[2011] 198 TAXMAN 551 (Kar)

HIGH COURT OF KARNATAKA

DIT(International Taxation) Vs. Prahlad Vijendra Rao

MRS. MANJULA CHELLUR AND ARAVIND KUMAR, JJ.

IT APPEAL NO. 838 OF 2009

NOVEMBER 8, 2010

Section 5, read with sections 9 and 15, of the Income-tax Act, 1961 -

Income - Accrual of -

Aravind andM.V. Sheshachala for the Appellant. A. Shankar and M. Lava for the Respondent.

JUDGMENT

Aravind Kumar, J. - This is revenue's appeal questioning the correctness and legality of the order passed by the Tribunal in ITA No. 1137/Bang./2008, dated 26-6-2009.

2. Assessee is an individual and for the assessment year 2005-06 return of income was filed under the status of "non-resident" declaring total income of Rs. 85,230. The same was processed under section 143(1) which resulted in refund order being issued. Subsequently it was selected for scrutiny and notice under section 143(2) came to be issued and in response to the said notice issued, assessee appeared and furnished the details of his stay in India during the previous years which according to the assessee was 140 days. Since assessee contended that he is a non-resident fresh notice was issued and after considering the reply submitted by the assessee, Assessing Officer came to a conclusion that amount received by way of salary by the assessee in a sum of Rs. 10,00,131 was income deemed to have been received in India as per section 5(2)(b) and as such same was brought within the taxable income and demand was raised accordingly by assessment order dated 28-12-2007.

3. The assessee being aggrieved by the same preferred an appeal before CIT(A) in ITA No. 43/R-19/CIT(A)-IV/2007-08. The appellate authority considered the contentions raised by the assessee and on facts found that appellant has earned salary to the extent of $ 22,284 (in Indian currency Rs. 10,00,131) and while residing outside India or when he stayed outside India for a period of 225 days and came to a conclusion that income or salary earned by the assessee was outside India and held it was exempted and as such deleted the demand of tax raised by the Assessing Officer.

4. The revenue being aggrieved by the same persued its cause before Tribunal in ITA No. 1137/Bang./2008. The Tribunal considered the plea put forward by the revenue with regard to section 5(2)(a) of the Income-tax Act, 1961 and on considering the rival contentions held that `salary income' taxable on accrual basis as per section 15 and the salary that has been paid to the assessee is on account of the work discharged by the assessee outside India and it was not a salary paid to the assessee for the work carried on in India and as such the amount of salary that has been transferred to the bank account of the assessee cannot be considered or brought within the definition of "salary" as defined either under section 5 or within scope of total income as defined under section 15 of the Act on accrual basis and accordingly rejected the contentions of the revenue by its order dated 26-6-2009.

5. It is this order which is assailed in the present appeal by the revenue contending that substantial questions of law raised in the appeal memorandum would arise for consideration.

6. Having heard the learned advocates appearing for the parties and after perusing the orders passed by the authorities and after having given our anxious consideration to the contentions raised, we are of the considered view that there is no substantial question of law involved in this appeal for being formulated and adjudicated for the following reasons :

(a)The revenue does not dispute that assessee had worked as a chief engineer on the board of a ship belonging to his employer "M/s. Live Stock Transport & Trading Co.", Kuwait and during the relevant period the assessee had stayed outside India for a period of 225 days and the salary that was earned by him was on account of the work discharged by him on board during the said period which is outside the shores of India.

(b)The CIT(A) has placed reliance in the case of CIT v. Avtar Singh Wadhwan [2001] 247 ITR 2601 (Bom.) wherein it has been held that salary received by the non-resident marine engineer for services rendered by him on a foreign going Indian ship which mainly remained away from the Indian coast during the relevant accounting year accrued outside India and was not taxable in India. While answering the question of law thereunder with reference to section 9(1)(ii) in the said case it has also been held that the salary which is earned in India will alone be regarded as income arising in India and not otherwise. The principle laid down in the said case is squarely applicable to the facts of present case also.

(c)The criteria of applying the definition of section 5(2)(b) would be such income which is earned in India for the services rendered in India and not otherwise.

(d)Under section 15 of the Act even on accrual basis salary income is taxable i.e., it becomes taxable irrespective of the fact whether it is actually received or not; only when services are rendered in India it becomes taxable by implication. However, if services are rendered outside India such income would not be taxable in India.

7. The Explanation to section 9(1)(ii) has been taken note of while answering the substantial question of law in favour 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.

8. In view of the above discussions the appeal is dismissed as devoid of merits. No order as to costs.