IN THE INCOME TAX APPELLATE TRIBUNAL, AGRA BENCH, AGRA
[Coram : Bhavnesh Saini JM and Pramod Kumar AM]

I.T.A. No. : 319 and 320/Agr/2013

Assessment year: 2008-09 and 2009-10

Arvind Singh Chauhan …….Appellant
110 Sarswati Nagar
University Road, Gwal ior
[PAN : AEIPC 2120 F]

Vs.

Income Tax Officer
Ward 1(2), Gwalior ……Respondent

O R D E R

Per Pramod Kumar:

1. This is an appeal fi led by the assessee and is directed against the order dated 31st July, 2013 passed by the CIT(A) in the matter of assessment under Section 143(3) of the Income Tax Act 1961, for the Assessment Year 2009-10.
2. In Ground No.1, the assessee has raised the fol lowing grievance: -
That, on the facts and circumstances of the case and in law and in any view of the matter, the authorit ies below have erred in making and upholding the addition of Rs.13,34,884 on account of salary considering it as accrued and received in India, which was remitted by the employer company by transferring the amount from bank account in Singapore to the NRE bank account of the assessee with HSBC Bank at Mumbai .
3. Briefly, the relevant material facts are l ike this. The assessee, an individual , is in employment of Executive Ship Management Pte. Ltd., Singapore (**ESM-S, in short**), and works on merchant vessels and tankers plying on international routes. In addition to this salary income, the assessee also derives income from bank interest and receives pension from Indian Army, his former employer. There is also no dispute that the assessee's stay in India, in the relevant previous year, was less than 182 days, and that the residential status of the assessee is 'non-resident' . In the income tax return fi led by the assessee, the salary received by the assessee from ESM-S was not offered to tax. The income tax return filed by the assessee was selected for scrut iny assessment , and, in the course of resultant assessment proceedings, the Assessing Of ficer required the assessee to show cause as to why salary received by the assessee from ESM-S, for services rendered as ship crew, not be brought to tax in India. It was explained by the assessee that as assessee was a non-resident, the scope of his income l iable to

be taxed in India was restricted to income accruing or arising in India, income de emed to accrue or arise in India, or income received or is deemed to be received in India. Since the salary income in respect of ship crew is accruing and arising outside India, it is outside the ambit of l imited scope of Section 5(2). As for salary income being credited to bank account in India, assessee's contention was that salary income deposited in bank account in India, directly from bank account of the company outside India was not taxable in India. Reliance was placed on judicial precedents in the cases of **DIT Vs. Prahlad Vijendra Rao (51 DTR 95)** , **DIT vs. Diglan George Smith [(2011) 40 (I) ITCL 419)]** and **ITO vs Lohithakshan Nambian (ITA No. 1045/ Bang/09; order dated 12.04.2010).** None of these submissions, however, impressed the A.O. The Assessing Officer was of the view that the assessee's explanat ion cannot be accepted because section 6(5) provides that where a person's status is resident for one of the sources of his income, his status for al l the sources of income is to be taken as resident, and because assessee's status for pension and interest, by his own admission, is that of 'resident' - an inference based on assessee having shown pension and interest income as his taxable income in the return of income, the status of the assessee for al l his sources of income is required to be taken as 'resident ' . The Assessing Of ficer further observed that, "**Otherwise also, the assessee is a resident in India for one of the sources of income i.e. pension, because he was a Government employee and is getting pension**." The Assessing Of ficer was also of the view that since appointment letter was issued by foreign employer's agent in India, it is to be deemed that the salary income accrued in India. A reference was made to Hon'ble Supreme Court's judgment in the case of **CIT Vs. Shri Govardhan Ltd. (69 ITR 675)** for the proposition that i f an assessee acquires a right to receive income, the income is said to have accrued to him even though it may be received later, on it 's being ascertained. It was also noted that "**by receiving the appointment letter and details of salary to be paid, the assessee gets right to receive the salary**" . The AO further took note of the fact that the salary cheques were credi ted to assessee's account with HSBC Bank. It was in this backdrop that the salary of Rs.13,34,884 received from ESM-S was brought to tax in the hands of the assessee. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) upheld the stand of the Assessing Of ficer and observed as fol lows: -

I have considered the rival contentions of the Ld. AR of the appellant and gone through the assessment order and the decisions in the cases relied upon by the appel lant. The Assessing Officer has made the addition of Rs.13,34,884 as salary accrued and received in India. In this case, the appellant was an employee of M/s Executive Ship Management Pte Limited, Singapore. The employer company had issued the appointment letter to the appellant in India. Therefore, the salary was accrued in India. The appellant has maintained his bank account with HSBC Bank in India, in which the salary was deposited by the employer. Therefore the salary was also received in India. As per section 15 of the Income Tax Act also, the salary is to be tad on accrual basis. Since, the appointment letter was issued in India and therefore the salary was accrued in India. As per provision of the section 5(2) of the Income Tax Act, 1961 the income which is accrued or received in India is taxable in India . Accordingly, I am of the considered opinion that since the salary was accrued and received in India hence, the Assessing Officer has correctly assessed the salary income in the hands of the appellant. Therefore, the addition of Rs.13,34,884 is hereby confirmed.

4. The assessee is not satisfied by the stand so taken by the CIT(A) and is in further appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal positions.
6. We find that the Assessing Officer has himself taken note of the number of days of his stay outside India, as per passport entries, and given a categorical finding that the assessee's residential status, under section 6, is of 'non-resident' . Yet, he has proceeded to treat the assessee as 'resident' for al l purposes on the basis of reasoning that once assessee has a residential status of 'resident ' for the purpose of bank interest and pension income, and in view of operat ion of Sect ion 6(5), the assessee is required to be treated as 'resident' for the purposes of al l sources of his income. However, the reasoning so adopted by the Assessing Officer is based on fundamental conceptual misconceptions of facts as also of law.
7. In our considered view, the Assessing Of ficer was clearly in error in assuming that the assessee has accepted the status of resident, so far as interest and pension income is concerned, just because the assessee has included interest and pension income in his taxable income. The pension income received by the assessee accrued and was received in India inasmuch as the pension was paid by his former employer in India, and, therefore, irrespect ive of his residential status, the income was taxable in India. Simi larly, so far as interest on savings bank account was concerned, the interest accrued in India was credited, in income character as such, in India, and was, therefore, taxable in India. This taxabi l ity does not require recipient of income to have 'resident' s tatus under section 6 at al l , as even a non resident, by the virtue of s ection 5(2), is taxable in India in respect of (a) income received or is deemed to be received in India, by or on behal f of such person; and (b) income which accrues or arises, or is deemed to accrue or arise to him, in India. The Assessing Of ficer was thus clearly in error in assuming that the assessee accepted his residential status as 'resident ' for the purpose of pension income and interest income, or that the assessee had 'residen t' status for these incomes. In view of this finding, Section 6(5) cannot have any appl icat ion in the matter, though, for the reasons we wi l l set out now, Section 6(5) is anyway a redundant legal provision which can no longer have any pract ical impl ications. Section 6(5) provides that, " **If a person is resident in India in a previous year relevant to an assessment year in respect of any source of income, he shal l be deemed to be resident in India in the previous year relevant to the assessment year in respect of each of his other sources of income**". This sub section is one of the few provisions which have remained intact since the Income Tax Act,1961, is enacted, but then ironical ly this sub section itself is redundant since long time, because effective assessment year 1989-90, previous year, for al l sources of income and for al l assessee, is uni form i .e. financial year immediately preceding the assessment year. Until that time, it was possible for an assessee to have di f ferent previous years for di fferent sources of income, e.g. calendar year for business income and financial year for income form salaries, and, therefore, it was possible to have di f ferent residential status for di f ferent sources of income, because the number of days of presence in India was to be seen vis-à-vis the relevant previous years and those previous years, in some cases, could cover different period – even as assessment years for al l those previous years remained the same. With the uni formity of previous years, such a situation is no longer possible, and, the legal provision incapable of any appl icat ion. If this legal provision sti l l exists on the statu te, it can only be explained by inertia of the law makers in weeding out redundant legal provisions.
8. Once it is not in dispute that the assessee qual i fies to be treated as a 'non-resident ' under Section 6 of the Act, as is the undisputed posi tion in this case, the scope of taxable income in the hands of the assessee, under Section 5(2), is restricted to (a) income received or is de emed to be received in India, by or on behal f of such person; and (b) income which accrues or arises, or is deemed to accrue or arise to him, in India. Therefore, it is only when at least one of these

two condit ions is ful fi l led that the income of a non-resident can be brought to tax in India. In the present case, the services are rendered outside India as crew on merchant vessels and tankers plying on international routes. A salary is compensation for the services rendered by an employee and, therefore , *situs* of its accrual is the *situs* of services, for which salary paid, being rendered. In the case of **CIT Vs Avtar Singh Wadhwan (247 ITR 260),** Hon'ble Bombay High Court has held that income from salary, in the case of crew of even an Indian vessel opera ting in international waters, is to be treated as having accrued outside India. As for the Assessing Of ficer's rel iance on Hon'ble Supreme Court's judgment in the case of **CIT Vs. Shri Govardhan Ltd** *(supra)* and his observation to the ef fect that "by receiving the appointment letter and detai ls of salary to be paid, the assessee gets right to receive the salary" , this is whol ly incorrect to assume that an employee gets right to receive the salary just by get ting the appointment letter. An employee has to render the services to get a right to receive the salary and unless these services are rendered, no such right accrues to the employee. Undoubtedly, i f an assessee acquires a right to receive an income, the income is said to have accrued to him even though it may be received later, on it 's being ascertained, but this proposition wi l l be relevant only when assessee gets a right to receive the income, and, in the present case, assessee gets his right to receive salary income when he renders the services and not when he simply receives the appointment letter. The stand of the Assessing Officer, which has been rather mechanical ly approved by the learned Commissioner (Appeals) as wel l , is devoid of legal ly sustainable merits.

9. The next objection of the Assessing Of ficer, which has met learned CIT(A)'s approval , is that the money was received in India , since, beyond any dispute or controversy, the salary cheques were credited to the assessee's account with HSBC, Mumbai . So far as this aspect of the mat ter is concerned, in our considered view, the law is trite that 'receipt' of income, for this purpose, refers to the first occasion when assessee gets the money in his own control – real or constructive. What is material is the receipt of income in its character as income, and not what happens subsequent ly once the income, in its character as such is received by the assessee or his agent; an income cannot be received twice or on multiple occasions. As the bank statement of the assessee clearly reveals these are US dol lar denominated receipts from the foreign employer and credi ted to non resident external account maintained by the assessee wi th HSBC Mumbai . The assessee was in lawful right to receive these monies, as an employee, at the place of employment, i .e. at the location of its foreign employer, and it is a matter of convenience that the monies were thereaf ter transferred to India. These monies were at the disposal of the assessee outside India, and, it was in exercise of his rights to so dispose of the money, that monies were transferred to India. We may, in this regard, refer to Hon'ble Madras High Court 's judgment in the case of **CIT Vs AP Kalyankrishnan (195 ITR 534)** wherein Their Lordships were *in seisin* of a si tuat ion in which the assessee had received pen sion from Malaysian Government which was remitted by the Accountant General, Federation of Malaya, Kuala Lumpur to Accountant General , Madras, for onward payment to the assessee. On these facts, rejecting the contention of the revenue that the pension amounts are required to be treated as having been received in India, Their Lorships observed, inter al ia, that "**that the pension payable to the assessee had accrued in Malaya…… and only thereafter, by an arrangement embodied in the letter found in Annexure D to the stated case, the pension had been remitted to the assessee in India and made avai lable to him. The assessee had, therefore, to be regarded as having received the income outside India and the pension had been remitted or transmitted to the place where the assessee was l iving, as a matter of convenience and that would not , in our view,**

const itute receipt of pension in India by the assessee, fal l ing within s. 5(1)(a) of the Act ". This would show that once an income is received outside India, whether in reality or on constructive basis, the mere fact that i t has been remi tted to India would not be decisive on the question as to income is to be treated as having been received in India. The connotation of an income having been received and an amount having being received are qual itat ively di f ferent. The salary amount is received in India in this case but the salary income is received outside India. It is elementary that an income cannot be taxed more than once but i f, at each point of receipt, the income is to be taxed, it may have to be taxed on multiple occasions. In this view of the mat ter, in a situation in which the salary has accrued outside India, and, thereaf ter, by an arrangement, salary is remitted to India and made avai lable to the employee, it wi l l not constitute receipt of salary in India by the assessee so as to trigger taxabi l ity under section 5(2)(a) of the Act.

10. In view of the above discussions, as also bearing in mind entirety of the case, we deem i t fit and proper to delete the impugned addition of Rs 13,34,884. The assessee gets the rel ief accordingly.

11. Ground no. 1 is thus allowed.

12. In ground no. 2, the assessee has raised the fol lowing grievance: **That, on the facts and circumstances of the case and in law and in any view of the matter, the authorit ies below have erred in making and upholding the addit ion of Rs 40,589 on account of bank interest earned and credited in NRE account with HSBC Bank, Mumbai.**

13. So far as this grievance of the assessee is concerned, the r elevant material facts are l ike this. During the course of the assessment proceedings, the Assessing Of ficer noticed that total amount of Rs 40,589 has been credited to the assessee's bank account wi th HSBC but the assessee has not included the same in his taxable income. On this basis, the Assessing Of ficer added the said amount to the income returned by the assessee. Aggrieved by the addi tion so made, assessee carried the matter in appeal before the CIT(A) but without any success. Even though it was pointed out to the learned CIT(A) that the account , in which the interest of Rs 40,589 was credited, was an NRE (Non-resident - External) account, and such, interest earned thereon was exempt under section 10(4)(i i) of the Act , learned CIT(A) held that since the said account was not an NRE account , and, accordingly, exemption under section 10(4)(i i) was not avai lable. The assessee is not satisfied wi th the stand so taken by the learned CIT(A) and is in appeal before us.

14. We have heard the rival contentions, pe rused the material on record and duly considered factual matrix of the case as also the applicable legal position.

15. On a perusal of bank statements, we find that the HSBC has categorical ly indicated that the account in question is an NRE account. When this was pointed out to the learned Departmental Representat ive, he did not have much to say except for placing his rather duti ful reliance on the orders of the authorit ies below. In this view of the mat ter, and in view of speci fic mandate of Section 10(4)(i i) which exempts interest on NRE accounts from income tax, we uphold the grievance of the assessee and delete the impugned addition of Rs 40,589.

16. Ground No. 2 is also thus allowed.

17. In the result, the appeal fi led by the assessee for the assessment year 2009-10 is al lowed.

18. This is an appeal fi led by the assessee and is directed against the order dated 2nd August , 2013 passed by the CIT(A) in the matter of assessment under Section 143(3) of the Income Tax Act 1961, for the Assessment Year 2008-09, on the fol lowing grounds:

1. That, on the facts and circumstances of the case and in law and in any view of the matter, the authorit ies below have erred in making and upholding the addition of Rs.10,40,411 on account of salary considering it as accrued and received in India,

which was remitted by the employer company by transferring the amount from bank account in Singapore to the NRE bank account of the assessee with HSBC Bank at Mumbai .

2. That, on the facts and circumstances of the case and in law and in any view of the matter, the authorit ies below have erred in making and upholding the addit ion of Rs 19,738 on account of bank interest earned and credited in NRE account with HSBC Bank, Mumbai.

19. Learned representatives fairly agree that whatever we decide for the assessment year 2009-10 wi l l also apply mutatis mutandis for this assessment year as wel l . Al l the relevant facts and circumstances of the case, barring the amounts of additions, are the same as in the assessment year 2009-10. As we have deleted the simi lar additions for the assessment year 2009-10, as discussed in the foregoing paragraphs, we delete these additions as wel l . The assessee gets the rel ief accordingly.

20. In the result, this appeal for the assessment year 2008-09 is also al lowed.

21. To sum up, both the appeals fi led by the assessee are al lowed. Pronounced in the open court today on 14th day of February, 2014.

Bhavnesh Saini Pramod Kumar

(Judicial Member) (Accountant Member)

Agra, the 14th day of February, 2014

Copies to : (1) The appel lant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) The Departmental Representat ive
(6) Guard Fi le
By order etc
Senior Private Secretary
Income Tax Appel late Tribunal
Agra bench, Agra