IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : SMC-1 : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER

ITA No.9232/Del/2019
Assessment Year: 2011-12

Ashish Bhardwaj, Ch. No.206-207, Ansal Satyam, RDC Rajnagar, Ghaziabad.	Vs	ITO, Ward-36(4), New Delhi.

PAN: AMWPB4194J

(Appellant) (Respondent)

Assessee by	:	Shri Akhilesh Kumar, CA
Revenue by	:	Ms Rano Mukherjee, Sr. DR
Date of Hearing	:	17.03.2021
Date of Pronouncement	:	14.06.2021

ORDER

This appeal filed by the assessee is directed against the order dated 27th September, 2019 of the CIT(A)-2, New Delhi, relating to assessment year 2011-12.

2. Facts of the case, in brief, are that information was available on record that the assessee had purchased an immovable property amounting to Rs.49,97,152/- during the financial year 2010-11 relevant to A.Y. 2011-12. The AO, therefore, after recording the reasons, reopened the assessment u/s 147 of the Act and notice u/s 148 was issued on 31.03.2018. In response to the same, the assessee filed his return of income on 5th October, 2018 declaring the total income at Rs.2,910/-. The assessee declared interest income only in the status of NRI. During the

assessment proceedings, the AO noted that the assessee is maintaining a bank account with HDFC Bank, C-9/4, Ground Floor, Back Portion, Model Town-3, Delhi ï 110 009 wherein salary amounting to Rs.19,25,067/- has been credited being salary from foreign enterprises i.e., ANGLO Eastern Ship Management Ltd., 23RD Floor, CEF Life Tower, 248, Queenôs Road East, Wanchai, Hong Kong. On being questioned by the AO, it was submitted that the assessee has NRI status during the period under consideration and, during the year, the assessee had stayed outside India for more than 187 days and, therefore, is not liable to tax on the salary income earned abroad from a foreign employer. However, the AO was not satisfied with the arguments advanced by the assessee. He referred to the provisions of section 6 of the IT Act and held that the assessee was resident in India and salary income earned by him was taxable in India. He also referred to the definition of non-resident u/s 2(30) of the IT Act and noted that the assessee had spent more than 60 days in India and fulfilled the conditions envisaged under Clause (c) of section 6(1) of the IT Act, 1961. He rejected the explanation of the assessee that his income was not taxable in India by virtue of clause (a) of section 6(1). Rejecting the various explanations, the AO made addition of Rs.19,25,067/- under the head óIncome from salary.ô

2.1 Further, the AO noted that an amount of Rs.3,50,000/- has been spent towards the stamp duty for purchase of the property. On being questioned by the AO, it was explained that an amount of Rs.3,66,700/- was debited by M/s

Landcraft Developers Pvt. Ltd., against purchase of stamp papers. However, in absence of any satisfactory explanation given by the assessee, the AO made addition of Rs.3,50,000/- as unexplained investment u/s 69A of the IT Act. The AO accordingly determined the total income of the assessee at Rs.22,77,980/-.

3. Before the CIT(A), the assessee, apart from challenging the addition on merit, challenged the validity of reopening of the assessment. However, the ld.CIT(A) upheld the validity of the reassessment proceedings by relying on various decisions. So far as the merit of the case is concerned, he sustained the addition of Rs.19,25,067/- on account of salary by observing as under:-

> ñ10. Decision
>
> 10.1 The Assessing Officer has observed in the assessment order that as per the bank account of the Assessee with HDFC Bank, Model Town, Delhi foreign receipts amounting to Rs. 19,25,067/- were credited under the head óSalary ô from Anglo Eastern Ship Management Ltd., Wanchai Hongkong. The Assessing Officer asked the Assessee to explain the status as non-resident in India during the relevant financial year. The Assessing Officer referred to the provisions of section 6 of the IT Act and held that the Assessee was resident in India and salary income earned by him was taxable in India. The Assessing Officer also referred to the definition of non-resident u/s 2(30) of the IT Act. The Assessee had spent more than 60 days in India and fulfilled the conditions envisaged under clause (c) of section 6(1) of the Income Tax Act, 1961. The Appellant states that his income was not taxable in India by virtue of clause (a) of section 6(1) of the IT Act. It is also stated that the Assessee was employed with a foreign company and the salary accrued outside the India.
>
> 10.2 On the careful consideration of the facts of the case, this is to be observed that the scope of total income of a person is decided as per the provisions of section 5(1) and 5(2) of the IT Act. As per the provisions of section 5(1) of the IT Act, if the total income of a person who is a resident is received or is deemed to be received in India in such year by or on behalf of such person or accrues or arises or is deemed to accrue or arise to him in India during such year or accrues or arises to him outside India during such year, his such income is includible in the total income. In view of the above, it is clear

that the Appellantôs income even if not accrued or arisen in India would be taxable in India by virtue of clause (c) of section 5(1) of the IT Act. Though the fact is that the Appellantôs income has been credited to an Indian branch of HDFC Bank. The other question to be decided in this case is whether the Assessee was resident in India or not for bringing the salary income earned from a foreign entity during the year under consideration. To be a resident in India either of the conditions given below are to be satisfied :

> ñ6. For the purposes of this Act, -
>
> (1)An individual is said to be resident in India in any previous year, if he-
>
> (a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more; or
>
> (b)é .
>
> (c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.ò

10.3 The Appellant had to satisfy with the facts that if by virtue of clause (a) of section 6(1) of the IT Act he was not resident in India, whether he had been in India within the four years preceding that year for a period or periods amounting in all to three hundred and sixty five days or more and was in India for a period or periods amounting in all to sixty days or more in the year under consideration. In the absence of any such facts submitted by the Appellant, he would be treated resident in India.

10.4 In view of the above facts, I hold that the decision of the Assessing Officer to tax the salary income in question was justified.ò

3.1 So far as the addition of Rs.3,50,000/- on account of stamp duty is concerned, he noted that the property was purchased jointly with his wife Mrs. Vandana Bhardwaj. Therefore, the investment also should be made by both of them. Since the assesseeôs share in the property is 50%, he restricted the addition to Rs.1,75,000/-.

4. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

> ñ1. That, the order of ld. authority is bad in law and is against the facts and circumstances of the case.
>
> 2. That, the Id. CIT(A) erroneously upheld the issuance of notice u/s 148, which is issued without any application of mind and/or satisfaction of ld. AO/approving authority sheerly to conduct roving enquiries against the settled law.
>
> 3. That, the Id. CIT(A) further erred in upholding the validity of notice u/s 148, by not appreciating the fact that Ld. AO had not made addition on the 'reasons' for issuing notice and hence lost jurisdiction to continue with the proceedings as soon as he has accepted explanation on the 'reasons' and issue is covered with the ratio of several cases of hon'ble courts/tribunals.
>
> 4. That Id. CIT(A) grossly erred in sustaining addition of Rs. 19,25,067/- to the declared income by not appreciating the fact that assessee was a non-resident in India and to tax his foreign income in India is beyond the scope of taxation and issue is covered by several decisions of hon'ble jurisdictional tribunal.
>
> 5. That, Id. CIT(A) further erred in sustaining the addition by holding that even if income has not accrued or arisen in India still it shall be added u/s 6(l)(a) of Act and defeated the binding decisions of superior authorities.
>
> 6. That, Id. CIT(A), erred in sustaining addition of Rs. 1,75,000/-, even after admitting such payment by wife and addition is against all the cannons of law.ò

5. The ld. counsel for the assessee strongly challenged the order of the CIT(A) upholding the validity of reassessment proceedings as well as the addition on merit. So far as the validity of the reassessment is concerned, the ld. Counsel submitted that the case of the assessee was reopened for verification of purchase of immovable property amounting to Rs.49,97,152/-. However, no such addition has been made on account of reasons for which the case was reopened. Relying on

various decisions, he submitted that where there is no addition on the basis of reasons recorded, the AO loses jurisdiction to assess income under other heads or under other issue. For the above proposition, he relied on the decision of the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. vs. CIT 12 taxman.com 74, the decision of the Hon'ble Delhi High Court in the case of Tikaula Sugar Mills Ltd. vs. DCIT, ITA No.86/2006, order dated 21.01.2016, the decision of the Hon'ble Delhi High Court in the case of Oriental Bank of Commerce vs. Addl.CIT, 49 taxman.com 485 and various other decisions.

5.1 Referring to the following decisions, he submitted that the reasons based on patently incorrect facts do not clothe the AO to issue a valid notice u/s 148 being without application of mind and without foundation:-

i) Kolahai Infotech P. Ltd. vs. (2018) 409 ITR 595 (Del);

ii) Shamshad Khan vs. ACIT [2017] 395 ITR 265: 82 taxmann.com 35 (Delhi);

iii) Mumtaz Hazi Mohamad Memon (2018) 408 ITR 268 (Guj);

iv) Shri Sanjeev Malhotra vs. DCIT -ITA No. 6723/D/2018(Del-'G');

v) Jagat Singh vs. ITO - ITA NO. 2749/D/18 (Del-C);

vi) ACIT vs.. M/s Asis Plywood Pvt. Ltd.(ITA No. 2144/D/l5) (28/01/2019); &

vii) Pr. CIT vs. Meenakshi Overseas [2017] 82 taxmann.com 300 (Delhi)

5.2. He accordingly submitted that the reopening of the assessment is bad in law.

6. So far as the merit of the case is concerned, the ld. Counsel for the assessee submitted that when a citizen of India leaves the country for employment and stays

outside India for 182 days or more, he becomes a non-resident and income received from services rendered outside India cannot accrue or arise or deemed to accrue or arise in India and cannot be taxed in India. He submitted that the AO as well as the CIT(A) has given findings that the assessee has stayed outside India for more than 187 days and the assessee was employed with a foreign company and the salary has accrued outside India. Therefore, regardless of being in India for 365 days or more during the four preceding previous years, the assessee cannot be treated as resident of India.

7. He submitted that identical issue had come up before the coordinate Bench of the Tribunal in the case of Avdesh Kumar vs. DCIT, reported in 172 ITD 73. The Tribunal held that where assessee was outside India for a period of more than 182 days, he had become a non-resident and, therefore, salary income of the assessee received outside India could not be held to be taxable merely because his foreign employer had deducted TDS on such income. He submitted that in the instant case, the assessee is in a much stronger footing because the foreign employer had not even deducted TDS since income had accrued outside India and was received outside India. He accordingly submitted that salary income added by the AO and upheld by the CIT(A) is not justified.

7.1 So far as 50% stamp duty sustained by the CIT(A) is concerned, he submitted that the assessee had enough withdrawals to meet the stamp duty

expenses amounting to Rs.1,75,000/- and, therefore, the CIT(A) was not justified in sustaining the addition.

8. The ld. DR, on the other hand, heavily relied on the order of the CIT(A). So far as the validity of reassessment proceedings are concerned, he submitted that although the case was reopened for purchase of immovable property amounting to Rs.49,97,152/-, however, it is a fact that the AO has made addition of Rs.3,50,000/- on account of stamp duty for purchase of the property. Therefore, the argument of the ld. Counsel that the addition has not been made on account of the reasons for which the case was reopened and, therefore, the AO cannot make any other addition is without any basis and misplaced and cannot be accepted. The ld. CIT(A) has given justifiable reasons while upholding the validity of the reassessment proceedings. So far as the merit of the case is concerned, the ld. DR heavily relied on the order of the CIT(A).

9. I have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and CIT(A) and the paper book filed on behalf of the assessee. I have also considered the various decisions cited before me. I find, the AO reopened the assessment of the assessee on the basis of information available on record that the assessee has purchased an immovable property amounting to Rs.49,97,152/- during the F.Y. 2010-11 relevant to A.Y. 2011-12. However, he completed the assessment determining the total income of the assessee at Rs.22,77,980/- wherein he made addition of Rs.19,25,067/- being

salary income received from a foreign employer as a crew member of a foreign ship and Rs.3,50,000/- being stamp duty incurred for purchase of immovable property. I find, the assessee before the CIT(A) challenged the validity of the reassessment proceedings as well as the addition on merit. The ld. CIT(A) upheld the validity of reassessment proceedings and sustained the addition of Rs.19,25,067/- being the salary received by the assessee from the foreign employer. He, however, restricted the addition of Rs.3,50,000/- being stamp duty incurred for purchase of the property to Rs.1,75,000/- on the ground that the property is owned by the assessee jointly with his wife and, therefore, the assesseeôs share being 50% the addition has to be restricted to that extent. It is the submission of the ld. Counsel that since no addition has been made by the AO on account of purchase of immovable property for which the reasons were recorded, therefore, the entire reassessment proceedings should be held as invalid. However, I do not find any substance in the above argument of the ld. Counsel. The AO has made addition of Rs.3,50,000/- being the stamp duty incurred for purchase of the above property. Therefore, it cannot be said that no addition has been made on account of reasons for which the case was reopened. The ld.CIT(A) while deciding the issue has given justifiable reasons while upholding the validity of the reassessment proceedings. The ld. Counsel for the assessee also could not controvert the findings/reasonings given by the CIT(A) on this issue. Accordingly, the order of the CIT(A) upholding the validity of the reassessment proceedings is upheld.

10. Now, coming to the addition of salary of Rs.19,25,067/- is concerned, I find, the assessee, in the instant case, was employed with a foreign company and the salary accrued outside India. The assessee had stayed outside India for a period of more than 187 days, a fact brought on record by the AO and not controverted by the ld. DR. Under these circumstances, it has to be seen as to whether such salary income is liable to be taxed in India where the assessee was outside India for a period of more than 182 days and became a non-resident and the salary income was received outside India from a foreign employer for services rendered outside India.

11. I find, identical issue had come up before the coordinate Benches of the Tribunal in the case of Avdesh Kumar (supra). In that case, the AO, during the course of assessment proceedings had observed from the bank extract furnished by the assessee that it had received salary outside India (Korea) which had not been declared in the return of income and the assessee had also not claimed any relief u/s 90. The amount of such salary in Korean currency was converted into Indian currency. Keeping in view of 26AS wherein it was found that employer had deducted TDS on the entire income i.e., salary received in India as well as in Korea, the AO added back the salary income earned in Korea as income of the assessee. The ld.CIT(A) upheld the order of the AO. On further appeal by the assessee, the Tribunal set aside the order of the CIT(A) and directed the AO to delete the addition by observing as under:-

ñ9. I have considered the rival arguments made by both the sides and perused the material available on record. I find on the basis of the Form 26AS the Assessing Officer made addition of Rs.17,09,702/- which is the income earned by the assessee from his foreign employer received outside India on the ground that tax has been deducted by the employer from such salary income and assessee has not disclosed the same in his salary income. It is the submission of the Ld. Counsel for the assessee that since the assessee was outside India for a period of more than 182 days, (247 days to be precise), therefore, he has become a non-resident and therefore, is not liable to tax on such income received from his foreign employer which was received outside India. I find some force in the above argument for the Ld. Counsel for the assessee. It has been held in various decisions that when a citizen of India leaves India for employment abroad and stayed outside India for 182 days or more, then he becomes a non-resident and the income received from services rendered outside India cannot accrue or arise or deemed to accrue or arise in India and cannot be taxed in India notwithstanding the fact that the same is credited in the bank in India or TDS has been deducted on such income.

10. I find the Delhi Bench of the Tribunal in the case of Pramod Kumar Sapra (supra) has held that where the stay of the assessee, an employee of RIL, and deputed to Iraq outside India was for more than threshold 182 days, salary income of assessee for the previous year could not be held to be taxable because he was not resident of India. The Delhi Bench of the Tribunal in the case of Addl. CIT Vs. Rajiv Bali (supra) under identical circumstances, following various decisions has held that remuneration received by the assessee in respect of the foreign employment is not taxable in India under provision of section 5 (2) (a) of the IT Act, 1961 and such income cannot be taxed in India when the assessee stayed outside India for more than 182 days. The relevant observations of the Tribunal from para 4 onwards read as under :-

> "4. The only issue involved is against the deletion of addition of Rs.22,29,385/- made by the Assessing Officer by holding that the remunerations received by the assessee in respect of the employment in Russia and Tanzania are not taxable in India under the provisions of section 5(2)(a) of the Income-tax Act, 1961.
>
> 5. We have heard both the sides on this issue. After hearing, we find that during the relevant period, the assessee has stayed in India for 135 days. As per the provisions of section 6(1)(a) and (c) read with Explanation (a) to section 6(1), the period of stay of an individual should be 180 days for being a resident in India. Thus, the status of the assessee was a nonresident. In view of this fact, the income can be taxed only with the provisions of section 5(2)(a) of the Income-tax Act, 1961. The assessee has rendered services outside India and the income has accrued outside India. The only issue is that whether the amount credited in the NRI account of the assessee located in India as

per his instructions to the employer can be taxed as per provisions of section 5(1)(a) and (b) of the Income-tax Act, 1961 with regard to scope of income. We have considered all the facts of the case and we find that this issue is covered in favour of the assessee by the decision of Hon'ble ITAT in the case of Ranjit Kumar Bose vs. ITO reported in 18 ITD 230 (ITAT - Calcutta) where it is held as under :-

"14. True, in this case, salary income accrued outside India, but was received in India in the same accounting year. It is clear that salary income could not have been brought to tax on accrual basis for the simple reason that it accrued outside India. The provisions of section 5(2)(a) are subject to section 15 which, inter alia, says that salary is chargeable to income-tax on due basis irrespective of the fact whether it has been received or not. So, salary income is not liable to be taxed in India on recent basis under section 15. We are, therefore, clearly of the view that the salary received in India in this case was not chargeable to income-tax under the head 'Salaries' under section 15(a). As has also been pointed out above, this case does not fall either under clause (b) or clause (c) of section 15."

ITAT, Delhi has also decided in the case of ADIT vs. Nandan Singh Chauhan reported in 2011 -TII-27-ITAT-DEL-NRI as under :-

"We have carefully considered the submissions and perused the record We find is undisputed that the assessee is NRI and he has received income from foreign company for the services rendered outside India. Just merely because he has instructed the salary to be transferred to his FCNR a/c maintained with HSBC bank, Barakhamba Road, Connaught Place, New Delhi can not bring the amount to taxation under Indian Income Tax Act. This view is clearly supported by the tribunal's decision as above. Hence, respectfully following the precedent as above, we uphold the order of Ld. CIT(A) and decide the issue in favour of the assessee and against the revenue."

Considering the totality of the facts and circumstances and also ITAT decisions, we uphold the order of the CIT (A) and dismiss the revenue's appeal."

11. Since the assessee in the instant case has stayed outside India for more than 182 days, therefore, respectfully following the decisions cited (supra), I set aside the order of the CIT (A) and direct the Assessing Officer to delete the addition.

12. In the result, the appeal filed by the assessee is allowed.ò

12. Since the assessee, in the instant case, had stayed outside India for more than 182 days and had received salary from a foreign employer outside India for services rendered outside India, therefore, respectfully following the decision cited supra, I set aside the order of the CIT(A) and direct the AO to delete the addition.

13. So far as the addition of Rs.1,75,000/- sustained by the CIT(A) on account of stamp duty is concerned, I find the same also is liable to be deleted under the facts and circumstances of the case. Admittedly, the AO has not made any addition on account of purchase of immovable property amounting to Rs.49,97,152/- meaning thereby he has accepted the source of that huge amount. So far as the amount of Rs.3,50,000/- towards the stamp duty is concerned, a perusal of the assessment order shows that the amount was paid by Mrs. Vandana Bhardwaj as per the ledger account of M/s Landcraft Developers Pvt. Ltd. which was reproduced by the AO in the body of the assessment order. Therefore, when the money was paid by Mrs. Vandana Bhardwaj, there was no reason for making the addition in the hands of the assessee. The ld. CIT(A) had not given any cogent reason as to why 50% shall be added in the hands of the assessee when the payment was admittedly made by Mrs. Vandana Bhardwaj, a fact brought on record by the AO himself. In any case, if the order of the CIT(A) is accepted, then, 50% of the investment in the property also should be borne by the wife of the assessee, Mrs. Vandna Bhardwaj. Thus, the finding of the CIT(A) becomes contradictory. Since the AO himself has given a finding that Mrs. Vandana

Bhardwaj had made the cash payment on 03.12.2010 as per the records maintained by M/s Landcraft Developers Pvt. Ltd., therefore, I do not find any reason to sustain 50% addition in the hands of the assessee. In this view of the matter, I set aside the order of the CIT(A) on this issue and direct the AO to delete the addition. The ground raised by the assessee on this issue is accordingly allowed.

14. In the result, the appeal filed by the assessee is partly allowed.

The decision was pronounced in the open court on 14.06.2021.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 14th June, 2021

dk

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi