KPMG

TAX FLASH NEWS

26 August 2016

Salary received by a non-resident in India for services rendered outside India not eligible for exemption under the tax treaty

Background

The tax treaties provide relief from taxation in case the same income is taxable in more than one jurisdiction. Typically, under most treaties, two kinds of benefits are provided in respect of salary income - exclusion benefit [where salary earned by a resident of a country is taxable only in the country of his/her tax residency, unless services are rendered in the other country, in which case salary for such services may be taxable in both countries] and foreign tax credit (FTC) [credit of taxes paid overseas from the tax liability in the home country in order to eliminate double taxation]. The Income-tax Act, 1961 (the Act) permits that the beneficial provisions of the treaties would apply in order to avoid double taxation. Recently, the Chennai Bench of the Income-tax Appellate Tribunal (the Tribunal) in the case of Swaminathan Ravichandran[1] (the taxpayer) held that a non-resident is not eligible to claim any benefit under the tax treaty.

Facts of the case

- The taxpayer had received the salary in India for the services rendered in China. As the salary was paid in India for the entire financial year (FY), the Indian employer had deducted tax at source on such salary payment.

- During the relevant FY, the taxpayer qualified as a tax resident of China and a non-resident of India for the FY 2010-11.

- As per Article 15(1) of the India-China tax treaty, a resident of China receiving the salary for services rendered in China was taxable only in China. Accordingly, in his India Tax Return (ITR), the taxpayer had claimed benefit under Article 15(1) of the tax treaty and claimed a refund[2] of Tax Deducted at Source (TDS) by the Indian employer on such salary.

- The Assessing Officer (AO) had *inter-alia* disallowed the claim of exemption under Article 15(1) of the tax treaty on the following basis:

  - Article 23 of the tax treaty allows only residents to claim relief under the tax treaty

  - As the taxpayer qualified as a non-resident in India, he was not eligible to claim relief under Article 15(1) of the tax treaty.

- On an appeal by the taxpayer, the Commissioner of Income-tax (Appeals) [CIT(A)] upheld the order of the AO in denying an exemption under Article 15(1) of the tax treaty to the taxpayer.

- Aggrieved by the CIT(A)'s order, the taxpayer went on appeal before the Tribunal relying on the following judicial precedents where claim of exemption under the relevant treaty was allowed for non-residents of India in respect of

[1] Swaminathan Ravichandran v. ITO (ITA No. 299/Mds/2016)
Taxpayer's appeal before the Tribunal also includes issues dealing with income from house property. However, this Flash News is prepared only on the issues relevant to a claim of exemption of salary income in India under the India-China tax treaty.

[2] On applying beneficial provisions under Section 90 of the Act
[3] Bholanath Pal v. ITO (ITA No.10/Bang/2011)

© 2016 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

salary received in India for services rendered outside India by virtue of the respective Articles in the treaties which were worded similar to Article 15(1) of the India-China tax treaty:

- Bholanath Pal[3] under Article 15(1) of the treaty between India and Japan.
- Neeraj Badaya[4] under Article 16(1) of the treaty between India and the USA.
- Arjun Bhowmik[5] under Article 16(1) of the treaty between India and Philippines.

Tribunal's ruling

- The Tribunal observed that the judicial precedents relied upon by the taxpayer were not applicable as they were factually different from the case of the taxpayer as the taxpayer was a non-resident in India who qualified as a tax resident of China.
- As the Article 23 of the India-China tax treaty applies only to residents of India, the taxpayer, by virtue of being a non-resident in India, was not eligible to claim exemption under Article 15(1) of the treaty.
- The Chennai Tribunal upheld the order of the CIT(A) and denied an exemption under Article 15(1) of the tax treaty to the taxpayer.

Our comments

This decision assumes significance as it has denied an exemption under the tax treaty in respect of salary received in India for services rendered abroad, in spite of judicial precedents in which such benefit was granted under similar fact patterns. It is a well-settled principle that such income is eligible for the benefit of exclusion under the tax treaty. By virtue of denial of the claim, the income earned outside India suffers additional taxation in India despite the benefits provided in the tax treaties to eliminate double taxation.

This decision is divergent to other judicial precedents[6] which have upheld the principle that salary received in India for services rendered outside India are not taxable in India. Considering that Article 15(1) and Article 23 do not have any specific nexus, the applicability of this decision would need to be evaluated.

---

[4] Neeraj Badaya v. ADIT (ITA No. 308/JP/2014)
[5] ITO v. Arjun Bhowmik (ITA No: 3484/Del/2012 and https://www.kpmg.com/IN/en/services/Tax/FlashNews/Arjun-Bhowmik.pdf as accessed on 19 August 2016
[6] Decisions relied on by the assessee and DIT v. Prahlad Vijendra Rao [2011] 198 Taxman 551 (Kar)

© 2016 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

www.kpmg.com/in

Ahmedabad
Commerce House V, 9th Floor,
902 & 903, Near Vodafone House,
Corporate Road,
Prahlad Nagar,
Ahmedabad – 380 051
Tel: +91 79 4040 2200
Fax: +91 79 4040 2244

Bengaluru
Maruthi Info-Tech Centre
11-12/1, Inner Ring Road
Koramangala, Bangalore 560 071
Tel: +91 80 3980 6000
Fax: +91 80 3980 6999

Chandigarh
SCO 22-23 (Ist Floor)
Sector 8C, Madhya Marg
Chandigarh 160 009
Tel: +91 172 393 5777/781
Fax: +91 172 393 5780

Chennai
No.10, Mahatma Gandhi Road
Nungambakkam
Chennai 600 034
Tel: +91 44 3914 5000
Fax: +91 44 3914 5999

Delhi
Building No.10, 8th Floor
DLF Cyber City, Phase II
Gurgaon, Haryana 122 002
Tel: +91 124 307 4000
Fax: +91 124 254 9101

Hyderabad
8-2-618/2
Reliance Humsafar, 4th Floor
Road No.11, Banjara Hills
Hyderabad 500 034
Tel: +91 40 3046 5000
Fax: +91 40 3046 5299

Kochi
Syama Business Center
3rd Floor, NH By Pass Road,
Vytilla, Kochi – 682019
Tel: +91 484 302 7000
Fax: +91 484 302 7001

Kolkata
Unit No. 603 – 604,
6th Floor, Tower – 1,
Godrej Waterside,
Sector – V, Salt Lake,
Kolkata 700 091
Tel: +91 33 44034000
Fax: +91 33 44034199

Mumbai
Lodha Excelus, Apollo Mills
N. M. Joshi Marg
Mahalaxmi, Mumbai 400 011
Tel: +91 22 3989 6000
Fax: +91 22 3983 6000

Noida
6th Floor, Tower A
Advant Navis Business Park
Plot No. 07, Sector 142
Noida Express Way
Noida 201 305
Tel: +91 0120 386 8000
Fax: +91 0120 386 8999

Pune
703, Godrej Castlemaine
Bund Garden
Pune 411 001
Tel: +91 20 3050 4000
Fax: +91 20 3050 4010

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

© 2016 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.

The KPMG name and logo are registered trademarks or trademarks of KPMG International.

© 2016 KPMG, an Indian Registered Partnership and a member firm of the KPMG network of independent member firms affiliated with KPMG International Cooperative ("KPMG International"), a Swiss entity. All rights reserved.