IT/ILT : Where assessee succeeded in establishing that he was a resident of US under article 4 of DTAA between India and USA for period he was on Indian assignment , assessee would be entitled to treaty exemption and accordingly, his income for aforesaid period could not have been brought to tax in India

IT/ILT : Where period during which assessee a resident of US was on Indian assignment (August, 2012 to March, 2013), he had a permanent home available both in India as well as in US, however, by applying second tie breaker in Article 4 of the DTAA between India and USA i.e closer personal and economic relations, assessee's centre of vital interest was closure to US and assessee succeeded in establishing that he was a resident of US under DTAA for period August, 2012 to March, 2013, treaty exemption would be available to assessee. Therefore, sum brought to tax by Assessing Officer could not have been brought to tax in India for aforesaid period

[2019] 104 taxmann.com 183 (Bangalore - Trib.)

IN THE ITAT BANGALORE BENCH 'A'

Deputy Commissioner of Income-tax, Circle- 5 (3) (1), Bangalore

v.

Shri Kumar Sanjeev Ranjan

N.V. VASUDEVAN, VICE-PRESIDENT
AND G. MANJUNATHA, ACCOUNTANT MEMBER
IT APPEAL NO. 1665 (BANG.) OF 2017
[ASSESSMENT YEAR 2013-14]
MARCH 15, 2019

Vikas Suryavamshi *for the Appellant.* **Nageshwara Rao**, Adv. *for the Respondent.*

ORDER

N.V. Vasudevan, Vice-President - This appeal by the revenue is against the order dated 31.03.2017 of the CIT(Appeals)-V, Bengaluru relating to assessment year 2013-14.

2. The grounds of appeal raised by the revenue reads as follows:-

"1. The order of the Commissioner of Income Tax (Appeals) - 5, Bangalore, is opposed to the law and not on the facts and circumstances of the case.

2. The Ld. Commissioner of Income Tax (Appeals) erred in accepting fresh evidence in the form of Tax Residency Certificate which the assessee failed to produce/furnish during the assessment proceedings without calling for any Remand Report from the Assessing Officer on this purported fresh evidence nor allowing verification of the same by the Assessing Officer during Appellate proceedings as mandated under Rule 46A of the Income Tax Rules,1962.

3. The Ld. Commissioner of Income Tax (Appeals) erred in holding the assessee was a Non-Resident during the year without offering any findings

on applicability or other-wise of section 6 (1)(C) of the Income Tax Act,1961.

4. For these and other grounds that may be urged upon, the order of the CIT(A) may be reversed and that assessment order be restored."

3. The assessee is an individual. For the AY 2013-14, the assessee filed return of income declaring total income of Rs.1,05,38,260. The assessee is a citizen of the United States of America (USA/US) and has been living and working in the USA since 1986. The assessee's spouse and 2 children are also citizens of the USA.

4. The assessee was working for Accenture USA continuously since 1998 till 2016 and was assigned on a temporary cross border assignment to Accenture India starting from June 2006 to August 2012. This assignment was subject to multiple extensions based on the business requirements of Accenture India till August 2012. On August 10, 2012 the assessee completed his assignment in India and moved back to Accenture US where he is now residing with his family and continued his career with Accenture US.

5. Based on the assessee's physical presence in India, he qualified as a Resident of India for the period 01 April 2012 to 31 March 2013, as per the Income Tax Act, 1961 (Act/Indian income tax laws). He also qualified as a Resident of USA as per the US domestic tax laws, for the above mentioned period, as the assessee is a US citizen. The Tax Residency Certificate ["TRC"] from US tax authorities was filed before the CIT(Appeals) by the Assessee for the year 2012 & 2013.

6. The question before the AO was as to whether the income for the period 11 August 2012 to March 2013 amounting to US$ 4,55,428 i.e. Rs.2,45,84,003/- (at exchange rate of Rs.53.98) being salary earned in USA should also be brought to tax for AY 2013-14 in India. According to the AO, once the Assessee is regarded as Resident for the relevant AY, then the entire global income is liable to tax under the Act. Section 90 of the Act provides that where India has entered into an Agreement for Avoidance of Double Taxation ("DTAA"), the provisions of the Act shall be applicable to the extent they are more beneficial to the taxpayer over the provisions of the DTAA. Accordingly, while considering the tax implications in the hands of the Assessee, it would be relevant to examine the provisions of the relevant DTAA. Once an individual is regarded as Resident in India, his worldwide income becomes taxable in India. However, it is quite likely that the individual leaving India may also be a resident of the country from which he came to India under the local laws of such country in this case USA. Hence, for the relevant year(s), the individual would become a resident of both India and the other country. Thus, the individual may become a "dual resident", i.e. resident of two countries for tax purposes. On becoming a dual resident, the question arises as to which country has the right to tax his income. India has entered into a DTAA with USA. In such a situation, the revenue authorities of both countries would have claim over the individual's worldwide income for the purpose of levying tax. This would clearly lead to a case of double taxation. The Article-4 of the DTAA between India and USA provides for a "tie-breaker" provision under which such determination can be made is as follows:-

> "ARTICLE 4 - Residence - 1. For the purposes of this Convention, the term resident of a Contracting State means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that
>
> (*a*) this term does not include any person who is liable to tax in that State in respect only of income from sources in that State; and
>
> (*b*) in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.

(2) Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows :

(*a*) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;

(*b*) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;

(*c*) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;

(*d*) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement."

7. Where by reason of the provisions of paragraph 1 of Article-4, an individual is a resident of both Contracting States, then his status shall be determined in accordance with Article 4(2) as follows : (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him ; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ; (b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either Contracting State, he shall be deemed to be a resident of the Contracting State in which he has an habitual abode ; (c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident of the Contracting State of which he is a national ; (d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

8. The tiebreaker rule specified under Article 4 of the Double Taxation Avoidance Agreement (treaty) between India and USA was applied in sequence for determining the Assessee's residency.

Residential status of the assessee for the period from April 01, 2012 to August 10, 2012 – the tie-breaker rule of the treaty between India and US

9. The assessee had a house property in India as well as in the US during the previous year 2012-13 (i.e. from April 01, 2012 to March 31, 2013). The assessee's house property in the USA was let out during the period of his Indian assignment (i.e. from April 01 2012 to August 10, 2012) and therefore for the purpose of the tie-breaker, deemed to be 'unavailable for use' to the assessee during this period, and accordingly, he did not satisfy the first test for availability of a permanent home in the USA and hence, tie-broke his residency to India for the aforesaid period. Additionally, once the test for 'availability of Permanent home' has been satisfied, it cannot move forward to the second test of 'Centre of vital interests'. However, if the first test had been a tie during this period, the second tie-breaker test for 'Centre of vital interests' has to be looked into.

10. Detailed below are specific points pertaining to the second tie-breaker test for 'Centre of Vital Interests' which substantiates that the assessee would tie-break his residency to the USA during the period April 1, 2012 to August 10, 2012 as well.

April 1, 2012 to August 10, 2012

1	**Dependent members**	The assessee's spouse and 2 children are citizens of the US and were living with him till August 10, 2012 in India post which they repatriated to the US along with him.
2	**Personal belongings**	The assessee has a house property along with all his personal belongings in the US.
3	**Voting rights**	The assessee is a citizen of the US and exercises his voting rights in the US.
4	**Driving license**	The assessee holds a driving license in the US. He had kept his car in the US even though he was in India and was using the same whenever he visited US. The car property tax receipt for the year 2011 was filed.
5	**Country of Residence**	The assessee's designated country of residence is the US. He had filed Virginia state tax returns, as Virginia was his home, and his car and home were in Virginia during his period of assignment to India. The Virginia tax return for 2011 was filed.
6	**Better Social Ties**	The assessee has been living in the US for 26 years and hence his social ties are closer to the US. His son had applied for colleges in the US in December 2011 and by March 2012, he got admitted to Carnegie Mellon University, and was about to start college in US from August 2012. The admission letter from the University was filed. Hence the assessee's intention was to return to US in 2012. Further, his son started his college education in 2012, completed in 2016 and is now working in the US. His daughter goes to school in the US.
7	**Investments**	The assessee has all his investments in shares, mutual funds, 401K plans and insurance policies in the US which constitutes a significant portion of his total investments.
8	**Settlement**	The assessee has settled down in the US with his spouse and 2 children where he plans to stay for the rest of his lifespan.
9	**Social Security**	The assessee has been contributing towards social security in the US since 1988 and to pension plan since 1998 (from Accenture US).

'Habitual Abode of the assessee'

1. **Time spent -** For 21 years the assessee lived in India, after which he re-located to the US in 1986. Since then the appellant has been working in US based companies like Accenture US (earlier) and currently in Deloitte US and paying taxes in the US. The assessee started contributing towards US social security since 1988. He became permanent US resident in 1992, got married in 1992 and since then his spouse is also continuously residing in the US. The assessee's 2 children were born in the US. His spouse and children are all citizens of the US as well. The assessee spent his summer vacations as well in the US during the period of assignment to India. The assessee has spent an aggregate of 30 years in the US.
2. **Settlement** - Post completion of his India assignment, the assessee has been living in the US with his spouse and children, where he plans to settle down for the rest of his lifespan.

Residential status of the appellant for the period from August 11, 2012 to March 31, 2013

11. The assessee completed his assignment to India and moved back to the US on August 11 2012, where he resided at his US home and he also had a rented home available in India. Therefore, during this period of the previous year 2012-13 (i.e. from August 11 2012 to March 31 2013), he had a permanent home available both in India as well as in the US. Hence there is a tie.

12. Given that the first test was a tie, the second tie-breaker test for 'Centre of vital interests' had to be looked into. On the basis of this test, the assessee tie-broke his residency to the US as it was determined that the assessee's social and economic interests were closer to US.

13. Detailed below are specific points pertaining to the second tie-breaker test for 'Centre of Vital Interests' which substantiates that the assessee would tie-break his residency to the US during the period August 11, 2012 to March 31, 2013.

August 11, 2012 to March 31, 2013

1	**Dependent members**	The assessee's spouse and 2 children are citizens of the US and were living with him.
2	**Personal belongings**	The assessee has two house properties and car along with all his personal belongings in the US.
3	**Voting rights**	The assessee is a citizen of the US and exercises his voting rights in the US.
4	**Driving license**	The assessee holds a driving license in the US
5	**Country of Residence**	The assessee's designated country of residence is the US.
6	**Better Social Ties**	The assessee has been living in the US for 26 years and hence his social ties are closer to the US.
7	**Investments**	The assessee has all his investments in shares, mutual funds, 401K plans and insurance policies in
8	**Settlement**	The assessee has settled down in the US with his spouse and 2 children where he plans to stay for
9	**Social Security**	The assessee has been contributing towards social security in the US since 1988 and to pension plan

14. The AO, however, was not satisfied with the above explanation of the assessee. He raised three issues as arising for consideration on the basis of the claim made by the assessee with regard to non-taxability of income of the assessee received in USA for the period from 11.08.2012 to March, 2013 as follows:-

(*a*) What is the tax residential status of the assessee?

(*b*) What is the legal position on the concept of split residency?

(*c*) Can the exemption claimed under Article 16(1) be allowed in this case?

15. On point (a), the AO came to the conclusion that since the assessee stayed in India during the relevant previous year by his physical presence for the period exceeding 182 days, he had to be regarded as a resident of India for AY 2013-14. With regard to the tie-breaker test laid down in Article 4(2) of the Indo-US DTAA, the AO held as follows:-

> "4.7 The AR of the assessee is attempting to say that during the period of 11 august 2012 to 31 march 2013, the personal and economic relations are closer (centre of vital interests) to US. By the corollary the AR admits that till such period the personal and economic relations are closer (centre of vital interests) to India. It has to be noted that personal and economic relations refers to a long and continuous relation that an individual nurtures with a place (in this case a state). It cannot be broken so casually into bit and pieces by claiming that today one has economic and personal relationship with state A and after few days with state B. The concept of economic and personal relationship is a qualitative one which has to be analyzed in a holistic manner rather than being compartmentalized. Thus the claim of the assessee that during the period of 11 august 2012 to 31 march 2013, the personal and economic relations are closer (centre of vital interests) to US negates all logic. It has to be noted that during the entire period of AY 2012-13 (i.e immediately preceding the AY in discussion) the assessee was working for Accenture Services Pvt Ltd, India and was present in India. Thus by moving into US for an assignment from 11 august 2012 to 31 march 2013, the assessee cannot claim that his economic and personal relationship are suddenly closer to US than India. Rather by all logic the assessee economic and personal relationship is closer to India than to US for any given time.
>
> 4.8. Hence by applying the second criteria of article 4(2) of the Indo-US DTAA it can be clearly

ascertained that the state with which his personal and economic relations are closer (centre of vital interests) is India. Thus for the AY 2013-14 if the assessee wants to tie break his residency to one of the states (India or US), it has to be definitely to India. Thus for the AY 2013-14 the assessee is a Resident and Ordinarily Resident as per the Act and also by the Indo-US DTAA tie breaking rules."

16. With regard to the concept of split residency, the AO held that there is no concept of split residency recognized under the provisions of the Income-Tax Act, 1961 ["the Act"] or the DTAA.

17. With regard to the claim for examination under Article 16(1) of the DTAA, the AO held as follows:-

"6.6 The assessee in order to claim exemption under Article 16 (1) of Indo-US DTAA has to satisfy the following conditions,

i. A Tax Residency Certificate (TRC) is to be obtained from the other state in which the assessee is a resident. Section 90 (4) of the Act states that "An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless [a certificate of his being a resident] in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that Country or specified territory"

ii. Form 1OF under the Income-tax Act, 1961 (Act) has to be furnished

iii. Any other documents and information, as may be prescribed (section 90 (5)

However the assessee does not satisfy the conditions for claiming any tax exemption under DTAA as he has not produced Tax Residency Certificate (TRC) or Form 10F under the Income-tax Act, 1961.

7. The AR of the assessee further argues that the income in the nature of interest and dividend that he earned in US is not offered in India for the period 11 August 2012 to March 2013. The ARs explains that the interest and dividend income earned by the assessee cannot be treated under Article 10 and 11 of the Indo-US DTAA but has to be treated under Article 23. This argument is based on assessee assumption that for the period 11 August 2012 to March 2013 the assessee is a non-Resident in India. But as discussed earlier split residency as claimed by the assessee is not accepted and the assessee is treated as Resident and Ordinarily Resident in India for tax purposes. Thus in this case Article 10, 11 or 23 of the DTAA is not applicable as the assessee is treated as Resident and Ordinarily Resident in India for tax purposes."

18. On the basis of the above discussion, the AO brought to tax a sum of Rs.2,45,84,003 as income which escaped assessment.

19. Aggrieved by the aforesaid additions made by the AO, the assessee filed appeal before the CIT(Appeals) and reiterated the submissions as were made before the AO on the non-taxability of income received for the period 11.08.2012 to March, 2013. Before the CIT(A), the assessee had filed the Tax Residency Certificate for the years 2012 & 2013 obtained from the US authorities. The CIT(Appeals), on a consideration of the entire material on Assessee's centre of vital interest with US (these details are set out in the earlier paragraphs of this order and hence not repeated) came to the conclusion that by applying the second tie breaker for the period of August, 2012 to March, 2013 the Assessee's centre of vital interest was closure to US and that the Assessee succeeded in establishing that he is a Resident of US under the DTAA for the period August, 2012 to March, 2013. Therefore, the treaty exemption is available to the Assessee and therefore the sum brought to tax by the AO cannot be brought to tax in India for the aforesaid period.

20. Aggrieved by the order of CIT(Appeals), the revenue has preferred the present appeal before the Tribunal.

21. We have heard the rival submissions. As far as ground No.2 raised by the revenue is concerned, it is no doubt true that the Tax Residency Certificate ["TRC"] was filed by the assessee only before the CIT(Appeals), but we are of the view that the CIT(Appeals) has made only a passing reference to the TRC and has not based his conclusion that the assessee is a tax resident of USA for the period between 11.08.2012 to March, 2013 on the basis of the same. The ld. CIT(Appeals) has applied the test of closer personal and economic relations (centre of vital interest) as he found that the assessee had a permanent home in India as well as US. His conclusions on the basis of the facts presented by the assessee that supporting evidence cannot be faulted with. We are therefore of the view that there is no merit in ground No.2 raised by the revenue.

22. As far as ground No.3 is concerned, the test of residency is based on Article 4 of the DTAA in the present case and therefore the provisions of section 6(1)(c) of the Act do not assume any importance. Therefore, we do not find any merit in ground No.3.

23. In the result, the appeal by the revenue is dismissed.

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