 6(1)(c) of the Act would be applicable.
- In view of the above, the assignee would not be a resident in India under the Act.
- The certificates issued by the Indian Company and Foreign Company clearly demonstrate that the assignee was seconded to the Foreign Company and no salary was paid by the Indian Company.
- The Tribunal placed reliance on the judgment of Authority for Advance Ruling (AAR) in the case of British Gas India P. Ltd.⁴, while supporting the view of CIT(A).
- Accordingly, salary paid during the period of secondment to the assignee is not taxable in India

Our Comments

This judgment reiterates that an Indian citizen on secondment to a foreign entity may be considered as leaving for the purpose of employment outside India. Therefore the threshold number of days presence in the year of departure is extended to 182 days and not 60 days.

It is interesting to note that the facts are not very clear as the Tribunal

⁴ (2006)285ITR218(AAR) = (2006-TIOI-06-ARA-IT)

seems to have concluded that the entire salary received during the period of secondment is exempt from tax in India under the provisions of the Act. In the instant case, part salary was paid in India which seems to have been cross-charged to the Foreign Company. Although the entire economic burden of the salary is borne by the Foreign Company, the fact remains that part salary was first received in India and then recovered from the Foreign employer.

As per the provisions of the Act, any salary received in India is taxable in India even if it is subsequently cross-charged to the Foreign Company. It is only under the provisions of the Relevant Double Tax Avoidance Agreement ('Treaty') that the assignee who is a non-resident of India and a resident of the host country can claim exemption for salary received in India for exercising employment outside India.

While the judgment seems to have relied on the British Gas ruling, it is important to note, that the British Gas Ruling referred to the provisions of the Indo-UK Treaty for claiming exemption of the salary received in India for exercising employment outside India.

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