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

BEFORE,
SHRI SAKTIJIT DEY, VICE PRESIDENT
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.1457/Del/2022
(ASSESSMENT YEAR 2018-19)

Amit Laroya No.48, Malcha Marg, New Delhi-110001 PAN No.AAAPL8950A		ACIT Circle International Tax (2) (2) (1) New Delhi
(Appellant)		**(Respondent)**

Appellant by	Sh. Vishal Kalra, Advocate Ms.Sumisha Murgai, Advocate Sh. Kashish Gupta, Advocate
Respondent by	Sh. Vizay B. Vasanta, CIT DR

Date of Hearing	16/11/2023
Date of Pronouncement	28/11/2023

ORDER

PER M. BALAGANESH, AM:

This appeal of the Assessee arises out of the order of the CIT, Circle, Int. Tax. 2(2)(1) [hereinafter referred to as ['CIT'] in Appeal dated 29/04/2022 against the order passed by DRP u/s 144C(5) of the Income Tax Act (hereinafter referred to as 'the Act') on 07/01/2022 for the Assessment Year 2018-19.

2. Though the assessee has raised several grounds of appeal before us, the only effective issue to be decided in this appeal is as to whether the salary income earned by the assessee in the sum of Rs.5,11,71,307/-is eligible for exemption in terms of Article 15(1) of India-Korea Double Taxation Avoidance Agreement (DTAA) for the exercise of employment in Korea in the facts and circumstances of the instant case.

3. We have heard the rival submissions and perused the material available on record. The assessee filed his return of income for the assessment year 2018-19 declaring total income of Rs.57,69,390/-. The Ld. AO on perusal of Form 26AS of the assessee observed that the assessee was in receipt of Rs.5,40,07,330/- under the head

income from salary from 3M India Limited, an Indian resident company. Out of this, the assessee had declared only the sum of Rs.29,86,022/- under the head salary and claimed TDS refund of Rs.1,98,58,099/- which included TDS of Rs.1,89,69,411/- deducted on receipt of Rs.5,40,07,330/- . It is not in dispute that assessee during the year under consideration was a non-resident. The assessee as a matter of abundant caution and on a conservative basis had offered a sum of Rs.29,86,022/-being the salary proportionate to the period of stay in India for 31 days, in the return of income. The assessee was sent on international assignment to 3M Korea from 3M India Limited effective from June, 2016 and since then he was working in Korea. During the assessment year 2018-19, as stated earlier, the assessee had stayed in India only for a short period of 31 days. The assessee offered the proportionate salary thereon amounting to Rs.29,86,022/- in the return of income filed in India. Since assessee was exercising employment in Korea, the Indian company i.e. 3 M India Limited paid the salary to the assessee and cross charged the same on the Korean Company since the assessee was only sent on deputation on an international assignment to 3M Korea. It is not in dispute that

services were rendered by the assessee outside India. However, in order to ensure withholding tax compliance laid down u/s. 192 of the Act, 3 M India Limited deducted tax at source on the salary paid to the assessee. The entire salary paid was reimbursed to 3M India Limited by 3M Korea. It is not in dispute that assessee had filed his tax returns in Korea duly offering the salary income earned for services rendered in Korea. The tax residency certificate issued by the District Tax Office of Korea is on record. The income tax returns filed by the assesee in Korea are also placed on record.

4. The assessee claimed exemption in terms of Article 15(1) of the Act of India Korea treaty in the sum of Rs.5,11,71,307/- being the salary accrued outside India for services rendered outside India. However, Indian company while making payment of salary to the assessee had deducted tax at source in terms of section 192 of the Act. Hence, in order to claim refund of excess TDS, the assessee had filed the return in India offering regular income earned by him in India and claiming exemption for salary outside accrued India in the status of non resident. In the said return, the salary accrued outside India for services rendered outside India were claimed as

exemption in terms of Article 15(1) of India, Korea DTAA. The main contention of the revenue as well as Ld. DR before us, is as per section 9 of the Act, all incomes which had come directly or indirectly through any source in India would be taxable in India. It is not in dispute that during the year the assessee had duly furnished the following documents before the lower authorities:-

(a) details regarding the number of days for which the assessee stayed in India from A.Y. 2014-15 to A.Y. 2019-20 to prove the fact that he is not a resident during the year under consideration.

(b) Offer letter issued by Indian employer for the assignment in Korea.

(c) the reconciliation of salary income which was reflected in Form 26AS with the income reported in tax returns filed in Korea.

(d) Copy of assessee's passport for the period between assessment years 2014-15 to 2018-19.

(e) details of assessee's stay in India during assessment years 2018-19 and stay between 01.04.2013 to 31.03.2016.

(f) Copy of tax residency certificate issued for the year 2017 and 2018 by the District Tax Office Korea

(g) Copy of income tax return of the assessee

5. We find that the Ld. AO had reproduced Article 15 of the India Korea treaty and concluded that assessee is not eligible to claim the relief by applying Article 15(2) (b) and 15 (2) (c). The Ld. AO also

observed that since remuneration was always paid by the Indian employer and control and management of the assessee was always based in India. Thus, the salary received by the assessee from Indian employer shall be deemed to accrue or arise in India u/s. 9 (i) (ii) of the Act. We find that the said section has to be read together with the explanation thereon which clearly states that *income of the nature referred to in this clause payable for-*

(a) services rendered in India;
(b) the rest period or leave period which is preceded and succeeded by services rendered in India and forms part of the services contract;

shall be regarded as income earned in India.

Hence, as aforesaid explanation, it is very clear that salary payment could be stated to be earned in India only if the corresponding services are rendered in India. Since in the instant case, the services are rendered outside India which fact is not in dispute before us and hence income cannot be said to be deemed to accrue or arise in India. Further we find that Article 15 (1) of India Korea

treaty states that employment income earned by individual is exempt from tax in India if the following conditions are satisfied :-

(a) If the individual is resident of Korea; and

(b) if the employment is outside India.

In the instant case, both the conditions had been satisfied and hence in any event, the salary would not be taxable in India in terms of Article 15 (1) of India Korea treaty.

6. The next aspect on this issue is the salary of Rs.29,86,022/- offered suo moto by the assessee in the return of income filed in India. As stated in the earlier part of this order, this income has been offered by the assessee to tax in India on a conservative basis proportionate to the period of stay of 31 days in India during the year under consideration. Be that as it may, merely because a particular receipt has been erroneously offered to tax by the assessee in the return, it does not mean that the revenue acquires the right to tax the same in the hands of the assessee. The revenue could tax particular receipt only if the provisions of the Act enables it to do so. There is no estoppel against the statute.

7. In view of the aforesaid observations, we hold that the salary income earned in India is not taxable under the Act as well as under the India Korea treaty. Accordingly the grounds 2 to 5.1 raised by the assessee are allowed.

8. The ground No.1 raised by the assessee is general in nature and does not require any specific adjudication.

9. The ground No.6 raised by the assessee is seeking concessional rate of tax @ 15% on short term capital gains declared by the assessee.

10. We have heard the rival submissions and perused the material available on record. It is not in dispute that short term capital gain declared by the assessee had duly suffered Securities Transaction Tax (STT) and thereby the assessee would be liable to tax in terms of section 111 A of the Act. From the perusal of the orders of the lower authorities, we find that there is no finding given with regard to this issue. Hence, we deem it fit to restore this issue to the file of

Ld. AO for denovo adjudication in accordance with law. Accordingly, ground No.6 raised by the assessee is allowed for statistical purposes.

11. The ground No.7 raised by the assessee is seeking credit for tax deducted at source amounting to Rs.1,98,58,098/-. This matter requires factual verification. Hence we direct the Ld. AO to grant the credit of TDS in accordance with law. Accordingly ground No.7 raised by the assessee is allowed for statistical purposes.

12. The ground No.8 raised by the assessee is regarding chargeability of interest u/s. 234B of the Act which is consequential in nature and hence does not require any specific adjudication.

13. The ground No.9 raised by the assessee is challenging the initiation of penalty proceedings u/s. 270 A of the Act, which would be pre mature for adjudication at this stage. Hence, dismissed.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on 28.11.2023.

Sd/-	Sd/-
(SAKTIJIT DEY)	**(M. BALAGANESH)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 28/11/2023
Neha, Sr. P.S.