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TAX FLASH NEWS

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Salary received in India by non-resident for services rendered outside India not taxable in India despite the absence of TRC

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 be taxable in India.

In this context, the Bangalore Bench of the Income-tax Appellate Tribunal (the Tribunal) has recently held[1] that salary received in India by a non-resident individual taxpayer for services rendered in the U.S is not taxable in India under the Income-tax Act, 1961 (the Act), despite taxpayer's failure to furnish Tax Residency Certificate (TRC) as all evidence relating to stay and taxation in the U.S was furnished in the course of assessment.

Facts of the case

- During the tax year (TY) 2012-13, the taxpayer, a salaried employee was deputed from India to the U.S and had received salary into her bank account in India in relation to services rendered in the U.S.
- During the said TY, the taxpayer had qualified to be a non-resident in India based on physical presence in India.
- The taxpayer had filed her India tax return (ITR) for the TY 2012-13 by disclosing the portion of income earned for services rendered in the U.S. as exempt income.
- The taxpayer had also duly paid her taxes and filed a return of income in the U.S for the period of employment services rendered in the U.S.
- The ITR was subject to scrutiny assessment, and an order was passed under Section 143(3) of the Act, whereby the assessing officer (AO) inter-alia denied the exemption in respect of salary income on the basis that the taxpayer failed to furnish TRC.
- Aggrieved by the order passed by the AO, the taxpayer filed an appeal before the Commissioner of Income-tax Appeals [CIT(A)]-12, who deleted the addition made by the AO with respect to exempt income, by relying on certain judicial precedents[2] [first appellate order].
- Subsequently, another appellate order was passed by CIT(A)-10 in the same case wherein he had upheld the order of the AO exparte [second appellate order] and passed an order under Section 154 of the Act invalidating the first appellate order.
- Aggrieved by order of the CIT(A)-10, the taxpayer had filed an appeal with the Tribunal.

Taxpayer's contentions

- The taxpayer questioned the validity of the second appellate order and requested that the first appellate order be sustained.
- On merits, the taxpayer's contention was on the following grounds:
  - Salary is taxable only on accrual basis[3] and it would accrue in the USA in respect of services rendered in the USA. Accordingly, the salary received by a non-resident for services rendered outside

[1] Smt. Maya C Nair v. ITO ITA No.2407/ Bag/2018 dated 31 October 2018

[2] DIT v. Prahalad Vijendra Rao [2011] 198 Taxman 551 (Kar) and ITO v. Bholanath Pal [2012] 23 taxmann.com 177 (Bang)

[3] Section 15 of the Act

India cannot be taxed in India, even if the salary has been credited to the bank account in India.

- Further, the taxpayer had claimed exempt income under the Income-tax Act[4] and not under the provisions of the tax treaty and accordingly, a TRC was not required to be submitted.

Tribunal's decision

- The Tribunal was of the view that there could not be two appellate orders on the same appeal and quashed the second appellate order on the grounds of non-maintainability.

- On merits, the Tribunal, placing reliance on the judicial precedents[5] had observed that salary is accrued where the employment services are rendered and accordingly, in the instant case salary for employment services rendered in the USA is not taxable in India.

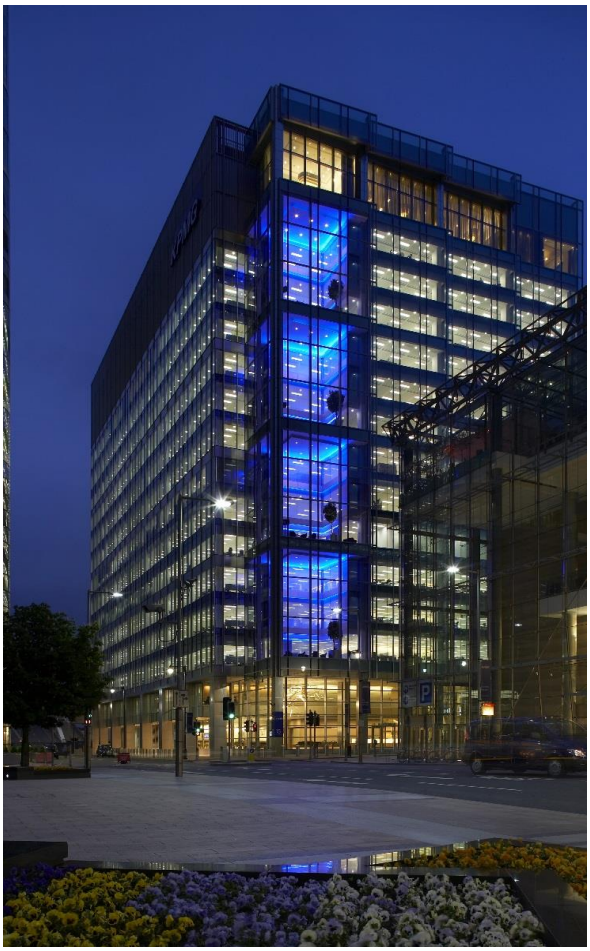
- Additionally, the Tribunal noted that furnishing of TRC is applicable only to cases where benefits under the tax treaty[6] are claimed.

- Further, the Tribunal, based on a judicial precedent[7] held that absence of TRC cannot be a ground for denying the benefit of a tax treaty. The Tribunal also stated that proof for the claim of exemption like details of stay abroad, overseas tax return, etc. would need to be submitted which the taxpayer has duly provided during the course of the assessment.

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, without a TRC. This view is also supported by other judicial precedents as discussed in this case.

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 5(2) read with Section 15 of the Act
[5] ITO v. Bholanath Pal [2012] 23 taxmann.com 177 (Bangalore)
[6] Section 90(1) of the Act
[7] Skaps Industries India Pvt Ltd v. ITO [2018] 94 taxmann.com 448 (Ahd)

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