

# Yogesh Kotiyal, New Delhi vs Acit Circle Int Tax 2(1)2, New Delhi on 12 April, 2024

IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'D', NEW DELHI

Before Dr. B. R. R. Kumar, Accountant Member

Sh. Anubhav Sharma, Judicial Member

ITA No. 391/Del/2023 : Asstt. Year : 2020-21

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| Yogesh Kotiyal,<br>Block C-2, Flat-14, Lodhi Colony,<br>Kasturba Nagar, South East Delhi<br>New Delhi-110003<br>(APPELLANT)<br>PAN No. BVTPK8967K | Vs | ACIT,<br>International Taxation,<br>Circle-2(1)(2),<br>New Delhi-110006<br>(RESPONDENT) |
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Assessee by : Ms. Preeti Goel, Adv.

Revenue by : Sh. Vizay B. Vasanta, CIT-DR

Date of Hearing: 09.04.2024

Date of Pronouncement: 12.04.2024

ORDER

Per Dr. B. R. R. Kumar, Accountant Member:

The present appeal has been filed by the assessee against the order dated 21.12.2022 passed by the AO u/s 143(3) r.w.s. 144C(13).

2. Following grounds have been raised by the assessee:

"1. The learned Assessing Officer has in pursuance of the directions of the Hon'ble DRP, in the facts and circumstances of the case and in law erred in issuing the impugned Final Assessment Order dated 21 December 2022 under Section 143(3) read with Section 144C(13) of the Act disallowing the exemption of INR 55,37,591 claimed by the Appellant under Article 15(1) of the India-Australia Double Taxation Avoidance Agreement (DTAA) read with Section 90 of the Act in ignorance of the facts, documentary evidence, statutory provisions and judicial precedents cited.

2. The learned Assessing Officer and Hon'ble DRP has in the facts and circumstances of the case and in law Yogesh Kotiyal erred in disallowing the exemption claimed under Article 15(1) of the India-Australia DTAA read with Section 90 of the Act on the following erroneous conclusions/ premises:

a. The Assessee exercised his employment in India. b. Employment was based in India throughout the Australia assignment period.

c. Control and management of the employment was in India d. Source of salary income was in India e. Salary and expenses during the assignment were borne by Nokia India f. Salary received from Nokia India accrued/ arose in India under section 90

f the Act.

g. No concrete evidence was provided to show that the Assessee was Tax Resident of Australia.

3. The learned Assessing Officer and the Hon'ble DRP has in the facts and circumstances of the case and in law erred in applying Article 15(2) of India - Australia DTAA instead of the applicable provisions of Article 15(1) of the DTAA read with Section 90 of the Act.

4. Without prejudice, the learned Assessing Officer and the Hon'ble DRP has in the facts and circumstances of the case and in law erred in holding that the Salary income received in India is taxable in India under Section 5(2)(a) read with Section 9(1)(ii) of the Act and Explanation thereto.

5. The learned Assessing Officer has in the facts and circumstances of the case and in law erred in adding back the refund (including the interest under Section 244A if any) of INR 14,994 issued to the Appellant.

6. The learned Assessing Officer has in facts and circumstances of the case and in law erred in initiating penalty proceedings under Section 270A of the Act for alleged under-reporting of income."

3. Heard the arguments of both the parties and perused the material available on record.

4. During Assessment year 2020-21, the Assessee an employee of Nokia Solutions and Networks India Private Limited ('Nokia India') was on an overseas assignment to Australia and Yogesh Kotiyal was exercising employment by rendering services in Australia with Nokia Australia from 23 August 2017 to 10 March 2020 and also placed in Australia. While working with Nokia Australia, the Assessee was based in and was physically present in Australia during the F.Y. 2019-20.

5. The Assessee was in India for less than 60 days during F.Y. 2019-20 and qualified as a Non-Resident in India as per Section 6(1) of the Act. The Assessee qualified as Tax Resident of Australia for the Tax Year (TY) 2018-19 and TY 2019-20. As the Assessee qualified as a Resident of Australia under the domestic tax law of Australia for the TY 2018-19 and TY 2019-20, and Non-Resident of India.

6. Accordingly, the Assessee qualified as a Resident of Australia as per Article 4(1) of India- Australia Double Taxation Avoidance Agreement (DTAA) between India and Australia for the F.Y. 2019-20. The relevant extract of Article 4(1) of the India- Australia DTAA is as under:

"1. For the purposes of this Agreement, a person is a resident of one of the Contracting States if the person is a resident of that Contracting State for the purposes of its tax. However, a person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State;

2. Where, by reason of the provisions of paragraph (I), an individual is a resident of both Contracting States, the status of that person shall be determined in accordance with the following rules:

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(a) the person shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the person;

(b) if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a resident solely of the Contracting State with which the person's personal and economic relations are closer (centre of vital interests).

For the purposes of this paragraph, an individual's citizenship of a Contracting State as well as that person's habitual abode shall be factors in determining the degree of the person's personal and economic relations with that Contracting State.

3. Where, by reason of the provisions of paragraph (I), a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the Contracting State in which its place of effective management is situated."

7. During F.Y. 2019-20, the Assessee continued to receive salary income in India for exercising employment in Australia and services rendered to Nokia Australia. The salary income was paid to the Assessee in India for administrative convenience and the payroll remained in India while the Assessee was on assignment in Australia and exercised his employment in Australia during the F.Y. 2019-20. As the Assessee qualified as a Resident of Australia under the India-Australia DTAA for the FY 2019-20 and was rendering services/ exercised employment in Australia 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- Australia DTAA, read with Section 90 of the Act.

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8. The Assessee filed his original Return of Income (ROI) of income on 30 December 2020, vide acknowledgement number 956112060301220, reporting the net taxable income of Rs.66,19,857/-. Once the Australia tax return of the Assessee was filed, the Assessee revised his India ROI on 27 March 2021 for the AY 2020-21 having acknowledgement number 312379830270321 as per Section 139(5) of the Act and claimed the exemption as per Article 15(1) of the India-Australia DTAA for the salary received in India for services rendered in Australia.

9. The Assessee was not present in India during the entire F.Y. 2019-20 and was rendering services in Australia to Nokia Australia. The salary income of Rs.55,37,591/- received in India for services rendered in Australia to Nokia Australia was claimed as exempt from tax in India as per Article

15(1) 'Dependent Personal Services' of the India-Australia DTAA, read with Section 90 of the Act.

10. The Assessing Officer initiated scrutiny assessment proceedings vide notice dated 29 June 2021 issued under Section 143(2) of the Act to verify the reduction of income and claim for refund in the Revised ITR filed by the Assessee for F.Y. 2019-20.

11. The AO issued notices dated 25 October 2021 and 3 January 2022 under Section 142(1) and show cause notice dated 28 February 2022 of the Act to seek further details and information from the Assessee in connection with the revised ROI filed by him.

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12. In response to the notices issued under Section 143(2), Section 142(1) of the Act, the Assessee had filed the responses vide submission dated 13 July 2021, 8 November 2021 and 7 January 2022 along with documentation/ evidence in support of the exemption claimed under Article 15(1) of the India-Australia DTAA.

13. In response to the show-cause notice dated 28 February 2022 issued by the AO, the Assessee had filed Adjournment letter on 3 March 2022 requesting for additional time to provide the information requested by the AO.

14. The Assessee filed the following documents in support of the exemption claimed under Article 15(1) of the India-Australia DTAA as per submission dated 8 and 7 January 2022:

€ Passport  
€ Australia Tax returns for 2018 and 2019 evidencing residency in the Australia and proof of payment of taxes in Australia

15. The AO has in the Draft Assessment Order under Section 144C of the Act, disallowed the exemption of Rs.55,37,591/- claimed under Article 15(1) of the India-Australia DTAA read with Section 90 of the Act on the premise that the Assessee had not submitted the Tax Residency Certificate (TRC) issued by Australia tax authorities. Subsequently, the AO has determined the assessed income at Rs.66,19,861/- as against returned income of Rs.10,82,270/-.

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16. The Assessee filed Objections before the Id. DRP against the Draft Assessment Order on 7 April 2022 under Section 144C(2)(b) of the Act challenging the denial of the exemption of INR 55,37,591 claimed under Article 15(1) of the India-Australia DTAA read with Section 90 of the Act in respect of employment exercised/ services rendered in Australia with Nokia Australia.

17. Since, the Assessee was unable to furnish the Tax Residency Certificate (TRC) during assessment proceedings and was not granted additional time sought to furnish the same, therefore the Assessee had duly filed the application for admission of copy of the TRC issued by Australian Tax Authorities for the FY 2019-20 as additional evidence before Id. DRP on 29 April 2022 to

enable adjudication of the appeal based on the facts and merits of the case as per Rule 9 of Rules . The copy of the TRC issued by Australian Tax Authorities filed before the ld. DRP is enclosed at Pages 156 to 159 of Pa per- book.

18. The ld. DRP has issued directions on 4 November 2022 under Section 144C (5 ) of the Act and rejected the Obje ctions raised by the Assessee on the following premises:

a) The Assessee had an employer-employee relationship with Nokia So lutions and Networks India Private L imited (Nokia India) even while working in Australia.

b) The Assessee has not demonstrated that taxes have been paid in Australia for services rendered o utside India i.e., in Australia and hence not eligible for the treaty exemption under Article 15(1) of the India-

Yogesh Kotiyal Australia DTAA. The Australia tax return has been ignored and incorrectly interpreted by the ld. DRP.

c) The contract of employment was eXecuted in India and employment was based in India throughout his Australia assignment.

19. The As sessing Officer has thereafter issued final assessment order under Section 144C(13) read with Section 143(3) of the Act on 21 Dece mber 2022 and disallowed the claim for relief on gro und that Tax Residency Certificate and Australian tax returns reflecting taxes paid in Australia ha s not been submitte d and that the ld. DRP rejected the Obje ctions raised by the Assessee.

20. Aggrieve d by the Final Assessment order issued by the Assessing Officer, the Assessee has filed the present appeal before the Tribunal.

21. Before us, it was submitted that,

1. The Assessee qualified as a Non -Resident in India as per Section 6(1) of the Act as he was prese nt in India for less than 60 days during FY 2019-20.

2. During FY 2019-20, the Assessee an employee of Nokia Solutions and Networks India Private Limited (No kia India ) was on an overseas assignment to Australia and was eXerc ising & e mployment/rendering services in Australia to Nokia Australia from 23 August 2017 to 10 March 2020 , post which he was localized in Australia.

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3. While on his assignment in Australia with Nokia Australia , the Assessee was physically present/ exercised employment in Australia during the F.Y. 2019-20.

4. While on his overseas assignment, the Assessee continued to receive salary and benefits in India as his payroll remained in India for administrative convenience during his assignment to Australia.

5. The Assessee has claimed exemption of Rs.55,37,591/- on salary income received in India for the F.Y. 2019-20 for services rendered/ employment exercised in Australia under Article 15(1) of the India-Australia DTAA, read with Section 90 of the Act as he was Resident of Australia under Article 4(1) of the India- Australia DTAA.

6. Section 90(2) of the Act reads as under:

"Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (I) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of such Act shall apply to the extent they are more beneficial to that assessee."

As per section 90(2) of the Act, where a DTAA exists between India and the country where the Assessee's income is doubly taxed, the provisions of the Act would apply to the Assessee to the extent it is more beneficial to the Assessee.

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7. As per Article 15(1) of India-Australia 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."

22. Accordingly, the following conditions are required to be satisfied to claim exemption under Article 15(1) of the India- Australia DTAA:

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

23. The salary of Rs.55,37,591/- received in India by the Assessee for employment exercised /services rendered in Australia has been claimed as exempt from tax in India under Article 15(1) of the India- Australia DTAA read with Section 90 of the Act as the Assessee was Resident in Australia and exercised employment in Australia with Nokia Australia during the relevant Financial Year.

24. The Assessee produced copies of Assignment Agreement. Passport and Australia tax return evidencing due payment of taxes in Australia in respect of salary paid to him in India for

employment exercised in Australia with Nokia. Australia. The TRC was also furnished during proceedings before the DRP as Yogesh Kotiyal additional evidence in support of the claim for exemption of Salary income under India- Australia DTAA.

25. Further, the following judicial precedents support the contention of the Assessee:

a) The Delhi Tribunal in the case of Vishal Gulati vs. ACIT [2024] 159 Taxmann.com 713 where it was held that "Where assessee, a non-resident, had rendered services outside India and assessee neither had any rest period nor leave period which was preceded and succeeded by services rendered outside India, salary received by assessee from an Indian company could not be taxed in India."

b) The Delhi Tribunal in the case of Anjali Puri vs. ACIT [2024] 159 Taxmann.com 603 where it was held that "Where assessee was residing and exercising employment in Ireland under complete control of BA PLC, Ireland for impugned assessment year and services were rendered in Ireland, and salary was also borne by BA PLC, Ireland, salary of assessee though derived from BA PLC, India on behalf of BA PLC, Ireland could not be said to be deemed to accrue or arise in India and was duly exempt from tax in India"

c) The Ahmedabad Tribunal's judgement in the case of Sunil Chit Ranjan Muncif (2013 58 SOT 356) is squarely applicable in the present case. The assessee was employed by M/s Gemini India, and he was sent to deputation to Australia by Indian employer. It was held as under:

Yogesh Kotiyal "After hearing both the parties and perusing the record, we find that there is no dispute about the fact that assessee is a NR1 and the salary income received by him in India for employment exercised in Australia has been offered by him for taxation in Australia in pursuance of Article 16 of DTAA with Australia. On these facts Id. CIT(A) by following the advance ruling in the case of British Gas India (P.) Ltd. In [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 Australia therefore the order passed by him is hereby upheld."

26. We also find that the issue in dispute is also covered in favour of assessee by the Hon'ble Karnataka High Court in the case of DIT (International Taxation) vs. Prahlad Vijendra Rao [2011] 10 taxmann.com 238 /198 Taxman 551 (Kar.); the decision of Hon'ble Bombay High in the case of CIT vs. Avtar Singh Wadhwan [2001] 247 ITR 260/115 Taxman 536 (Bom.); the decision of Hon'ble Calcutta High Court in the case of Sumana Bandyopadhyay vs. Dy. CIT (International Taxation) [2017] 88 taxmann.com 847/395 ITR 406.

27. Placing reliance on afore-mentioned rulings, the exemption of Rs .55,37,591/- claimed by the Assessee under Article 15(1) of the India-Australia DTAA read with Section 90 of the Act in respect

of employment exercise d/ services rendered in Australia to No kia Austr alia be a llowed. The AO has denied the exemption claimed under Article 15(1) of the India- Australia DTAA on the premise that the TRC has not been furnished while ignoring that alternate evidence in support of the Tax Residency in Aus tralia has been duly furnishe d i.e., Australia tax return is evidence of Yogesh Kotiyal residency in the Austr alia and also evidences due payment of taxes in the Australia. The Assessee had applied for TRC in Australia for the TY 2018 and TY 2019 and it is pertin e nt to highlight that the Assessee had received the TR C of Aus tralia issue d by the Australia Taxatio n Office for TY 2 019-20 and in this regard an application for admission of additional evidence was filed before the ld. DRP.

28. The undisputed facts are that:

- The a ssessee is a NRI
- The assessee received salary for services rendered outside India
- The a ssessee has paid taxes in Australia.
- Copy of the tax return filed Australian tax authority are filed before the revenue authorities.
- Assessee had a valid TRC.

29. Under these facts, the taxability of the salary paid by the Indian company to a non-reside nt is examined with reference to the provisions of Section 5, Section 9, Section 15 of the Income Tax Act, 1961 . Section 5 Income Tax Act reads as under:

"Scope o f total income.

5.(1) Subject to the pro visions o f this Act, the to tal income of any previous ye ar of a person who is a resident inc ludes 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 o f such perso n o r

(b) accrues or a rises or is deemed to accrue or ar ise to him in India during such year; or Yogesh Kotiyal

(c) accrues or arises to him o utside India dur ing such year:

Pro vide d tha t, in the case o f a person not o rdinarily re sident in India within the meaning of sub-sectio n ( 6) of section 6, the income w hich accrues or arises to him outside India shal l not be so included unless it is de rived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total inco me of any previous year o f a person who is a non-resident includes all income from wha tever 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."

30. This section deals with the scope of total income and subjected to the other provisions of this Act. The taxable income includes income from all sources received, deemed to be received accrues and deemed to have accrued is taxable in India in case of a non-resident. Hence, it is imperative to examine the provisions of taxability of salary received by non-

Yogesh Kotiyal resident from an Indian company as per the provisions of section 9 of the Income Tax Act. Section 9 Income Tax Act reads as under:

"Income deemed to accrue or arise in India.

9. (1) The following incomes shall be deemed to accrue or arise in India:-

27(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation 1-- For the purposes of this clause--

(a) in the case of a business, other than the business having business connection in India on account of significant economic presence, of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India;

(b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export;

(c) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from Yogesh Kotiyal activities which are confined to the collection of news and views in India for transmission out of India ;

(d) in the case of a non-resident, being--

(1) an individual who is not a citizen of India ; or (2) a firm which does not have any partner who is a citizen of India or who is resident in India ; or (3) a company which does not have any shareholder who is a citizen of India or who is resident in India, no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;

(e) in the case of a foreign company engaged in the business of mining of diamonds, no income shall be deemed to accrue or arise in India to it through or from the activities which are confined to the display of uncut and un-assorted diamond in any special zone notified by the Central Government in the Official Gazette in this behalf.

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(ii) income which falls under the head "Salaries", if it is earned in India.

Explanation.-- For the removal of doubts, it is hereby declared that the income of the nature referred to in this clause payable for--

- (a) service rendered in India; and
- (b) the rest period or leave period which is preceded

succeeded by services rendered in India and forms part of the service contract of employment, Yogesh Kotiyal shall be regarded as income earned in India ;

(iii) income chargeable under the head "Salaries" payable by the Government to a citizen of India for service outside India; "

31. As per the provision of Section 9 (1)(ii), the income earned under head "Salaries" is taxable in India " if it is earned"

in India. The explanation issued for removal of doubts declares that 'salaries if it is earned' means services rendered in India.

32. In the instant case the assessee neither had any rest period nor leave period which is preceded and succeeded by the services rendered outside India. Since, the assessee has rendered services

outside India, the salary cannot be taxable in India. The definition of salary as per the Income Tax Act is as under:

"Salaries.

15. The following income shall be chargeable to income-tax under the head "Salaries"--

(a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;

(b) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;

(c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer, if not charged to income-tax for any earlier previous year.

Explanation 1.--For the removal of doubts, it is hereby declared that where any salary paid in advance is included in the total income of Yogesh Kotiyal any person for any previous year it shall not be included again in the total income of the person when the salary becomes due.

Explanation 2.--Any salary, bonus, commission or remuneration, by whatever name called, due to, or received by, a partner of a firm from the firm shall not be regarded as "salary" for the purposes of this section."

33. As per the definition the salary paid or the advances received are to be included in the total income of the person when the salary becomes due.

34. From the concurrent reading of Section 5 dealing with scope of total income, Section 15 dealing with computation of total income under the head salary and chargeability thereof and Section 9 dealing with income arising or accruing in India with reference to the salaries and the services rendered in India, we hold that no taxability arises on the salary/allowances received by the assessee since the assessee is a non-resident and has rendered services outside India.

35. Thus, the Assessee is eligible for exemption on his salary for services rendered in Australia employment exercised in Australia during his Australia assignment period.

36. In the result, the appeal of the assessee is allowed. Order Pronounced in the Open Court on 12/04/2024.

Sd/-  
(Anubhav Sharma)  
Judicial Member  
Dated: 12/04/2024

Sd/-  
(Dr. B. R. R. Kumar)  
Accountant Member

\*Subodh Kumar, Sr. PS\*