आयकर अपीलीय अधिकरण
कोलकाता 'बी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'B' BENCH, KOLKATA

डॉ. मनीष बोरड, लेखा सदस्य
एवं
श्री प्रदीप कुमार चौबे, न्यायिक सदस्य
के समक्ष
Before
DR. MANISH BORAD, ACCOUNTANT MEMBER
&
PRADIP KUMAR CHOUBEY, JUDICIAL MEMBER

I.T.A. No.: 41/KOL/2024
Assessment Year: 2016-17

Shri Santanu Sanyal*.....*Appellant
[PAN: AIOPS 0078 A]

Vs.

ACIT, Cir.-2(1), Kolkata*.....*Respondent

Appearances:

***Assessee represented by*:** Nageswar Rao, A/R.

***Department represented by*:** P.P. Barman, Addl. CIT, Sr. D/R.

Date of concluding the hearing : June 4th, 2024
Date of pronouncing the order : July 23rd, 2024

ORDER

Per Pradip Kumar Choubey, Judicial Member:

This appeal filed by the assessee pertaining to the Assessment Year (in short 'AY') 2016-17 is directed against the order passed u/s 250 of the Income Tax Act, 1961 (in short the 'Act') by ld. Commissioner of Income-tax (Appeals)-22, Kolkata [in short ld. 'CIT(A)'] dated 21.11.2022 arising out of the assessment order framed u/s 144 of the Act dated 08.12.2018.

2. It appears from the record that the instant appeal has been filed after a delay of 344 days. Ld. Counsel for the assessee submitted that the appellant was an employee of IBM India Pvt. Ltd. and he had moved to United Kingdom in the year 2017 when the issuance of the impugned order passed. Ld.

Counsel for the assessee further submits that delay in filing the appeal was not intentional rather on account of absence of the appellant from India,delay as caused.

We have perused the condonation petition and find that the sole ground taken by the appellant is that he was not present in India at the time of the issuance of the impugned order and it is a fact that appellant was an employee of IBM India Pvt. Ltd. In a catena of decisions, Hon'ble Supreme Court has held that in every case there is a delay, can be some laps on the part of the litigant concerned. That alone is not enough to turn down his plea and shut the door against him. In the present case we find that explanation submitted by the appellant do not reflect any mala fide intention of the appellant. Hence, keeping in view the decision of the Hon'ble Apex Court that the case should be decided on merit and not on technical basis. Accordingly, the delay is hereby condoned and the appeal is admitted for adjudication.

2. The brief facts of the case of the appellant are that the appellant Mr. Santanu Sanyal filed his return of income online for the AY 2016-17 declaring taxable income at Rs. 2,55,640/- after claiming a deduction of INR 2,19,372/- under Chapter VI-A of the Act. It is also the case of the appellant that he claimed a refund of INR 35,53,510/- in his return of income after adjusting the tax payable at INR 581/- against the tax deducted at source of INR 35,54,094/- [TNR 35,35,840/- as per Form 16 issued by IBM India Pvt. Ltd.], [INR 12,678/- as per Form 16A issued by SBI and INR 5,576/- as per Form 16A issued by Kotak Mahindra Bank Ltd.]

2.1. Ld. CIT(A) in the appeal has taken the issue ground-wise and in his judgement dismissed the grounds of the appellant that the Assessing Officer (hereinafter referred to as ld. 'AO') erred in law and in facts in assessing the income of the appellant at INR 1,15,28,610/- as against the return of income of INR 2,55,640/- and further dismissed the ground that ld. AO ordered in law and in facts in adding the foreign allowances to the total income of the appellant which was received as per the appellant outside India for service rendered in United Kingdom. The ld. CIT(A) has further dismissed the ground in which appellant has challenged the order of the AO in adding the value of

stock prerequisite amounting to Rs. 1,59,053/- and further dismissed the ground taken by the appellant in which the AO disallowed the exemption claimed by the appellant under Article 61 of the India-UK Double Taxation Avoidance Agreement amounting to INR 57,93,857/-. So far as other grounds are concerned the observation of the ld. CIT(A) is that the ground is statutorily allowed subject to the above verification and directed the AO to verify the veracity of these claims from his records and make necessary adjustments. Being aggrieved and dissatisfied with the impugned order the present appeal has been preferred by the appellant on the following grounds:

> *"1. That Ld. CIT(A) erred in not appreciating that the Appellant being non-resident would not be liable to tax under the Act on remuneration received towards services rendered outside India. Ld. CIT(A) failed to consider decisions by Hon'ble Courts relied on by appellant.*
>
> *2. That the Impugned Order erred in upholding addition of stock perquisite received outside India relating to services rendered outside India of Rs. 1,59,053/- to taxable income under the Income Tax Act, 1961 ('the Act').*
>
> *3. That the Impugned Order erred in upholding disallowance of exemption claimed under Article 16(1) of India-UK Double Taxation Avoidance Agreement and adding salary received in India of Rs. 57,93,857/- towards services rendered outside India to taxable income under the Act.*
>
> *4. That the Impugned Order of Ld. CIT(A) upholding inclusion of foreign assignment allowance amounting to Rs. 48,39,078/-received towards services rendered outside India by nonresident individual, in taxable income under the Act is contrary to provisions of law*
>
> *5. That the Impugned Order erred in misinterpreting provisions of law to conclude the employment contract is in India and in ignoring that services are undisputedly rendered outside India and hence not taxable under the Act.*
>
> *6. That Ld. CIT(A) erred in upholding unjust and arbitrary assessment under Section 144 on irrelevant considerations.*
>
> *7. That Ld. CIT(A) erred in not deleting arbitrary determination of income by Ld. AO purportedly under Section 144, failing to appreciate that even best judgement cannot be arbitrary or capricious.*
>
> *8. That the Ld. AO erred on facts and in law in disallowing exemption under Section 10(38) on long terms capital gains of Rs. 2,30,238/- from of sale of equity share and equity-oriented fund, while giving effect to the Impugned Order.*

9. That the Ld. AO erred on facts and in law in not granting exemption under Section 10(34) on dividend income of Rs. 31,378/- while giving effect to the Impugned Order.

10. That the Impugned Order erred on facts and in law in levying interest under section 234A of the Act.

11. That the Impugned Order erred in not deleting interest levied under section 234B of the Act.

12. That the Impugned Order erred in not deleting interest levied under section 234D of the Act

13. That the Ld. AO erred on facts and in law in initiating penalty proceedings under section 271(1)(c) of the Act on the ground of furnishing inaccurate particulars of income."

2.2. Ld. Counsel for the assessee challenges the impugned order thereby submitting that the appellant was employed with the IBM India Pvt. Ltd. during the AY 2016-17 and he was sent on an assignment to United Kingdom. Ld. Counsel for the assessee further submits that during the aforesaid assessment year the appellant continued to receive salary from IBM India Pvt. Ltd. the salary had been duly disclosed and offered to tax in the return of income filed by the appellant. In addition to that the appellant has also received a sum of INR 48,39,078/- as foreign allowances outside India for services rendered in United Kingdom. Ld. Counsel for the assessee further submits that appellant is a qualified non-resident Indian during the AY 2016-17 and a non-resident would be taxable in India only in respect of income received/deemed to be received in India or the income accrued/deemed to be accrued in India. According to him the foreign allowances of INR 48,39,078/- does not fall within the scope of total income u/s 5(2) of the Act. He has filed several decisions of ITAT and Hon'ble Supreme Court which are as follows:

a) *Commissioner of Income Tax vs Avtar Singh Wadhwan [2001] 115 Taxman 536 (Bombay)*
b) *Director of Income Tax vs Prahlad Vijendra Rao [2011] 198Taxman551 (Karnataka)*
c) *Utanka Roy vs Director of Income Tax (International Taxation) [2017] 291 CTR 501 (Calcutta)*

d) *Deputy Commissioner of Income Tax vs Sudipta Maity [2018] 96 taxmann.com 336 (Kolkata - Tribunal)*

e) *Arindam Dasgupta vs Additional Commissioner of Income Tax, ITA No. 1127/Kol/2023*

f) *Debarghya Chattopadhaya vs Deputy Commissioner of Income Tax (International Taxation) ITA No. 24/Kol/2023*

g) *Bodhisattva Chattopadhyay vs Commissioner of Income Tax, Kolkata [2019] 111 taxmann.com 374 (Kolkata - Tribunal)*

h) *Tadimarri Prasanth Reddy vs Income Tax Officer (International Taxation) [2023] 153 taxmann.com 281 (Hyderabad -Tribunal)*

i) *Durga Prasad Sana vs Income Tax Officer (International Taxation) [20231 154 taxmann.com 532 (Hyderabad -Tribunal)*

j) *Ajay Kumar Singh Gaur vs Income Tax Officer - 2(2), Agra [2021] 127 taxmann.com 630 (Agra- Tribunal)*

k) *Arvind Singh Chauhan vs Income Tax Officer, Ward 1(2), Gwalior [2014] 42 taxmann.com 285 (Agra - Tribunal)*

l) *Sreenivasa Reddy Cheemalamarri vs Income Tax Officer, International Taxation - 1, Hyderabad ITANo. 1463/Hyd./2018*

m) *Serco BPO v Authority of Advance Rulings, New Delhi [2015] 379 ITR 256 (Punjab and Haryana)*

n) *Skaps Industries India (P.) Ltd v Income Tax Officer, International Taxation, Ahmedabad [2018] 171 ITD 723 (Ahmedabad)*

2.3. Ld. Counsel for the assessee further challenges with respect to the disallowance of deduction claimed under Chapter VI-A of India-UK DTAA amounting to INR 2,19,372/- and he submitted that he made the investment as an employee's provident fund, contribution towards public provident fund, medical premium, contribution made to National Pension Scheme etc. He has further submitted that the appellant has also ordered long-term capital gain of INR 2,30,238/- off sale of equity shares and equity oriented fund which was exempt u/s 10(38) of the Act. He further challenges the levy of interest u/s 234 of the Act.

3. Contrary to that ld. D/R has supported the impugned order of ld. CIT(A).

4. Upon hearing the rival submissions of the Counsels of the respective parties, we have perused the order of the AO and ld. CIT(A). It is pertinent to mention here that the AO in his order has stated that after issuance of notice to the assessee through e-mail of ITBA portal, assessee did not comply. Notices and questionnaire were also duly served to the assessee on e-mail but the assessee failed to comply and when the rescheduled date of submission/hearing date has been lapsed and the assessee has failed to furnish in any manner whatsoever by taking cognizance and as such left with no other recourse to the matter, proceeded to make an assessment of the assessee's returned income as per the provisions contained in u/s 144 of the Act and accordingly he passed order as well as started penalty proceedings. Before the ld. CIT(A) as it appears from the records that the assessee has taken almost 13 grounds of appeal and while we have gone through the decision of ld. CIT(A) it appears to us that ld. CIT(A) has also called for the remand report from the AO and going over the remand report as well as considering the documents and submissions of the assessee passed the impugned order in which he took the ground nos. 2-5 and dismissed it but so far as ground number 6 with respect to the disallowance of deduction claimed under Chapter VI-A of the India-UK DTAA amounting to INR 2,19,374/-, we find that there is an observation of the ld. CIT(A) save and except thus:

> *"The AO is directed to verify the above claims of the appellant which are factual in nature and accordingly give legitimate deduction under Chapter VI-A.*
>
> *The ground is allowed subject to above verification."*

4.1. Ld. CIT(A) has further held in respect of the issue of disallowance of long-term capital gains exemption u/s 10(38) of the Act and his finding is as thus:

> *"Having examined the matter, the AO is accordingly directed to verify the veracity of these claims from his records and make necessary adjustments in computation of the total income of the appellant. The appellant may be provided with an opportunity to produce evidences if required.*

The ground is statistically allowed subject to the above verification."

4.2. So far, the interest and penalty are concerned it has been observed that since the ground is consequential in nature and disposed with the direction to the AO that interest u/s 234A, 234B, 234D of the Act are consequential and mandatory and therefore, the correct computation of interest may be calculated as per law at the time of giving effect to this order.

So, before us we have to decide only ground nos. 2-5 as these were dismissed by the ld. CIT(A). The grounds are regarding the assessing of income of the appellant amounting to INR 1,15,28,610/- and adding the foreign allowances to the total income of the appellant which was received outside India for services rendered in United Kingdom amounting to INR 48,39,078/-. Adding the value of stock amounting to INR 1,59,053/- and further disallowing the exemption claimed by the appellant under Article 16(1) of the India-UK DTAA amounting to INR 57,93,857/- for the AY 2016-17. In this context we have perused the documents filed by the assessee which are as follows:

a) *Copy of Return of Income along with acknowledgement and computation of income*
b) *Copy of Form 16 issued by IBM India Private Limited*
c) *Copy of Passport of the Appellant*
d) *Copy of United Kingdom tax return of the Appellant*
e) *Copy of Tax Residency Certificate issued by UK Revenue Authorities*
f) *Copy of Certificate issued by IBM India Private Limited for receipt of salary outside India*
g) *Copy of Natwest Bank Account Statement for FY 2015-16*
h) *Copy of Assignment Letters issued by IBM India Private Limited*
i) *Copy of Statement of Salary account held with Kotak Mahindra Bank for FY 2015-16*

4.3. From the records it admits of no doubt that appellant is qualified as a non-resident Indian during the previous AY 2015-16 as it is evident from his stay in India during the relevant previous year. Ld. Counsel for the assessee

submitted that foreign assignment allowances were paid by IBM India Pvt. Ltd. to the international travel card outside India. Once an employee is sent on foreign assignments the travel card issued to the employee by Axis Bank Ltd. IBM India Pvt. Ltd. maintains an exchange under foreign currency account with on Dutch Bank, Bangalore. From the exchange under foreign currency account of Dutch Bank funds are transferred to the foreign banks outside India with whom Axis Bank maintains the nostro account.

The following two grounds are to be taken for adjudication:

That the ld. Assessing officer erred in law and facts in assessing the income of the Appellant at INR 11,528,610 as against return income of INR 255,640

That the ld. Assessing Officer erred in law and facts, in adding the foreign allowances to the total income of the Appellant which was received outside India for services rendered in United Kingdom amounting to INR 4,839,078 which does not form part of the total income of the Appellant under section 5(2) of the Act, as the Appellant qualifies as a Non-resident in India during the Previous Year ('PY') 2015-16."

As I have already discussed in my preceding paragraph that appellant qualified as a Non-resident in India during the Previous 2015-16 as evident from his stay in India during the relevant PY. A non-resident would be taxable in India only in respect of income received/deemed to be received in India or the income accrued / deemed to accrue in India. In the present case the Appellant being a Non-Resident, has received the foreign allowances of INR 48,39,078 in United Kingdom for services rendered in United Kingdom. Hence we are in this view that the foreign allowance of INR 48,39,078 does not fall within the scope of total income under section 5(2) of the Act.

We further find that the foreign assignment allowance was paid by IBM India to the International Travel Card outside India. 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. In this regard, appellant has submitted before us the detailed mechanism of credit to Travel which is as follows-

When an employee of IBM is sent on international assignment, Axis Bank upon instruction from IBM issues an Axis travel currency card to an employee who is sent to a foreign assignment.

IBM maintains an Exchange Earner Foreign Currency ('EEFC') Account with Deutsche Bank, Bangalore.

From the EEFC Account of Deutsche bank, funds are transferred to the foreign banks outside India with whom Axis Bank maintains the Nostro Account (i.e., Zuercher Kantonal Bank, Zurich; JP Morgan Chase Bank, New York, etc).

Upon instruction from IBM the funds are transferred from the Nostro Account of Axis Bank maintained outside India to the Axis travel currency card of the respective employee. A copy of letter confirming the said modality is enclosed as Annexure 10.

From the above mechanism we find that the funds are first transferred from the EEFC Account of IBM to foreign banks with whom Axis Bank has maintained the Nostro Account. Out of the transferred funds, the travel card of the employees are credited outside India upon instruction from IBM. It is therefore very clear that the funds are credited from outside India and the Appellant is also in first receipt of the foreign assignment allowance outside India, i.e., both the payment and first receipt of foreign assignment allowance is outside India. It is important to mention here that Explanation 1 to Section 5(2) of the Act, the intent of legislature is to tax income on a receipt basis and in the given case as explained above in detail the first receipt of foreign assignment allowance in the hands of employee is only outside India.

Going over the discussion made above it is therefore clear that foreign assignment allowance is credited to the Axis travel currency card of the Appellant outside India, i.e., place of receipt of foreign assignment allowance

is outside India. Hence, keeping in the mind of Explanation 1 to Section 5(2) of the Act, receipt of salary has to be seen from the point of the recipient which in this case is outside India.

4.4. Now we have gone through the cited decisions of the assessee and find that Hon'ble Karnataka High Court in the matter of *DIT (International Taxation) vs. Prahlad Vijendra Rao (IT Appeal No. 838 of 2009)* held as under:

> *"The explanation to Section 9(ii) has been taken note of while answering the substantial question of law in favor of the assessee and to negative the contentions of the Revenue. Applying the said principles to the facts of the present case and number of days worked by the assessee outside India as extracted in assessment order when taken into consideration it would emerge that assessee was working outside India for a period of 225 days and the income in question earned by assessee has not accrued in India and is not deemed to have accrued in India. As such the contention of the revenue cannot be accepted."*

4.5. In the case of *Ranjit Kumar Bose vs. ITO (1986) 18 ITD 230 (Cal.)* Hon'ble ITAT, Kolkata Bench has held that *"Salary chargeable to tax on the basis irrespective of the fact whether it is received in India and therefore, for a non-resident where services are rendered outside India the same is approved outside India and hence, not taxable in India irrespective of the place of the resident."*

5. Going over the documents as well as the submissions of the assessee, we are of this opinion that addition of INR 48,39,078/- the taxable income of the appellant as made by the AO confirmed by the ld. CIT(A) is unjustified and accordingly, the same is deleted. So far as the other grounds are concerned, it appears to us that appellant had received stock option prerequisites amounting to INR 1,76,123/- during the previous AY 2015-16, further an amount of INR 1,59,053/- represents the value of stock option prerequisites accrued to the appellant for the services rendered outside India from the date of grant to the date of vesting and hence, the same does not form part of the scope of the total income of the non-resident and accordingly it is not taxable in India. Further submission of ld. Counsel for the assessee with respect to the disallowance of exemption claimed by the appellant in this context, we find that Section 90(2) of the Act purely attracts in this case as we have

already held that appellant satisfied the requisite condition to be eligible to claim the exemption as per the DPS Clause of India-UK DTAA. In this context, we find that appellant has filed copy of tax residency certificate and in this way, appellant qualified to be a tax resident of United Kingdom during United Kingdom tax year and accordingly, we are of this opinion that salary income amounting to INR 57,93,857/- as claimed be exempted under Article 16(1) of the India-UK DTAA.

5.1. So far as the other grounds are concerned, as have already stated in preceding paragraphs that disallowing the deduction claimed under Chapter VI-A and disallowing the long-term capital gain exemption u/s 10(38) of the Act have been allowed by the ld. CIT(A) in appeal subject to the above verification and directed the AO to verify the matter. So, it is needless to discuss the above grounds.

6. Keeping in view the above discussion as well as considering the entire documents filed by the appellant the appeal of the assessing is allowed with respect to the grounds discussed above.

7. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 23rd July, 2024.

Sd/-
[**Manish Borad**]
Accountant Member

Sd/-
[**Pradip Kumar Choubey**]
Judicial Member

Dated: 23.07.2024

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Shri Santanu Sanyal, C/o Mr. Nageswar Rao, Advocate, India Glycols Building, Tower 2, Third Floor, Plot No. 2B, Sector, 126, Gautam Budh Nagar, Uttar Pradesh, 201304.***
2. ***ACIT, Cir.-2(1), Kolkata.***
3. CIT(A)-22, Kolkata.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata