

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM ]

I.T.A No. 428/Kol/2017

Assessment Year : 2013-14

DCIT(IT), Circle-2(1), Kolkata

-vs-

Shri Sudipta Maity

[PAN: AOGPM 3882 A ]

(Appellant)

(Respondent)

I.T.A No. 416/Kol/2017

Assessment Year : 2013-14

ACIT(IT), Circle-1(1), Kolkata

-vs-

Shri Bodhisattava Chattopadhyay

[PAN: AHLPC 7400 N ]

(Appellant)

(Respondent)

I.T.A No. 425/Kol/2017

Assessment Year : 2013-14

DCIT(IT), Circle-2(1), Kolkata

-vs-

Shri Souvik Basu

[PAN: AJUPB 0795 Q ]

(Appellant)

(Respondent)

For the Department : Shri N. B. Som, Addl. CIT (DR)

For the Assessee : Shri Nageswar Rao, Advocate

Shri Navin Jain, CA

Date of Hearing : 28.06.2018

Date of Pronouncement : 11.07.2018

**ORDER**

**Per M.Balaganesh, AM**

1. This appeal by the Revenue in I.T.A. No. 428/Kol/2017 arises out of the order of the Learned Commissioner of Income Tax(Appeals)-22, Kolkata [in short the Id CIT(A)] in Appeal No. 27/CIT(A)-22/Kol/13-14/16-17 dated 28.12.2016 against the order passed by the DCIT(IT), Circle-2(1), Kolkata [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 28.03.2016 for the Assessment Year 2013-14.

This appeal by the Revenue in I.T.A. No. 416/Kol/2017 arises out of the order of the Learned Commissioner of Income Tax(Appeals)-22, Kolkata [in short the Id CIT(A)] in Appeal No. 43/CIT(A)-22/Kol/13-14/16-17 dated 21.12.2016 against the order passed by the ACIT(IT), Circle-1(1), Kolkata [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 28.03.2016 for the Assessment Year 2013-14.

This appeal by the Revenue in I.T.A. No. 425/Kol/2017 arises out of the order of the Learned Commissioner of Income Tax(Appeals)-22, Kolkata [in short the Id CIT(A)] in Appeal No. 19/CIT(A)-22/Kol/13-14/16-17 dated 21.12.2016 against the order passed by the DCIT(IT), Circle-2(1), Kolkata [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 26.03.2016 for the Assessment Year 2013-14.

Since the identical issue involved in these appeals, they are taken up together and disposed off by this common order for the sake of convenience.

2. The facts of Shri Sudipta Maity (ITA No. 428/Kol/2017) are taken up for adjudication as per the consent of both the parties before us. The decision rendered thereon would apply with equal force for other assesseees involved in these appeals except with variance in figures and page numbers of the paper book.

3. The only issue to be decided in this appeal is as to whether the Id CITA was justified in deleting the addition made in the sum of Rs 51,84,489/- which was brought to tax by the Assessing Officer by applying the provisions of section 5(2) of the Act, in the facts and circumstances of the case.

4. The brief facts of this issue are that the assessee was an employee in IBM India Private Limited and during the financial year 2012-13 was sent on short term assignment to Switzerland. He had stationed in Switzerland for 331 days during the year under consideration. Accordingly, his residential status for the year under consideration would be Non-Resident. During the year under consideration, the assessee had received the following emoluments from IBM :-

- a) Gross Salary received in India – Rs 6,77,128/- and
- b) Foreign allowances on account of the international assignment received in Switzerland – Rs 51,84,489/-

IBM had effected TDS of Rs 16,04,063/- on the entire emoluments paid to the assessee including the foreign allowances paid to the assessee u/s 192(1) of the Act. The assessee filed his return of income for the Asst Year 2013-14 declaring taxable income of Rs 5,73,320/- (being the salary received in India alone) after claiming deduction of RS 1,01,405/- under Chapter VIA of the Act and claimed a refund of Rs 15,58,060/- in his return of income.

4.1. During the financial year 2012-13, the assessee had received Rs 51,84,489/- outside India for services rendered outside India . The assessee pleaded that the entire foreign allowance of Rs 51,84,489/- was not offered to tax in India as the same was received by the assessee outside India for the services rendered outside India which does not form part of the total income u/s 5(2) of the Act. The assessee however offered the entire salary received in India of Rs 6,77,128/- to tax in India. In the course of assessment proceedings, the assessee submitted a letter dated 24.9.2015 with regard to exemption claimed by him towards foreign assignment allowance, which was paid by crediting the assessee's Travel Currency Card (TCC) . The assessee also furnished a certificate from IBM India Private Limited stating that the assessee had received Rs 51,84,489/- outside India for rendering services in Switzerland. In the said certificate, it was also mentioned by IBM that taxes to the tune of Rs 16,04,063/- was deducted at source including on the portion of foreign assignment allowance because the residential status as well as the tax residency of the assessee was not known.

4.2. The assessee vide letter dated 21.12.2015 elaborated the modality of payment of Foreign Assignment Allowance by IBM as under:-

*“..... We would submit before your goodself that the foreign assignment allowance was paid by IMB India Private Limited, employer of the captioned assessee, to the International Travel Card outside India (copy of travel card statement enclosed as Annexure 3). The said card is denominated in foreign currency only and can be used only outside India. Once an employee is sent on foreign assignment, a travel currency card is issued to the employee by Axis Bank Limited.*

*Upon instructions from IBM, Axis Bank pays the amount of foreign assignment allowance to the international travel card of the employee outside India through its Nostro account situated outside India. A nostro account is a bank account held in a foreign country by a domestic bank, denominated in the currency of that country. Nostro Accounts are used to facilitate settlement of foreign exchange and trade transactions. A Nostro Account is always maintained outside India and denominated in Foreign Currency.*

*In view of the same, since the foreign assignment allowances are paid from Nostro Account situated outside India to the International Travel Card outside India, the same is not taxable under section 5(2) of the Act in case of Non-residents. In this regard, we have also enclosed a letter issued by Axis Bank confirming that the amount is credited to the International Travel Card of the employees outside India through the Nostro Account maintained outside as Annexure 4.....”*

The assessee furnished a letter issued by Axis Bank, Bangalore, addressed to IBM, wherein the details of its Nostro Account, viz Swift Code, account number, names of the intermediary bank and the denominated currency were listed out. The said letter also confirmed that the allowance paid to employees of IBM while on assignment through the Nostro Account of Axis Bank which are situated abroad.

4.3. The Id AO issued a show cause to the assessee as to why the foreign assignment allowance received by the assessee through TCC should not be treated as income received in India. In response, the assessee reiterated his submissions made earlier and summarized the same as under:-

- a) When an employee of IBM India Private Limited is sent on international assignment, Axis Bank upon instruction from IBM, issues a Travel Currency Card (TCC) to an employee who is sent to a foreign assignment.
- b) IBM maintains an Exchange Earners Foreign Currency (EEFC) Account with Deutsche Bank , Bangalore.
- c) From the EEFC Account of Deutsche Bank, funds are transferred to the Nostro Account of Axis Bank maintained outside India.
- d) Upon instruction from IBM, the funds are then transferred from the Nostro Account of Axis Bank maintained outside India to the Axis TCC of the respective employee.

4.4. The Id AO however did not heed to the contentions of the assessee and held that the foreign assignment allowance was received by the assessee pursuant to the employment contract entered in India ; that the first point of receipt of the same happens in India and

thereafter monies get transferred by way of credit to TCC issued to the assessee through the Nostro Account of Axis Bank. Therefore, the said receipt is taxable in India as per section 5(2) of the Act and accordingly denied the claim of exemption of the assessee in the sum of Rs 51,84,489/-.

5. The Id CITA deleted the addition and granted relief to the assessee. Aggrieved, the revenue is in appeal before us.

6. The Id DR argued that the monies were received by the assessee only pursuant to employer –employee relationship and out of employment contract which is entered in India and is also enforceable in Indian courts. He argued that TCC was issued by Axis Bank, which is a prepaid card and can be loaded / reloaded in foreign currency. The Axis Bank TCC is available in US, Australian, Canadian and Singapore Dollars, Euros, Sterling Pounds, Swiss Francs and Swedish Kroner Currency on VISA platform . The US dollars, Sterling Pounds, Euros, Dirhams and Saudi Riyals variants are also available on MASTERCARD platform. One can use the travel card in any country where VISA / MASTERCARD has acceptance. An individual does not need an account relationship with Axis Bank branch or the office of select full-fledged money changers (FFMC) and purchase an Axis Bank TCC as he can simply walk into any Axis Bank branch or the office of select FFMC and purchase an Axis Bank TCC over the counter. At the time of purchase of such a card for amounts exceeding \$5000 , the purchaser has to mandatorily submit a copy of passport, copy of Visa issued by the country of travel, copy of airline ticket and Form A2. The usage of travel card is to be in strict accordance with the regulations of Exchange Control Regulation of the Reserve Bank of India (RBI) and in particular the Foreign Exchange Management Act, 1999 (FEMA). For employment abroad, i.e for a period who is proceeding to work abroad, the present FEMA limit is \$100000 per financial year. He argued that thus it is Indian employer who extends this facility of TCC by depositing money in the card account by placing

instructions to the bank. The card needs to be purchased / loaded /reloaded from the bank branch of the FFMC over the counter. The said salary is deposited in India first and the bank from India issues further instructions to loan the said card with the said amount. Therefore, there can be no question of receiving the salary as income of an employee in his TCC.

7. We have heard the rival submissions. We have gone through the following documents enclosed in the paper book of the assessee:-

- a) Copy of passport for the relevant period – enclosed in pages 124 to 128 of paper book.
- b) Certificate issued by IBM India Private Limited explaining the entire facts of payments to assessee including the details of deduction of tax at source thereon together with its purpose – enclosed in page 129 of paper book.
- c) Statement of Account of Axis Bank TCC for the period 30.11.1999 to 14.12.2015 – enclosed in apges 130 to 145 of paper book.
- d) List of various Nostro Accounts held by Axis Bank in various countries , out of this list, the relevant Nostro Account from where payments were made to assessee herein is Zurcher Kantonal Bank (ZKB) from Account Number 0700-00037.370 – enclosed in Page 146 of paper book.
- e) Sample instructions given by IBM India Private Limited authorizing the Axis Bank, Bangalore to load currencies to the TCC of assessee - enclosed in pages 147 to 148 of paper book.

7.1. From the facts narrated above and on hearing the learned counsels of assessee as well as for the revenue, we find that:-

- a) The assessee is a non-resident individual and had rendered services outside India for which he has received foreign assignment allowance.
- b) IBM maintains money in foreign currency in its EEFC account maintained with Deutsche Bank, Bangalore.
- c) IBM instructs Axis Bank to issue Travel Currency Card to its employees who are sent on foreign assignment, which is loosely called Axis TCC.
- d) Axis Bank has maintained a Nostro Account with its Correspondent Banker (Zuercher Kantonal Bank, Zurich).
- e) IBM transfers funds from its EEFC Account from Deutsche Bank to the Nostro Account of Axis Bank (i.e Zuercher Kantonal Bank) for the purpose of loading / reloading the Axis TCC issued to the assessee who is sent on foreign assignment.
- f) The employee who is sent on foreign assignment uses the said funds outside India out of monies topped up or credited in his Axis TCC. Hence it could be safely concluded that the first point of receipt for the assessee happens outside India. This money is used by him for his sustenance in Switzerland. Both the accrual and receipt of income happens outside India. Hence the same is outside the ambit of tax as per the provisions of section 5(2) of the Act. The services of the assessee are also utilized only outside India.
- g) This foreign assignment allowance is duly subjected to tax in the country of Switzerland and the assessee had duly paid the said tax to the Swiss Government.



h) The assessee had paid taxes in India in respect of salary received by him in India, which is not in dispute.

7.2. We find that the Id DR had argued that the foreign assignment allowance given to the assessee is nothing but salary and that the same is first deposited in India and thereafter it gets loaded into the TCC by Axis Bank as instructed by IBM. In this regard, we find from the account statement of TCC enclosed in pages 130 to 145 of Paper Book for the period 30.11.1999 to 14.12.2015, that the assessee is sent outside India with a TCC containing zero balance and the same is loaded/reloaded periodically as per the requirement. This loading or reloading of funds in TCC happens when the assessee was rendering services outside India and was staying outside India. Hence the funds get deposited / loaded / reloaded in TCC for the first time outside India. Thereafter the assessee withdraws the monies for his sustenance outside India. Hence the first point of receipt of these funds loaded / reloaded in TCC for the assessee is outside India. We find that this submission of the Id DR is factually incorrect and is not borne out from the facts narrated above.

7.3. We find that the assessee's case squarely falls under the provisions of Explanation to Section 5(2) of the Act which are reproduced for the sake of convenience as under:-

*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.*

7.4. We find that the reliance placed by the Id AR on the *Co-ordinate Bench decision of Jaipur Tribunal in the case of ADIT (International Taxation) vs Sri Kartik Vyas in ITA No. 375/JP/2012 dated 31.12.2014* is directly on this point which was rendered in the context of an IBM employee under similar circumstances. It was held as under:-

*“5. At the outset, the learned AR for the assessee reiterated the submissions made before the ld. CIT(A) and submitted that the appellant is an employee of IBM India Pvt. Ltd., was sent on an International assignment to Netherlands during the previous year 2007-08. The appellant received foreign allowances of Rs. 17,27,360/- outside India for the services rendered in Netherlands. As the appellant, qualified as a non-resident during the relevant assessment year and foreign allowances received by the appellant is not liable to tax U/s 5(2) of the Act. The appellant had disclosed total income of Rs. 3,27,910/- excluding the foreign allowances and against this income, the tax of Rs. 48,790/- was paid by the appellant. The employer deducted TDS wrongly at Rs. 6,36,484.65 and appellant also paid self assessment tax at Rs. 4,653/- on account of his interest income from bank deposits. Therefore, the appellant had claimed refund of Rs. 5,92,305/- by filing the return. The learned Assessing Officer submitted that the amount of Rs. 17,27,360/- was received by the appellant in Netherlands from his employment on account of foreign allowances, for which he produced certificate from the employer. The employer was non-resident during the year and provisions of Section 6(1) of the Act is applicable. Therefore, foreign allowances received by him outside the India for services rendered outside India are not liable to be taxed in India U/s 5(2) of the Act. He also relied on the various case laws, which were relied upon before the learned CIT(A), therefore, he prayed to confirm the order of the learned CIT(A).*

*6. We have heard the rival contentions of both the parties and perused the material on record. The appellant was non-resident during the year under consideration and allowances were received by him in Netherlands. The employer wrongly deducted TDS, the appellant had claimed refund on it. The Indian income has been considered by the appellant as taxable but the allowances paid outside the India are not taxable u/s 5(2) of the Act in the case of non-resident. The case law relied upon by the learned CIT(A) are squarely applicable in the case of the assessee, therefore, we confirm the order of the learned CIT(A).*

*7. In the result, the appeal filed by the Revenue is dismissed.”*

7.5. We find that the Id DR placed reliance on the *Co-ordinate Bench decision of Chennai Tribunal in the case of Sri Balamuthu Kadiresan vs ITO in ITA No. 353/Mds/2016 dated 29.4.2016* in support of his contentions. We find that the said decision in para 9.1. of the order had considered the decision of Jaipur Tribunal in the

case of ADIT(International Taxation) vs Sri Karthik Vyas in ITA No. 375/JP/2012 dated 31.12.2014 and observed that the Jaipur Tribunal decision is factually distinguishable with the facts before the Chennai Tribunal. Hence the reliance placed on the decision of Chennai Tribunal supra does not come to the rescue of the assessee herein.

7.6. We also find that the *Hon'ble Karnataka High Court in the case of DIT (International Taxation) vs Prahlad Vijendra Rao reported in 198 Taxman 551 (Kar)* and *Hon'ble Bombay High Court in the case of CIT vs Avtar Singh Wadhwan reported in 247 ITR 260 (Bom)* had held that in the case of a non-resident, when services are rendered outside India , the accrual of income thereon happens outside India and hence the same cannot be brought to tax in India as per section 5(2) of the Act. As stated above, we find that the assessee was able to get control over the funds in his TCC for the first time only in Switzerland and not in India and first point of receipt also happens only in Switzerland. Hence it could be safely concluded that both accrual and receipt of funds happens outside India thereby making the said receipt to stay outside the ambit of taxability u/s 5(2) of the Act.

7.7. We also find that identical claim of exemption of the assessee was allowed by the Id AO for the Asst Year 2014-15 u/s 143(3) of the Act dated 10.12.2016 after detailed examination of the same and by giving proper findings in the assessment order vide para 5.02 and 5.03.

7.8. In view of the aforesaid findings in the facts and circumstances of the case and by respectfully following the various judicial precedents relied upon hereinabove, we hold that the Id CITA had rightly deleted the addition made on account of disallowance of claim of exemption in respect of foreign assignment allowance received by the assessee

outside India . Hence we do not find any infirmity in the order of the Id CITA in this regard. Accordingly, the grounds raised by the revenue are dismissed.

8. In the result, the appeal of the revenue is dismissed in all the three cases.

**Order pronounced in the Court on 11.07.2018**

Sd/-

[S.S. Godara]  
Judicial Member

Sd/-

[ M.Balaganesh ]  
Accountant Member

Dated : 11.07.2018

SB, Sr. PS

Copy of the order forwarded to:

1. i) DCIT(IT), Circle-2(1), Kolkata  
(ii) ACIT(IT), Circle-1(1), Kolkata  
(iii) DCIT(IT), Circle-2(1), Kolkata  
Aayakar Bhawan Poorva, 110, Shantipally, Kolkata-700107.
2. (i) Shri Sudipta Maiti, 7/9, S.N. Banerjee Lane, Nimta, Kolkata-700049.  
(ii) Shri Bodhisattava Chattopadhyay, Bhuban Chandra Bhor, 3<sup>rd</sup> Lane, P.O.-  
Chandannagar, Hooghly-712136.  
(iii) Shri Souvik Basu, Flat No. 5B, 4/1, Dum Dum Road, Nagerbazar, Kolkata-  
700074.
- 3..C.I.T.(A)-
4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary  
Head of Office/D.D.O., ITAT, Kolkata Benches