आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्री मनु कुमार गिरि, न्यायिक सदस्य एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI MANU KUMAR GIRI, JUDICIAL MEMBER AND
SHRI S. R. RAGHUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./**ITA No.:281/Chny/2025**
निर्धारण वर्ष / Assessment Year: **2022-23**

Sivakarthick Raman, 5/200, 2nd Street, Alagupillai Nagar, T.Pudukudi, Achampathu, Madurai – 625 019.	vs.	**The Assistant Commissioner of Income Tax**, International Taxation Circle, Madurai.
[PAN: AJNPR-3214-R] (अपीलार्थी/Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से/Appellant by : Ms. Preeti Goel, Advocate
प्रत्यर्थी की ओर से/Respondent by : Ms. Anitha, Addl. C.I.T.

सुनवाई की तारीख/Date of Hearing : 21.04.2025
घोषणा की तारीख/Date of Pronouncement : 07.07.2025

आदेश /O R D E R

PER S. R. RAGHUNATHA, AM:

This appeal by the assessee is filed against the order of the Assistant Commissioner of Income Tax, International Taxation Circle, Madurai for the assessment year 2022-23, vide order dated 29.03.2024.

2. The assessee has raised the following grounds of appeal:-

1. The learned AO has in pursuance of the Directions of the Hon'ble DRP erred in the facts and circumstances of the case and in law in issuing the impugned order dated 06 January 2025 issued under Section 143(3) read with Section 144C(13) of the Act against the Appellant for AY 2022-23 disallowing the exemption of INR 1,53,65,359 claimed under Article 15(1) of India-China Double Taxation Avoidance Agreement ('DTAA') read with Section 90 of the Act in respect of the salary income received in India for services rendered in China to BMW Brilliance Automotive Limited, China (BMW China) in ignorance of the facts, statutory provisions, documentary evidence and judicial precedents cited.

2. The learned AO has in pursuance of the Directions of the Hon'ble DRP erred in the facts and circumstances of the case and in law in disallowing the exemption claimed under Article 15(1) of the India-China DTAA read with Section 90 of the Act on the following incorrect premises:

(i) There was an employer-employee relationship between the Appellant and BMW India Private Limited (BMW India) even when he was working in China (Para 14(a), 14(b) and 14(c) of impugned order)

(ii) Salary is chargeable as per Section 15 of the Act [Para 14(d) of impugned order]

(iii) Salary received in India from BMW India is taxable in India under Section 5(2)(a) of the Act (Para 14(e) of impugned order]

(iv) As the Appellant is Resident in China and Non-Resident in India, he is not eligible to claim benefit of Article 15 of the India-China DTAA on combined reading of Article 15 and 23 of DTAA and DTAA provisions have been incorrectly applied [Para 14(f) of impugned order]

(v) Article 15(2)(b) of the DTAA does not apply as the employer BMW India is Resident in India and hence salary received by the Appellant is taxable in India. [Para 14(g) and 15 of impugned order]

(vi) It has been incorrectly stated that the Appellant has not provided a copy of the Secondment Agreement between BMW China and BMW India and has also not provided a copy of the Employment Contract of the Appellant with BMW China (Para 16 of impugned order)

(vii) The Learned AO has incorrectly held that cases relied upon are distinguishable in ignorance of the pari-materia facts of the case (Para 13 of impugned order)

(viii) The Learned DRP has incorrectly relied upon the decision of the Hon'ble ITAT, Chennai in the case of Dennis Rozaria to hold that as the Appellant was Non-Resident in India he was not eligible to claim the benefit of Article 15(1) of India-China DTAA (Para 18 of the impugned order)

(ix) The Learned DRP has incorrectly held that as the Salary was received in India from BMW India, the employer is BMW India (Para 17 of the impugned order)

(x) The Learned DRP has incorrectly held that Assessee has not demonstrated that any tax has been paid voluntarily or otherwise to the Chinese Government. (Para 6.6.3)

(xi) The Learned DRP and AO have incorrectly relied upon the Hon'ble ITAT, Chennai erder for AY 2019-20 as the same has been recalled being ex-parte and without due opportunity of hearing to the Appellant.

3. *The learned DRP has in the facts and circumstances of the case and in law erred in holding that the tax residency certificate was not filed by the Appellant while ignoring that the China Tax Return was sufficient evidence of Residency in China.*

4. *Without prejudice, the learned AO has in the facts and circumstances of the case and in law erred in ignoring that salary received in India by the Appellant is not taxable in India under Section 5(2) read with Section 9(1)(ii) and Section 15(1)(a) of the Act as the services have been rendered to BMW China in China by the Appellant.*

5. *The learned AO has in the facts and circumstances of the case and in law erred in levying interest under Section 234B and Section 234D of the Act amounting to INR 2,07,030.*

Any consequential relief, to which the Appellant may be entitled under the law in pursuance of the aforesaid grounds of appeal, or otherwise, may be thus granted. The Appellant may kindly be given an opportunity of being heard as per the principles of natural justice.

All of the above grounds of appeal are without prejudice and notwithstanding each other.

The Appellant craves leave to add, alter, omit or substitute any or all of the above grounds of appeal, at any time before or at the time of hearing of the appeal, to enable the Hon'ble ITAT to decide the appeal according to law.

3. The brief facts of the case are that the assessee, an employee of BMW India Private Limited ('BMW India') was on an assignment/secondment to BMW Brilliance Automotive Limited ('BMW China') during the FY 2021-22 relevant to the AY 2022-23 and was rendering services/exercising employment with BMW China in China during this period. While on an International assignment with BMW China, the assessee was based in China and was physically present in China and was rendering services in China during the FY 2021-22. The assessee was in India for less than 60 days during the FY 2021-22 and qualified as a Non-Resident in India as per Explanation (b) to Section 6(1) of the Act. The Appellant was present in India for "Nil" days during the FY 2021-22. The assessee qualified as Tax Resident of China for the Calendar Year ('CY') 2021 and 2022 as per Article 4(1) of India- China Double Taxation Avoidance Agreement ('DTAA') extracted as under:

"For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that Contracting State, is liable to tax therein by reason of his domicile, residence, place of head office or any other criterion of a similar nature."

4. As the assessee qualified as Resident of China under the domestic tax law of China for the CY 2021 and 2022 and Non-Resident of India under the domestic tax law of India, he qualified as a Resident of China under Article 4(1) of the DTAA between India and China r.w.s 90 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the period 01.04.2021 to 31.03.2022 of FY 2021-22. During the period of assignment of assessee to BMW China, assessee's payroll remained in India for administrative convenience and hence taxes were duly withheld at source by BMW India in respect of salary received by the assessee in India for employment exercised/services rendered in China as evidenced by the revised Form 16 and Updated Form 26AS for FY 2021-22.

5. As the assessee qualified as a Resident of China under the India-China DTAA for the 01.04.2021 to 31.03.2022 of FY 2021-22 and was rendering services/exercised employment in China during the concerned period, he was eligible to claim exemption of his salary income received in India, as per Article 15(1) 'Dependent Personal Services' of the India-China DTAA, r.w.s. 90 of the Act.

6. As per Article 15(1) of India-China DTAA (Dependent Personal Services)-

"…*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 Contracting State."*

Accordingly, the following conditions are required to be satisfied to claim exemption under Article 15(1) of the India-China DTAA read with Section 90 of the Act:

- The person should be a Resident of China; and
- The salary and other remuneration should be earned in respect of employment exercised in China.

7. During the FY 2021-22, the assessee duly qualified as a Non-Resident of India and as a Tax Resident of China for the Calendar Year 2021 and 2022 (i.e., period covering 01 April 2021 till 31 March 2022) and was eligible to claim the benefit of Article 15(1) of the India-China DTAA as he exercised employment/rendered services with BMW China in China.

8. Further, the assessee has also been duly taxed in China in respect of salary and benefits paid to him in India for the period 01.04.2021 to 31.03.2022 of Rs.1,53,65,359/- and related to employment exercised/services rendered in China to BMW China.

9. Since the assessee qualified as a Non-resident of India during FY 2021-22 and a Resident of China for the Calendar year 2021 and exercised his employment/rendered services in China with BMW China, the assessee claimed exemption of Rs.1,53,65,359/- with respect to salary received in India for services rendered in China, under Article 15(1) of the India- China DTAA r.w.s. 90 of the Act and accordingly filed his return of income for the A.Y. 2022-23 on 18.07.2022 and claimed a refund of Rs.52,22,590/-.

10. However, pursuant to scrutiny proceedings, the AO has in his Final

assessment order and the Dispute Resolution Panel ('DRP') in the directions issued, disallowed the exemption claimed and hence the assessee preferred present appeal before us.

11. The ld.AR for the assessee submitted that the detailed facts are summarised in Annexure to Form 35A submitted before the Dispute Resolution Panel at Pages 271 to 303 of the Paper book filed.

Grounds 1, 2 and 3

12. The ld.AR submitted that the AO has in pursuance of the Directions of the DRP erred in the facts and circumstances of the case and in law in issuing the impugned order dated 06.01.2025 passed u/s.143(3) r.w.s. 144C(13) of the Act against the assessee for AY 2022-23 disallowing the exemption of Rs.1,53,65,359/- claimed under Article 15(1) of India-China Double Taxation Avoidance Agreement ('DTAA') r.w.s. 90 of the Act in respect of the salary income received in India for services rendered in China to BMW Brilliance Automotive Limited, China (BMW China) in ignorance of the facts, statutory provisions, documentary evidence and judicial precedents cited. The learned AO has in pursuance of the Directions of the DRP erred in the facts and circumstances of the case and in law in disallowing the exemption claimed under Article 15(1) of the India-China DTAA r.w.s. 90 of the Act on the following incorrect premises:

a) There was an employer-employee relationship between the Appellant and BMW India Private Limited (BMW India) even when he was working in China. This is contrary to evidence placed on record i.e. Employment Agreement with BMW China, and Inter-company cross charge Agreement

between BMW India and BMV China evidencing that the legal and economic employer was BMW China.

b) Salary is chargeable as per Section 15 of the Act and by virtue of its receipt in India, the same is chargeable to tax in India as per Section 5(2)(a) of the Act. This is contrary to statutory provisions and judicial precedents.

c) As the assessee is Resident in China and Non-Resident in India, he is not eligible to claim benefit of Article 15 of India-China DTAA on combined reading of Article 15 and 23 of DTAA and DTAA provisions have been incorrectly applied. This is contrary to statutory provisions and judicial precedents.

d) Article 15(2)(b) of the DTAA does not apply as the employer BMW India is Resident in India and hence salary received by the assessee is taxable in India.

e) It has been incorrectly stated that the assessee has not provided a copy of the Secondment Agreement between BMW China and BMW India and has also not provided a copy of the Employment Contract of the assessee with BMW China.

f) The AO has incorrectly held that cases relied upon are distinguishable in ignorance of the pari-materia facts of the case.

g) The ld. DRP has incorrectly relied upon the decision of the Chennai Tribunal in the case of Dennis Rozaria to hold that as the Appellant was Non-Resident in India he was not eligible to claim the benefit of Article 15(1) of India-China DTAA, while ignoring the decision of the Chennai Tribunal in the case of Paul Xavier Samy (ITA No.2233/CHNY/2018) and

several recent judicial precedents issued by the Jurisdictional Tribunal on identical issue.

h) The Learned DRP has incorrectly held that as the Salary was received in India from BMW India, the employer is BMW India.

i) The Learned DRP has incorrectly held that Assessee has not demonstrated that any tax has been paid voluntarily or otherwise to the Chinese Government. This is contrary to evidence filed i.e. China Tax Returns for CY 2021 and 2022 evidencing payment of taxes in China.

j) The Learned DRP and AO have incorrectly relied upon the Chennai Tribunal order for AY 2019-20 as the same has been recalled being ex-parte and without due opportunity of hearing to the assessee.

k) The learned DRP has in the facts and circumstances of the case and in law erred in holding that the tax residency certificate was not filed by the assessee while ignoring that the China Tax Return was sufficient evidence of Residency in China

Ground 4

13. Without prejudice, the ld.AR submitted that the AO has in the facts and circumstances of the case and in law erred in ignoring that salary received in India by the assessee is not taxable in India under Section 5(2) r.w.s 9(1)(ii) and Section 15(1)(a) of the Act as the services have been rendered to BMW China in China by the assessee.

14. The ld.AR further submitted that on his overseas assignment with BMW China, the assessee continued to receive salary and benefits in India as his payroll remained in India for administrative convenience during his assignment to China in

addition to certain benefits paid in China. The assessee has claimed exemption of income, amounting to Rs.1,53,65,359/- being salary received in India for the period 01.04.2021 till 31.03.2022 for services rendered/employment exercised in China with BMV China as he qualified as Resident of China during this period. The exemption has been claimed under Article 15(1) of the India-China DTAA r.w.s. 90 of the Act.

15. The ld.AR submitted the following documentary evidence filed in support of the exemption claimed has been ignored by the AO and ld.DRP:

(a) Evidence in support of employment exercised/services rendered in China with BMW China:

Document	**Relevant terms**	**Paper-book**
Employment Contract issued by BMW China to the assessee	(a). *During the employment period with BBA* (BMW China) *under the Contract, the Associate owes his/her work performance/work output to BBA under whose direction he/she will operate. The Associate is to report his/her work results to BBA. The directive authority regarding time, place and type of work also lies with BBA. Profits generated from the Associate's work belong to BBA.* (Reference drawn from 1.1 (b) on Page 9 of the Paper-book). (b). *BBA is the legal and economic employer of the Associate. As such, BBA bears all remuneration of the Associate.* (Reference drawn from 6.1 on Page 13 of the Paper-book) (c). *Considering the economic ties of the Associate, such as his/her bank accounts, some household spending and social security contributions, remains in the country where Affiliate* (BMW India) *is located ('Home Country'), the Associate prefers that part of his remunerations paid in the currency of the Home Country directly to his/her bank accounts in his/her Home Country. Affiliate will act as 'technical' paying office to the Associate or related third parties in the Home Country.*	Pages 8 to 24

	(Reference drawn from 6.3 on Page 14 of the Paper book)	
Inter-company cross charge Agreement between BMW India and BMW China	(a). *Each Transferred Expat enters into a labour contract with Party B* (BMW China) *according to PRC Labor Law and Party B provides a job card for him/her. The Transferred Expats are released from working for Party A* (BMW India) *during the employment period with Party B.* (Reference drawn from (2) on Page 25 of the Paper book) (b). *Party B is the legal and economic employer of the Transferred Expats. As such, Party B bears all personnel costs and expenses ("Costs").* (Reference drawn from (3) Page 26 of the Paper book) (c). *Party A acts as a "technical" paying office to the Transferred Expats or related third parties in the Home Country and requests Party B to reimburse the Transferred Expats' related Costs such as the salary, social insurance paid in Home Country and some other benefits or costs ("Reimbursement").* (Reference drawn from (5) on Page 26 of the Paper book) (d). *Party B agrees to pay back the Reimbursement to Party A according to this Agreement.* (Reference drawn from (6) on Page 26 of the Paper book)	Pages 25 to 41
Cross-charge invoices issued by BMW India to BMW China wherein the gross salary of the Appellant of INR 1,53,65,359 (equivalent to USD 2,16,571.28) has been cross charged to BMW China. *The Cross Charge*		Pages 42 to 65 Revised Form 16: Page 219 to 225 Updated Form

invoices duly reconcile with the Salary as per *revised Form 16 /Updated Form 26AS.*		26AS: Page 226 to 230 Reconciliation: Page: 66
China Tax returns for CY 2021 and 2022 evidencing payment of taxes in China in respect of employment exercised in China with BMW China.	*Employer (BMW Brilliance Automotive Limited) (Refer Pages 67 to 87)* *Details of taxes paid (Pages 73 and 81)* (a). *Total taxable income in Calendar Year 2021 of CNY 18,94,790.13 (approximately INR 1,89,47,901.3)* (Reference drawn from Page 72 of the Paper book) (b). *Total pre-paid tax in China in Calendar Year 2021 of CNY 6,70,735.56 (approximately INR 67,07,355.6)* (Reference drawn from Page 73 of the Paper book) (c). *Total taxable income in Calendar Year 2022 of CNY 25,24,416.16 (approximately INR 2,52,44,161.6)* (Reference drawn from Page 80 of the Paper book) *(d). Total pre-paid tax in China in Calendar Year 2022 of CNY 9,54,067.27 (approximately INR 95,40,672.7)* (Reference drawn from Page 81 of the Paper book)	Pages 67 to 87

(b) Evidence in support of Residency in China/ Non-Resident in India

Document	**Relevant terms**	**Paper-book**
Passport and Travel Calendar evidencing Non-Resident Status in India	*Not present in India as per the passport and Travel Calendar.*	Pages 103 to 172
China Tax Returns evidencing Residency in China	*Number of days stayed in China during CY 2021 and CY 2022 for 365 days and 307 days respectively (Pages 73 and 81 respectively)* *Further, the following judicial precedents support the sufficiency of alternate evidence furnished in support of Residency in China in absence of the TRC:*	Pages 67 to 87

	(i). Bangalore ITAT in the case of Maya C Nair Vs. Income Tax Officer [ITA No.2407/Bang/2018] pronounced on 31 October 2018 has held as follows: *"...Further, in the decision cited by the learned Departmental Representative (supra), the Tribunal had held that absence of TRC cannot be a ground for denying the benefit of DTAA. It has only held that the assessee should furnish evidence for the claim of exemption. In the case on hand, the assessee has furnished evidence of her stay abroad in the year under consideration before the Assessing Officer and as the salary for services rendered did not accrue in India for that period of stay outside India, that salary income is not taxable in India."* (ii). ITAT Hyderabad in the case of Sreenivasa Cheemalamarri [I.T.A.No.1463/Hyd/2018] held that *if the assessee provides sufficient circumstantial evidence in such cases, the requirement of Section 90(4) ought to be relaxed and where there is a conflict between the Treaty and the Act, the Treaty shall overrule the Act.* (iii). Ahmedabad Bench of the Tribunal in the case of Skaps Industries India (P.) Ltd vs. ITO, International Taxation, Ahmedabad (ITA Nos. 478 and 479/Ahd/2018) has held that *"The failure to submit a 'Tax Residency Certificate' (TRC) as required by s.90(4) is not a bar to the grant of benefits under the DTAA. However, the assessee is required to produce reasonable evidence of the entitlement of the foreign entity to benefits under the DTAA".* (iv). Delhi Tribunal in the case of Yogesh Kotiyal vide decision dated 12 April 2024 in ITA 391/Del/2023 (v). Arindam Dasgupta v. ACIT (International Taxation) [2024] 159 taxmann.com 712 (Kolkata) (vi). Vamsee Krishna Kundurthi v. ITO (International Taxation)-1, Hyderabad [2021] 128 Taxmann.com 368 (Hyderabad) (vii). Hon'ble P & H High Court in the case of Secro BPO (P.) Ltd vs. Authority for Advance Ruling	

(c) The AO has failed to appreciate the provisions of India-China DTAA under Article 15(1) of India-China DTAA and has incorrectly relied on Article 23 to deny DTAA benefits to the Appellant.

(i). Article 15(1) is to be read independent of Article 23.

(ii). Article 23 is applicable when an individual qualifies as a Resident of India and global income is taxable in India including salary income or benefits received in China. India would then allow credit of the taxes paid in the China against the India taxes payable, in respect of the doubly taxed income.

(iii). However, in the facts of the case, the assessee was claiming refund of taxes deducted in India under the Act and not of any taxes paid in China under Article 23 of India- China DTAA.

(iv). Article 1 of the India-China DTAA clearly provides that the benefits of the DTAA shall be eligible to a person who is a Resident of one or both of the Contracting States and since the Appellant in this case was a Resident of China, he will be eligible for the DTAA benefits of the India-China DTAA.

(v). Further since, the assessee does not qualify to be a Resident of India and his global income is not subject to tax in India, hence, Article 23 of India-China DTAA is not applicable to him.

(vi). The AO has incorrectly ignored the facts of the recent Chennai Tribunal decision dated 28.02.2020, in the case of Paul Xavier Samy which is squarely applicable in the facts of the present case holding that the salary income received in India for services rendered outside India is non-taxable in India both under the Act and the relevant DTAA. It has overruled the earlier Chennai ITAT decisions cited by the Revenue i.e. Swaminathan Ravichandran (which relied upon Dennis Rozaria) and hence as per the rule of bindingness of judicial precedents, should be duly followed by the Income-tax Authorities.

(vii). Further, Para 6 of the ruling in Paul Xavier Samy clearly states that the Tribunal had only disallowed the treaty relief on ground that the Assessee was claiming

foreign tax credit relief for taxes paid on doubly taxed income, which is applicable in the case of Resident of India, Article 23 allows exemption only to Resident Indian. Accordingly, the exemption under Dependent Personal Services Clause of India-Australia DTAA was allowed for the Assessee qualifying as Non-Resident of India and Resident of Australia in light of provisions of Article 1, 4 and Article 15(1) of the said DTAA.

16. Further, the ld.AR relied on the Judicial precedents issued by Jurisdictional Chennai ITAT covering the issue in favour of the assessee:

A) Hon'ble Chennai Tribunal Bench D decision in own case of the Appellant for AY 2020-21 in the case of Nanthakumar Murugesan and Sivakarthick Raman [2024] 165 taxmann.com 304 (Chennai - Trib.) in decision dated 10 June 2024 in Para 8 enclosed as Annexure A held as follows:

"After deliberating upon the paper book which includes China tax return, Copy of passport showing total 3 days stay in India, Labor contract with 'BBA', and submissions dated 10-11-2021 filed before AO, it is concluded that there is substance in the arguments of the assessee that assessee being tax resident of China, the salary income was taxable in China only. In fact, salary to the tune of Rs.1,22,09,830/- received for the employment exercised in China is taxable in China and in the light of Article 15(1) of the India-China DTAA it is exempt income."

It is pertinent to highlight that Miscellaneous Application filed by the Revenue against the above favourable order for AY 2020-21 stands dismissed by the Chennai Tribunal on 27.03.2025.

B) The Chennai Tribunal's Bench 'A' judgment in the case of Mani Rajesh [2023] 157 taxmann.com 604 (Chennai – Trib) in decision dated 6 November 2023 in Para 9 enclosed as Annexure A held as follows:

"……salary income as accrued to the assessee for work performed in a foreign jurisdiction would not be taxable in India whereas the salary received for work performed in India would be taxable in India. The benefit of DTAA would be available to the assessee as per the decision of coordinate bench of Chennai Tribunal in Shri Paul Xavier Antony Samy v. ITO (ITA No.2233/Chny/2018 dated 28.02.2020) wherein it was held by the bench that the provisions of Sec. 5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec. 15(a). Even as per the provisions of Sec. 9(1)(ii), salary income could be deemed to accrue or arise in India only if it is earned in India in respect of services rendered in India. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence, treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia."

C) The Chennai Tribunal's Bench 'A' judgment in the case of Ramesh Kumar AE v. ITO, ITA IT/TP 51/ Chny/2018) in decision dated 11 August 2023 in Para 4 enclosed as Annexure B held as follows:

"In the above decision, we have held that salary income as accrued to the assessee for work performed in a foreign jurisdiction would not be taxable in India whereas the salary received for work performed in India would be taxable in India. The benefit of DTAA would be available to the assessee as per the decision of coordinate bench of Chennai Tribunal in Shri Paul Xavier Antonysamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020) wherein it was held by the bench that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), salary income could be deemed to accrue or arise in India only if it is earned in India in respect 7 of services rendered in India. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016) was held to be factually distinguishable.

5. We find that similar fact exists before us in the present appeal. The proportionate salary for services rendered in India has already been offered to tax in India whereas the balance salary has been offered to tax in China. The salary reconciliation statement has been placed by Ld. AR on record. The assessee has not claimed any foreign tax credit in any of the jurisdiction. The China tax has been paid by the foreign entity i.e., M/s Ford Motor (China) Co. Ltd. and the assessee has offered salary income on gross basis.

……In the result, the appeal of the assessee is allowed in terms of our above order".

17. Further, the ld. AR submitted that the Organization for Economic Cooperation and Development ('OECD') Model Convention on Article 15 - the employment is exercised at the place where the employee is physically present while performing the activities for which the employment income is paid.

18. Klaus Vogel in his commentary on Article in the treaties on Dependent Personal services i.e. Article 15(1), 16(1) has said that

> *"As a rule, the place where the employment is exercised is the place where the employee is personally present for purpose of exercising his employment."*

19. The ld.AR also relied on the following judicial precedents issued by other Tribunals covering the issue in favour of the assessee:

Hon'ble Ahmedabad Tribunal has held in the case of Sunil Chitranjan Muncif (2013 58 SOT 356)

> *"After hearing both the parties and perusing the record, we find that there is no dispute about the fact that assessee is a NRI and the* ***salary income received by him in India for employment exercised in U.K. has been offered by him for taxation in U.K in pursuance of Article 16 of DTAA with U.K.*** *On these facts Ld. CIT(A) by following the advance ruling in the case of British Gas India (P.) Ltd. In re [2006] 287 ITR 462/157 Taxman 225 (AAR – New Delhi) has rightly held that the salary received by the assessee was not taxable in India in pursuance of DTAA between India and U.K. therefore the order passed by him is hereby upheld."*

The Hyderabad Tribunal has held as follows vide its recent decision dated March 5, 2020 in Bhairaiah Gouryshetty v. Income-tax Officer (ITA 1464/Hyd/2018) and Sreenivasa Reddy Cheemalamarri v. Income-tax Officer, International Taxation – 1, Hyderabad (ITA 1463/ Hyd/2018) that

> *"From the facts of the case it is apparent that during the previous years relevant to AY 2014-15, the assessee qualifies as a non-resident in India and as a tax resident in Austria. The salary and allowances are earned by the assessee in respect of employment rendered in Austria due to his foreign assignment. Hence, the first two conditions enumerated under Article 15(1) of the India-Austria DTAA stands satisfied. Therefore, the assessee's claim of exemption in regard to his salary income as per*

the provisions of Article 15(1) of the India-Austria DTAA in the return of income filed by him is appropriate."

The Jaipur Tribunal's decision in case of Neeraj Badaya (ITA No.308/ Jaipur/ 2014) on the applicability of Article 16(1) of India-USA DTAA held as follows:

"It has not been disputed that the services in question were rendered by the assessee in US and taxed in the USA, which is evident from the relevant record filed on the paper book. The applicability of Article 16(1) of Indo-USA DTAA depends on the country where services are rendered which in this case is undisputedly USA. The application of Article 16(1) of Indo-USA DTAA cannot be denied to assessee merely because the salary check was paid by an Indian entity and the undisputed fact that no service was rendered by assessee for the impugned period in India."

The Delhi Tribunal in ITO v. Arjun Bhowmik (ITA 3484/Del/2012) held that

"The assessee qualified as a Non-Resident and was an employee of KJS India and was seconded to Kraft Foods Philippines. The salary received by him through KJS India for employment exercised in Philippines was not taxable in India due to applicability of DTAA."

In the case of British Gas India(P) Ltd., In Re, [2006] 157 Taxmann 225 (AAR – New Delhi) pronounced by Authority for Advance Rulings, New Delhi, it was held as under:

"…Because of their residence in U.K., 'N' and 'M' are liable to pay income-tax in that country. These two persons are presently exercising their employment in the U.K. Therefore, the provisions of clause (1) of article 16 of the DTAA would be attracted in their case. Since they are drawing their salary in respect of employment being exercised in the U.K., they shall be taxable in that country."

20. The ld.AR further submitted that the salary received by the assessee in India is exempt under Section 5(2) read with Section 9(1)(ii) of the Act as the same does not accrue or arise to him in India as the services have been rendered outside India. The Section 5(2) of the Act lays down the scope of total income of a NR subject to tax in India.

"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."

21. Based on the above, the income of an individual who qualifies as a NR in India is taxable in India only to the extent it is accrued, deemed to accrue, received or deemed to be received in India.

22. The expression "subject to" used in the opening para of the sub-section (2) indicates that the provisions of Section 5(2) of the Act are subject to other provisions of the Act and would have an overriding effect. If the charging provisions of the Act do not consider such receipts as taxable, it shall not be taxable under Section 5(2) of the Act.

23. As per Section 9(1)(ii) of the Act, income under the head "Salaries" shall be deemed to accrue or arise in India if it is earned in India. Further, as per Explanation to Section 9(1)(ii) of the Act, services rendered in India are regarded as income earned in India.

24. As indicated above, u/s.5(2) of the Act, the total income of a NR includes income which is received or deemed to be received in India. It also includes income which accrues or arises or is deemed to accrue or arise in India during such previous year. Given that Section 5(2) begins with "Subject to the provisions of this Act", the total income needs to be arrived at after considering all the relevant provisions of the Act.

25. Section 15 of the Act provides for the chargeability of income under the head “Salaries”. Accordingly, in arriving at the total income of a Non-Resident, the provisions of Section 15 of the Act need to be considered as well.

26. Section 15(a) of the Act provides for chargeability of salary on due or accrual basis, Section 15(b) of the Act provides for chargeability of salary paid in advance, Section 15(c) of the Act provides for taxability of arrears of salary. Further, the explanation provides for clarity in situations where salary has been taxed on receipt basis; such salary shall not be taxed again on accrual basis.

27. In other words, Section 15 of the Act contemplates chargeability of salary accrued to an employee, irrespective of whether it is received or not. However, where salary is received in advance, the same is taxable on receipt basis. This means that salary is taxable on accrual basis, the only exception being when salary is received in advance. To re-emphasize, it is only “advance salary” which is taxable on receipt as an exception to the general rule that salary is taxable on accrual basis.

28. Based on the above, it can be concluded that Salary is chargeable to tax on accrual basis, Salary is chargeable to tax on paid basis only when it is paid in advance, Arrears of salary are chargeable to tax on receipt if it has not already been taxed on accrual basis.

29. Based on the above, salary received by the assessee in India for services rendered in China is not taxable in India as per the provision of Section 5(2) read with Section 9(1)(ii) and Section 15(1)(a) of the Act.

30. The following judicial precedents by other Tribunals covering the issue in favour of the assessee were relied by the ld.AR:

Hon'ble AAR in Texas Instruments (India) Private Limited (A.A.R. No. 1299 of 2012) (Para 9.1.1 and 9.3)

> "*Although the recipient's case falls in (a) above, being a non-resident, since he was rendering services in the USA during that period, the salary accrued to him in the USA. Hence, since the income has not accrued in India, the same cannot be considered as chargeable to tax in India. In the case of* ***Prahlad Vijendra Rao (supra)****, the Hon'ble Karnataka High Court held that where the assessee was not resident in India and was rendering services outside India, the salary relating to the period of services rendered outside India has not accrued in India and hence is not taxable in India. In coming to this conclusion the Hon'ble High Court also considered the case of* ***Avtar Singh Wadhwan (supra)*** *wherein the Hon'ble Mumbai High Court also held that the relevant test to be applied to decide whether the income accrued to a non-resident in India or outside, is to find the place where the services were rendered, in order to consider where the income accrued. Both these cases were recently considered in the case of* ***Utanka Roy v. DIT (International Taxation), decided by the Hon'ble Calcutta High Court (2016), 390 ITR 109****, and it was held that the services rendered outside India have to be considered as income earned outside India"*

31. The Hon'ble ITAT Bangalore in the case of Bholanath Pal vs ITO (2012 52 SOT 369) has held that, salary is taxable on accrual basis and it accrues where employment services are rendered.

32. Important observations of the Hon'ble Supreme Court in Union Of India And Anr vs Azadi Bachao Andolan And Anr on 7 October, 2003, SLP(C) Nos. 22521-22522 of 2002) are extracted as follows:

> *"A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a double taxation avoidance agreement. When that happens, the provisions of such an agreement, with respect to cases to which where they apply, would operate even if inconsistent with the provisions of the Income-tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under section 4 and the general principle of ascertainment of total income under section 5 of the Act, then there was no purpose in making those sections "subject to the provisions" of the Act".*

33. Arvind Singh Chauhan v ITO [2014] 42 Taxmann.com 285(Agra) - An

employee has to render the services to get a right to receive a salary and situs of accrual of salary income is the place where the services are rendered.

34. Bombay High Court ruling in the case of Avtar Singh Wadhwan [2001] 247 ITR 260 - Salary accrued outside India where the services were performed.

Bombay High Court in the case of CIT vs Estienne Andreas and Others (2000) 242 ITR 422 - In the context of India France DTAA, held that the remuneration received by the employees for the services rendered in France could not be subject to tax in India and *Hon'ble Supreme Court has dismissed the special leave petition filed by the department against the above judgment as reported in (2000) 241 ITR (St) 124.*

35. Karnataka High Court in Prahlad Vijendra Rao 2011 198 Taxman 551 - Salary income derived by a person working outside India for 225 days has been held as not to have accrued in India.

36. The Hon'ble Calcutta High Court has held in Utanka Roy v. Director of Income-tax (2017 82 Taxman.com 113) that Explanation 2 of Section 5(2) clarifies that income will not be treated to be received in India solely on the basis that such income was received or deemed to be received in India. It has to be found out where the income to the person concerned had accrued. For the purpose of finding out the place of accrual of income, the place where the services have been rendered become material.

37. The Hon'ble Mumbai Tribunal has recently held in the case of Mridula Jha Jena v. International Tax [2025] 171 taxmann.com 175 (Mumbai - Trib.) that "Where assessee was sent on assignment to Cairo, Egypt by her employer company for a

period of 24 months and she had stayed in India for only 108 days during relevant previous year, salary received by assessee for services rendered outside India though received in India was not taxable as per provisions of section 9(1)(ii) of the Act."

38. In view of the facts and circumstances cited above, the documentary evidence filed, statutory provisions and judicial precedents cited, the present appeal be allowed by setting aside the order of the AO.

39. Per contra the ld.DR relied on the order of the authorities.

40. We have heard both the parties, perused materials available on record and gone through orders of the authorities below along with the judicial precedents relied on. Admittedly during the FY 2021-22, the assessee duly qualified as a Non-Resident of India and as a Tax Resident of China for the Calendar Year 2021 and 2022 (i.e., period covering 01.04.2021 till 31.03.2022) and was eligible to claim the benefit of Article 15(1) of the India-China DTAA as he exercised employment/rendered services with BMW China in China. Further, the assessee has been duly taxed in China in respect of salary and benefits paid to him in India for the period 01.04.2021 to 31.03.2022 of Rs.1,53,65,359/- and related to employment exercised/services rendered in China to BMW China. Since the assessee qualified as a Non-resident of India during FY 2021-22 and a Resident of China for the Calendar year 2021 and exercised his employment/rendered services in China with BMW China, the assessee claimed exemption of Rs.1,53,65,359/- with respect to salary received in India for services rendered in China, under Article 15(1) of the India- China DTAA r.w.s. 90 of the Act and accordingly filed his return of income for the A.Y. 2022-23 on 18.07.2022 and claimed a refund of Rs.52,22,590/-.

41. We note that the AO has disallowed the exemption claimed of Rs.1,53,65,359/- with respect to salary received in India for services rendered in China as taxable in India since the salary has been credited by BMW India Pvt Ltd into the assessee's account at Chennai from the payroll account of Chennai.

42. We find that the question of taxability of the salary income earned at China by the assessee, which has been offered to tax at China, was decided by the Chennai Tribunal in assessee's own case for AY 2020-21 along with the case of *Nanthakumar Murugesan and Sivakarthick Raman [2024] 165 taxmann.com 304 (Chennai - Trib.)* in decision dated 10.06.2024, the relevant extract are as follows:

> *"07. We have heard the both parties, perused the materials available on record, paper book and gone through orders of the authorities below. Brief facts are that the assessee is assessed as non-resident in AY 2020-21 as he had spent only three days in India. The appellant was an employee of the M/s BMW India Pvt. Ltd ('BMW-India' in short) during the previous year 2019-20. During Financial Year 2019-20 the appellant was seconded on overseas assignment to China by his employer 'BMW-India'. The appellant received gross salary of Rs.1,22,09,830/- for services rendered in China to BMW Brilliance Automotive Limited ('BMW China' or 'BBA' in short) and claimed exemption under Article 15(1) of DTAA between India and China.*
>
> *7.1 The assessee filed return of income on 24.11.2020 admitting income of Rs.1,85,353/. The assessee in return of income for AY 2020-21 claimed salary of Rs.1,22,09,830/- as reflected in Form 16, 26AS related to period 01.04.2019 till 31.03.2020 and claimed exemption under Article 15(1). The assessee claimed refund of Rs.41,72,850/- arising out of excess TDS in comparison to tax. However, Ld. AO treated the gross salary received by assessee in India of Rs.1,22,09,830/- from 'BMW-India' as taxable in India and held that the assessee is not eligible for exemption under the provisions of Article 15 of DTAA between India and China being non-resident in India.*
>
> *7.2 It transpired that the assessee was employed with 'BMW-India'. He was sent to China on International assignment to 'BMW China' by the employer company 'BMW-India'. The salary continued to be paid in India by the employer 'BMW-India'. The assessee submitted before AO that assessee being tax resident of China, the salary income was taxable in China only and the same has been offered to tax in China. It was further contended before AO that assessee being non-resident, the salary received in India for work performed in China would be exempt in India as per Article 15(1) of DTAA between India and China. The assessee submitted before ld. Assessing Officer that salary is taxable in India only if it accrues in India and salary is considered to be accrued where the employment is exercised.*
>
> *7.3 However, Ld. AO held that the assessee did not shift his employer and the assessee continued to be on the payroll of its employer. There existed employer*

employee relationship. Therefore, the income so received would be chargeable to tax in India under section 15 of the Act which provides that any salary due from an employer would be chargeable to tax under the head salaries. Further, in terms of the provisions of Section 5(2) of the Act, salary received by non-resident in India would be taxable in India. Therefore, the assessee's submissions were rejected. It was, however, held that the assessee could avail tax credit on the tax payable in China as per Article 23 of DTAA. The assessee was non-resident and therefore, he was not eligible to claim benefit of DTAA. Accordingly, the income as reflected in Form 16 was brought to tax. The Ld. DRP confirmed the stand of Ld. AO against which the assessee is in further appeal before us.

8. We have deliberated upon the paper book referred by the Ld.AR Ms. Preeti Goel, which includes China tax return (page Nos.50-54), Copy of passport showing total 3 days stay in India (Pg Nos.64-89 @89), Labor contract with 'BBA' (Pg Nos.7-21), submissions dated 10.11.2021 filed before AO. We find substance in the arguments of the Ld.AR that assessee being tax resident of China, the salary income was taxable in China only. In fact, salary to the tune of Rs.1,22,09,830/- received for the employment exercised in China is taxable in China and in the light of Article 15(1) of the India-China DTAA it is exempt income. We have also gone through the Co-ordinate Bench decision cited in the case of Shri Ramesh Kumar AE Vs ITO for AY 2015-16 in IT(TP)A 51/Chny/2018 dated 11.08.2023. The Co-ordinate Bench order held as under:-

> *"4. We find that similar issue, on similar facts, has been decided by us in our decision titled as Shri Kanagaraj Shanmugam vs. ITO (ITA No.2936/Chny/2018 dated 07.09.2022) as under: -*
>
> > *"Our findings and Adjudication*
> >
> > *5. From the fact it emerges that the assessee has stayed in India for 63 days during this year and his status, as per law, is non-resident. The assessee has worked in India for 21 days and offered proportionate salary to that extent to tax. For remaining period, the work has been performed in UK though the salary has been received in India from existing employer. It is also a fact on record that this salary, for work performed in UK, has been offered to tax in UK which is evident from Tax Returns filed in UK. The assessee submit the as per Article 16(1) of DTAA, this income would be taxable in UK only. Alternatively, the assessee relies on the provisions of Sec.15 read with Sec.5(2) and Sec.9(1)(ii) which provides for taxability of salary on accrual basis and not on receipt basis. However, Ld. CIT(A) has held that the assessee would not be eligible for the benefit of DTAA since DTAA relief is to be given by resident country which is UK in the present case.*
> >
> > *6. We find that an identical issue has been addressed by coordinate bench of Chennai Tribunal in Shri Paul Xavier Antonysamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020). In this decision, the bench has held that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), salary income could be deemed to accrue or arise in India only if it is earned in India in respect of services rendered in India. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention*

of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016) was held to be factually distinguished on the ground that in that case the assessee was claiming foreign tax credit relief for taxes paid on doubly taxed income which was not the case in that appeal. In para-7, the bench found the issue to be covered in assessee's favor by various judicial precedents including the decision of Hon'ble Karnataka High Court in DIT V/s Prahlad Vijendra Rao (198 Taxman 551); decision of Hon'ble Bombay High Court in CIT V/s Avtar Singh Wadhawan (247 ITR 260); decision of Hon'ble Calcutta High Court in Sumanabandyopadhyay V/s DDIT (TS281-HC- 2017) as well as CBDT Circular No.13/2017 dated 11/04/2017.

7. We find that facts are pari-materia the same before us and the ratio of this decision is squarely applicable to the present case. Therefore, we would hold that salary income as accrued to the assessee for work performed in UK would not be taxable in India. However, the salary received for work performed in India would be taxable in India. Accordingly, we direct Ld. AO to re-compute the income of the assessee. The above proposition is also supported by the fact that upon perusal of UK tax return, it could be seen that the assessee has offered earnings from employment for£24184 on net basis which has been tax grossed up for £6046. This is in view of the fact that OFSSL has paid provisional payment of £9062 to UK revenue authorities since the employer has undertaken to meet the UK income tax liability arising from employee's earnings in UK. Accordingly, the assessee has claimed refund of £3016. On the basis of the above, it could be seen that separate tax payment has been made by OFSSL to UK revenue authorities to discharge the tax liability of the assessee in that country.

8. The assessee has also placed on record Tax Residency Certificate (Page nos.192-193 of paper book). As per this certificate, the assessee has claimed relief for foreign earning not taxable in UK for £7952. The same shall be considered by Ld. AO while computing the quantum of income taxable in India as directed by us in preceding para-7.

9.The appeal stands partly allowed in terms of our above order."

In the above decision, we have held that salary income as accrued to the assessee for work performed in a foreign jurisdiction would not be taxable in India whereas the salary received for work performed in India would be taxable in India. The benefit of DTAA would be available to the assessee as per the decision of coordinate bench of Chennai Tribunal in Shri Paul Xavier Antonysamy V/s ITO (ITA No.2233/Chny/2018 dated 28.02.2020) wherein it was held by the bench that the provisions of Sec.5(2) are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(a). Even as per the provisions of Sec.9(1)(ii), salary income could be deemed to accrue or arise in India only if it is earned in India in respect of services rendered in India. The bench, reading down Article-1 and Article-15 of India-Australia DTAA, held that Treaty benefit shall be

applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect. Accordingly, it was held by the bench that the salary so earned for work performed in Australia would be taxable in Australia. The case law of Swaminathan Ravichandran V/s ITO (ITA No.2911/Mds/2016 dated 05.08.2016) was held to be factually distinguishable.

5.We find that similar fact exists before us in the present appeal. The proportionate salary for services rendered in India has already been offered to tax in India whereas the balance salary has been offered to tax in China. The salary reconciliation statement has been placed by Ld. AR on record. The assessee has not claimed any foreign tax credit in any of the jurisdiction. The China tax has been paid by the foreign entity i.e., M/s Ford Motor (China) Co. Ltd. and the assessee has offered salary income on gross basis.

6. The Ld. Sr. DR has relied on the decision of SMC bench in the case of Dennis Rozario (ITA No.298/Mds/2016 dated 06.01.2017) as well as another decision of SMC bench in Shri M.Ramesh Kumar (ITA No.1979/Mds/2017 dated 16.11.2017) which has taken a view against the assessee. However, both these decisions have been rendered by SMC bench and therefore, we are inclined to follow our own decision as cited above which has been rendered by coordinate bench. The Ld. AO is directed to re-compute the income of the assessee. The substantiative grounds raised by the assessee stand allowed which render additional grounds of appeal as infructuous. In the result, the appeal of the assessee is allowed in terms of our above order."

9. We have gone through order cited supra and respectfully agreed with the view taken by the Coordinate bench in IT(TP)A No.51/Chny/2022 etc dated 11.08.2023 for AY 2015-16. We find that identical fact exists before us in the present appeals. The proportionate salary for services rendered in India has already been offered to tax in India whereas the balance salary has already been offered to tax in China. The assessee has not claimed any foreign tax credit in any of the jurisdiction. The China tax has been paid. Therefore, we direct the AO to allow benefit of exemption under Article 15(1) of Double Taxation Avoidance Agreement (DTAA) between India and China.

10. Since the facts in other appeal is identical, our adjudication as above shall mutatis mutandis apply to other appeal IT(TP)A No. 13/Chny/2023 also."

43. We have gone through the order cited supra and respectfully agree with the view taken by the coordinate bench in assessee's own case in IT(TP)A No.12 & 13/Chny/2023. We find that identical facts exist in the present appeal. The salary income for services rendered in China has been rightly offered tax by the assessee in China. Therefore, we set aside the order of the AO and direct the AO to allow the benefit of exemption under Article 15(1) of the DTAA between India and China.

44. In the result the appeal of the assessee is allowed.

Order pronounced in the open court on 07th July, 2025 at Chennai.

Sd/-	**Sd/-**
(मनु कुमार गिरि)	**(एस. आर. रघुनाथा)**
(MANU KUMAR GIRI)	**(S. R. RAGHUNATHA)**
न्यायिक सदस्य/**Judicial Member**	लेखासदस्य/**Accountant Member**

चेन्नई/Chennai,
दिनांक/Dated, the 07th July, 2025
SP
आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT– Chennai/Coimbatore/Madurai/Salem
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF