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TAX FLASH NEWS

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Income earned abroad by a non-resident cannot be taxed in India for mere receipt of salary in Indian bank account

Background

For a taxpayer qualifying to be a non-resident in India, income received, deemed to be received, accrued, deemed to be accrued, arising or deemed to be arising in India would be subject to tax in India. In relation to salary income, the income earned for services rendered in India would alone be taxable in India.

In this context, the Delhi Bench of the Income-tax Appellate Tribunal (the Tribunal) has recently held[1] that income earned by a non-resident for services rendered outside India cannot be taxed in India merely since the receipt of salary is in India.

Facts of the case

- During the tax year (TY) 2010-11, the taxpayer was deputed from India to Iraq. The taxpayer had received a total salary of INR4.3 million into his bank account in India in relation to such employment. Further taxes were also deducted at source on such salary by the employer in India.
- During the TY 2010-11, the taxpayer had stayed for less than 182 days in India, and had accordingly qualified to be a non-resident[2] in India for the said TY.
- The taxpayer had filed his India tax return (ITR) by claiming an exemption of INR4 million (proportionate to the period of services rendered in Iraq) out of the total salary received.
- The ITR was subject to scrutiny assessment and an order dated 11 February 2014 was passed under Section 143(3) of the Act, whereby the returned income filed by the taxpayer including the exclusion of salary (earned for services rendered outside India) was accepted.
- The order passed by the Assessing Officer (AO), was revised by the Commissioner of Income Tax (CIT), under Section 263 of the Act and the exclusion claimed by the taxpayer was denied on the following basis:
  - The total income of a non-resident includes all incomes received or accrued in India[3];
  - The taxpayer has received the salary in India and hence such income credited into his bank account in India is deemed to be income received in India. Further, taxes were also deducted at source by the employer in India;
  - The AO has not made any proper enquiry on the applicability of the above and has not examined the issue of exclusion of salary, leading to the total income being under assessed and the order being erroneous and prejudicial to the interest of revenue.
- Aggrieved by the order of the CIT, the taxpayer had filed an appeal with the Tribunal.

[1] Pramod Kumar Sapra v. ITO (ITA No 5965 of 2015) (Del)
[2] Section 6(1) of the Income-tax Act, 1961 (the Act)
[3] Section 5(2) of the Act

Taxpayer's contention

- The taxpayer's contention was on the following grounds:
  - The AO during the course of rectification proceedings[4] has discussed the claim of exclusion benefit and the number of days of stay in India by the taxpayer in detail, and this was a part of the assessment record. Further, the said submissions were also made before the CIT for independent examination.
  - The salary received by a non-resident for services rendered outside India cannot be taxed in India, even if the salary has been credited to the bank account in India.

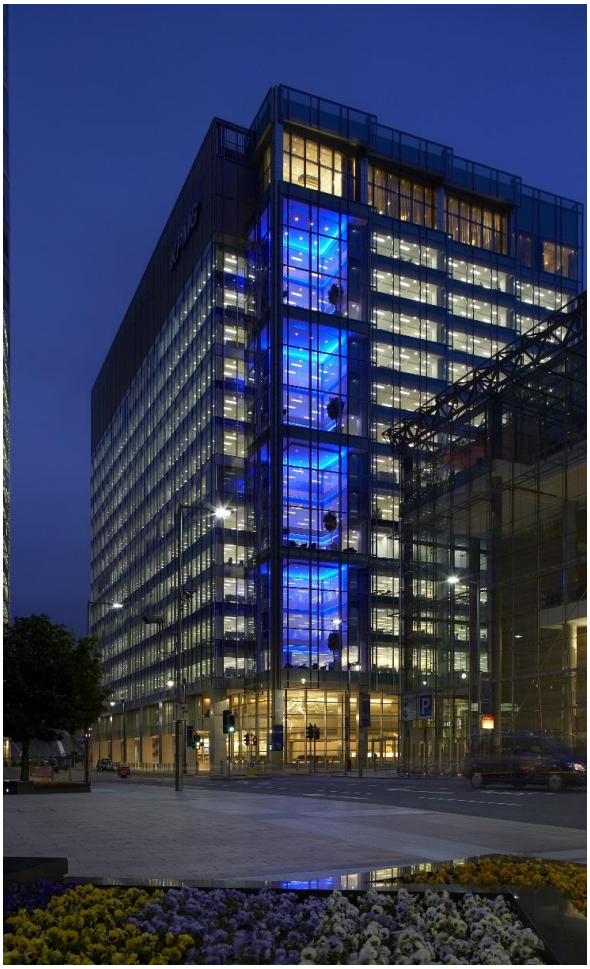
Tribunal's observation and ruling

- As per Section 6 of the Act the taxpayer clearly qualifies to be a non-resident in India based on the number of days of stay in India.
- Section 5(2) of the Act merely provides that total income of a non-resident includes all income received or accrued in India. However, it does not envisage that income received by a non-resident for services rendered outside India can be reckoned as a part of total income.
- In the instant case, no such income has been received by the taxpayer for carrying out any employment service in India or source of income is from India which could be reckoned as income received or accrued in India.
- Further, irrespective of the residential status, the taxes deducted at source by the employer cannot be determinative of the taxability in India.
- Accordingly, as per Section 6(1) of the Act, non-residents would be taxable in India only on India sourced income.
- Given the above, the Tribunal has held that the salary earned for services rendered in Iraq would not be taxable in India and hence the order passed by the AO is not prejudicial to the interest of revenue.
- Further, the powers under Section 263 of the Act can be exercised only when the order is both prejudicial to the interest of revenue and erroneous. Since the order passed by AO has been held as not being prejudicial to the revenue, the said order passed by AO cannot be set aside or revised by the CIT, by virtue of it simply being erroneous.
- The Tribunal has thus quashed the order of the CIT and upheld the allowability of exclusion benefit claimed by the taxpayer (non-resident) on the salary earned for services rendered outside India.

Our comments

This decision could enable taxpayers who travel outside India for employment and qualify to be a non-resident to claim an exclusion benefit on the salary received in India for services rendered outside India. This view is also supported by other judicial precedents.

Considering this is a fact specific case and a ruling of the Tribunal, adoption of the same in other jurisdictions/ set of facts could be evaluated on a case-to-case basis.



[4] Section 154 of the Act

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