आयकर अपीलीय अधिकरण, हैदराबाद पीठ में
IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES "B", HYDERABAD

BEFORE
SHRI RAMA KANTA PANDA, ACCOUNTANT MEMBER
&
SHRI K.NARASIMHA CHARY, JUDICIAL MEMBER

आ.अपी.सं / **ITA-IT No. 369/Hyd/2022**
(निर्धारण वर्ष / Assessment Year: 2019-20)

Prasanth Nandanuru, Hyderabad [PAN : ACQPN6612H]	Vs.	The Income Tax Officer (INT TAXN)-2, Hyderabad
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती द्वारा/Assessee by:	Shri Hiten Chande, AR
राजस्व द्वारा/Revenue by:	Shri Jeevan Lal Lavidiya, CIT-DR

सुनवाई की तारीख/Date of hearing:	13/02/2023
घोषणा की तारीख/Pronouncement on:	28/02/2023

आदेश / **ORDER**

PER K. NARASIMHA CHARY, JM:

Aggrieved by the order dated 17/06/2022, passed by the learned Income Tax Officer (Int Taxn)-2, Hyderabad ("Ld. AO") in the case of Prasanth Nandanuru ("the assessee") for the assessment year 2019-20, under section 143(3) r.w.s. 144C(13) of the Income Tax Act, 1961 (for short "the Act"), consequent to the directions of Hon'ble Dispute Resolution Panel, Bengaluru ("DRP"), assessee filed this appeal.

2. Assessee is an individual. He was an employee of Wells Fargo (EGS) India Pvt. Ltd ("Wells India") and was sent on short-term assignment to

Wells Fargo Bank N.A., USA (Wells USA) from 20/10/2017 and such short-term assignment continued in the 18/10/2018 and thereafter the assessee was directly employed by the Wells USA. During the assessment year 2019-20 he was absorbed in Wells USA w.e.f. 18/10/2018 the assessee was working in USA, physically present there and qualify to be a non-resident of India. During his short-term assignment to Wells USA, the assessee made on the payrolls of Wells India and his salary for the services rendered was credited to his Indian bank account by Wells India after deducting tax at source.

3. For the assessment year 2019-20 the assessee filed the return of income on 08/08/2019 declaring an income of Rs. 6,936/-. During the assessment year 2019-20 the assessee received a gross salary of Rs. 59,07,221/- from Wells India in respect of which the tax at source was deducted to the tune of Rs. 12,44,487/- under section 192(1) of the Act. On 18/10/2018 the employment of the assessee was terminated by Wells India and the terminal benefits were paid to him. Assessee claimed that he was part of it as a tax resident of USA and, therefore, eligible to avail the provisions of the India-US Double Taxation Avoidance Agreement (DTAA) to the extent it is beneficial to him as provided under section 90 of the Act.

4. Accordingly, at the time of filing of the Income Tax return, assessee claimed benefit under article 16(1) of DTAA and claimed that the income earned from services rendered in USA is only taxable in USA and not in India. On this premise, assessee had declared the total taxable income as Rs. 6, 936/-, after allowing the exemption under article 16(1) of DTAA, and claimed refund of Rs. 12,44,490/-.

5. Learned Assessing Officer, among other things, disallowed the exemption claimed by the assessee under article 16(1) of the DTAA and made an addition of Rs. 46,13,736/- on that score and passed the draft assessment order, holding that in as much as the assessee was under the payrolls of Wells India till his services were terminated here and he was

appointed by the Wells USA, his employment was exercised only in India, is not entitled to claim the benefit of article 16 (1) of the DTAA.

6. Assessee challenged the disallowance of his claim under the DTAA, before the Ld. Dispute Resolution Panel (DRP) stating that the salary income is not chargeable to tax in India under the act as well as by virtue of the provisions under Article 16(1) of the DTAA. Ld. DRP, however, brushed aside the contentions of the assessee and held that the provisions of Article 16(1) of the DTAA are not applicable as the salary income was earned by the assessee by exercising the employment in India and not in the USA since the assessee became the employee of Wells USA only w.e.f. 19/10/2018 under the provisions of section 5(2)(a) and section 5(2)(b) of the Act are applicable as the salary income has accrued in India and the same has been received in the Indian bank account of the assessee. Ld. DRP, however, directed the learned Assessing Officer to give credit for the taxes paid in USA. Learned Assessing Officer accordingly passed the final assessment order taxing the salary income of the assessee, but without giving credit for the taxes paid in the USA.

7. Assessee is therefore, before us in this appeal contending that the authorities below should have allowed the exemption claimed by the assessee under Article 16 (1) of the DTAA read with section 90 of the Act and should have held that the employment was exercised in USA where the services are rendered and also because during that period the assessee was qualify to be a non-resident of India. The counsel argued that the salary income pertaining to assignment/secondment was received for rendering the services outside India and, therefore, the salary income received by the assessee does not accrue or arise in India in view of the provisions under section 9(1)(ii) and section 15 of the Act. He further argued that as per the provisions of section 9(1)(ii) of the Act income which falls under the head “salaries” is considered to accrue or arise in India only if it is earned in India and explanation to Section 9(1)(ii) clarifies that the income under the head salaries is considered as in India only if the services are rendered in India. Basing on this he submits that inasmuch as the

services of the assessee were rendered outside India during the relevant period, it shall be deemed to have accrued or arising outside India. He further submits that under section 15(1)(a) of the Act in the salary from an employer to an employee, whether paid or not, alone is chargeable to tax in India. Since the provision of section 5 starts with the non obstante clause "subject to the provisions of the Act" to bring the salary income to tax, such a receipt must satisfy the requirement of section 9(1)(ii) of the Act and section 15(1)(a) of the Act, which provide that salary income is chargeable to tax in India only when the services are rendered in India and that the salary income is chargeable to tax on accrual basis which is evident from the words 'whether paid or not' employed in section 15(1)(a) of the Act.

8. He further argued that under Explanation 1 to section 5(2) income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is remitted into the Indian bank account of the assessee. Assessee placed reliance on many decisions including the decision in Authority for Advance Ruling, New Delhi (AAR) in the case of British Gas India (P) Ltd., In re (2006) 157 Taxman 225, which is applicable to the facts of the case on hand whereas other decisions are not.

9. Per contra, it is the submission of the learned DR that for all practical purposes, till he is absorbed as an employee of the foreign entity, till 18/10/2018, assessee was on the payrolls of the Indian entity, his salary was paid in India, there is no contract between the assessee and the foreign entity etc., and, therefore, the assessee is nothing but the extended arm of the Indian entity to discharge its obligation under a contract between the assessee and its foreign associated enterprise. According to the learned DR, the assessee, though worked in USA, is none but the agent of the Indian entity. On this premise, learned DR submitted that the case of the assessee is covered by section 5(2)(a) of the Act but not by 5(2)(b) of the Act. In respect of Article 16(1) of DTAA, learned DR submitted that such an article is not applicable to the case of the assessee,

because, the assessee was exercising the employment pursuant to the contract with the Indian entity, it shall be construed that the employment is exercised only in India where the seat of Indian entity exists. According to the learned DR, assessee is governed by the expression 'unless the employment is exercised in the other contracting state' in which case the remuneration derived by the assessee therefrom has to be taxed in the other country, namely, India.

10. We have gone through the record in the light of the submissions made on either side. During the relevant year, assessee is a non-resident of India and was working at USA serving a foreign entity, on a short-term assignment. During the financial year 2018-19 till 10/08/2018, the salary of the assessee was paid by the Indian entity and was remitted to the assessee's Indian bank account. Assessee also received some allowances in USA and there is no dispute about such allowances and the Revenue never contend that such allowances are chargeable to tax in India. Only dispute is in respect of the salary that is paid by the Indian entity and remitted to the Indian bank account of the assessee after deducting the TDS. Assessee contends that the employment is exercised where the services are rendered and at such place only the salary accrues, and, therefore, his salary had accrued in USA for the relevant period. His case is that 5(2)(b) of the Act his salary would be chargeable to tax in India only if it is accrued in India, but since his salary had accrued in USA and since he is an NRI under section 5(2)(b) of the Act, the same cannot be brought to tax in India; whereas the Revenue contends that his salary was actually received in India and, therefore, under section 5(2)(a) of the Act, the same is chargeable in India.

11. For the sake of completeness, we deem it necessary to refer to the relevant portions of section 5 of the Act, Article 16(1) of the DTAA and the decision of the Hon'ble AAR in the case British Gas India (P) Ltd., In re (supra).

Section 5 of the Act, -

5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

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(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

Article 16(1) of DTAA,-

ARTICLE 16

DEPENDENT PERSONAL SERVICES

1. *Subject to the provisions of Articles 17 (Directors' Fees), 18 (Income Earned by Entertainers and Athletes), 19 (Remuneration and Pensions in respect of Government Service), 20 (Private Pensions, Annuities, Alimony and Child Support), 21 (Payments received by Students and Apprentices) and 22 (Payments received by Professors, Teachers and Research Scholars), salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.*

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12. In the case of British Gas India (P) Ltd., In re (supra), the company sent two of its employees to its group company in UK on deputation, during the period of deputation, such employees continued to be on the payrolls of the Indian entity, and regularly received salary in India. The Indian entity sought advance ruling on the question as to whether the salary received in India by the two employees is taxable in India or not. Apart from this, ruling in respect of the TDS was also sought, but it is irrelevant for our purpose. We shall cull out the ratio in respect of the chargeability of salary received in India in respect of the services rendered outside India.

13. It was contended by the Indian entity that section 4 of the Act created a charge on the total income subject to the provisions of the Act that section 5 specified the scope of total income which was also subject to the provisions of the Act; that section 90, under which the Central Government entered into agreement with the Government of a foreign country, referred to granting of relief in respect of income-tax chargeable under the Act; that since section 90 itself provided for relief in respect of tax chargeable under the Act, the provisions of sections 4 and 5 would be subject to the terms of INDO-UK DTAA. Reliance was placed on the cases of Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 (SC) and CIT v. P.V.A.L. Kulandagan Chettiar [2004] 267 ITR 654 (SC) to argue that tax could be deducted at source only when income was chargeable to tax in India; that if the income was not chargeable in India, the provisions of deduction of tax at source would not apply. According to them, Chapter XVII dealing with deduction of tax at source, provided for 'Collection and Recovery of Tax'. Chargeability to tax was a condition precedent and where the tax itself was not chargeable, there was no question of collection and recovery thereof. For this purpose, reliance is placed on CIT v. Cooper Engg. Ltd. [1968] 68 ITR 457 (Bom.) and Al Nisr PublishingIn re [1999] 239 ITR 879 (AAR). It was further contended that under the provisions of article 4(1) of the INDO-UK DTAA between India and the U.K., the employees were tax residents of the U.K., Article 16(1) of

the INDO-UK DTAA provided that salary derived by a resident in the U.K. in respect of employment would be taxed in the U.K., unless the employment was exercised in India, and this gave U.K. the right to tax the employees' salary received in India.

14. on behalf of the Revenue it was contended that the mandate of the provisions of law as contained in sub section (2) of section 5 was very clear that any income received in India was subject of taxation laws of this country, and, therefore, even if the employees were non-resident in a particular year, the salary income received by them in India would be governed by the Act. It was also argued that both the employees were posted by the Indian entity to its group company in the U.K. on deputation basis, with salaries being paid by the Indian company in India, but, since both the employees continued to be on the payroll of the Indian company in India even when they were posted in the U.K, it could not be said that employment was exercised on behalf of the U.K. company.

15. As regards article 16 of INDO-UK DTAA, Revenue argued that the words 'employment' and 'exercised' were important. Both the employees were in the regular employment with Indian company although on deputation to a Contracting State. Salaries were being paid in India. The terms of employment were governed by laws of India. The employees had simply been leased to the U.K. associate company. They were not on regular payroll of the overseas company. On this premise, Revenue argued before the Hon'ble AAR that in this set of circumstances, it could not be said that employment was on behalf of the foreign company. These employees rather performed special duties at the behest of their Indian employers although at a distant destination. Therefore, the provisions of article 16 of INDO-UK DTAA do not help the Indian entity insofar as taxability of salary paid in India was concerned.

16. The facts of the case on hand are strikingly similar to the facts of the case in British Gas India (P) Ltd., In re (supra), and, therefore, the ratio of that decision is squarely appliable in this case also. Furthermore, the

decision of the Hon'ble AAR in British Gas India (P) Ltd., In re (supra), is not disturbed as on the date. In that decision, the Hon'ble AAR clearly held that in view of the fact that the salary was received in India by the employees of the Indian entity seconded to the foreign entity are no doubt taxable in India under the provisions of section 5(2)(a) of the Act. Respectfully following the same, we hold that the salary of the assessee in this case is covered by section 5(2)(a) of the Act and otherwise, taxable in India.

17. Now turning to the Indo-US DTAA, Article 4(1) of the DTAA, under this article, the term 'resident of contracting state' includes a resident, and, Article 16(1) of the DTAA mandates that in respect of the salaries derived by a resident of USA in respect of an employment shall be payable only in USA. The assessee, therefore, because of residence in USA, is liable to income tax in USA in respect of the salary derived by him because of his employment in USA. As matter of fact, the liability of the assessee to pay taxes in USA is not in dispute. On this aspect, the relevant observations of the Hon'ble AAR in British Gas India (P) Ltd., In re (supra), needs to be referred more particularly with reference to the impact of section 90 on this aspect. It reads thus,-

> *10. Section 90 of the Act empowers the Central Government to enter into agreements with foreign Governments for granting tax relief and avoidance of double taxation. Sub-section (2) of this section states that in relation to a person covered by such an agreement, the provisions of the Act shall apply to the extent they are more beneficial to that person. In Union of India v. Azadi Bachao Andolan [2003] 263 ITR 706 and CIT v. P.V.A.L. Kulandagan Chettiar [2004] 267 ITR 654, the Supreme Court has held that the provisions of an agreement notified under section 90 would override the provisions of the Act to the extent of inconsistency between the two. Since sections 4 and 5 are subject to other provisions of the Act, including section 90, the provisions of such an agreement would prevail over the provisions relating to chargeability to income-tax and ascertainment of total income. In view of these decisions, there is no doubt that it is open to the applicant to take recourse to article 16 of the DTAA, which would prevail over the provision of section 5(2)(a) of the Act. It is, in fact, seen from the pleadings of the*

applicant, that in his tax return filed in the U.K. for the financial year 2003-04, Mr. Nipun Pradhan has also included the salary received by him during this period in India. Thus, he has offered the Indian salary also for tax purpose in the U.K.

… … …
… … …

13. In the light of the above discussion, we determine as follows :

(i) The salary paid by the applicant to Mr. Manish Gupta shall not be taxable in India, if the same has been offered for tax in the U.K. in pursuance of the DTAA.

… … …
… … …

18. Respectfully following the decision of the Hon'ble AAR in British Gas India (P) Ltd., In re (supra), we hold that though the provision under section 5(2)(a) of the Act fastens tax liability on the assessee, but, because of the overriding effect of section 90 of the Act, article 16 of the DTAA would prevail over the 5(2)(a) of the Act and consequently, the salary received by the assessee in India for the services rendered in USA are not liable to tax in India. Consequently, we direct the learned Assessing Officer to delete the addition made.

19. In the result, appeal of the assessee is allowed.

Order pronounced in the open court on this the 28th day of February, 2023.

Sd/-	Sd/-
(RAMA KANTA PANDA)	**(K. NARASIMHA CHARY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad,
Dated: 28/02/2023

TNMM

Copy forwarded to:

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2. The Income Tax Officer (INT TAXN)-2, Hyderabad.
3. The Dispute Resolution Panel (DRP), Bengaluru.
4. The Director of Income Tax (IT & TP), Hyderabad.
5. The Addl. Commissioner of Income Tax (Transfer Pricing), Hyderabad.
6. DR, ITAT, Hyderabad.
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