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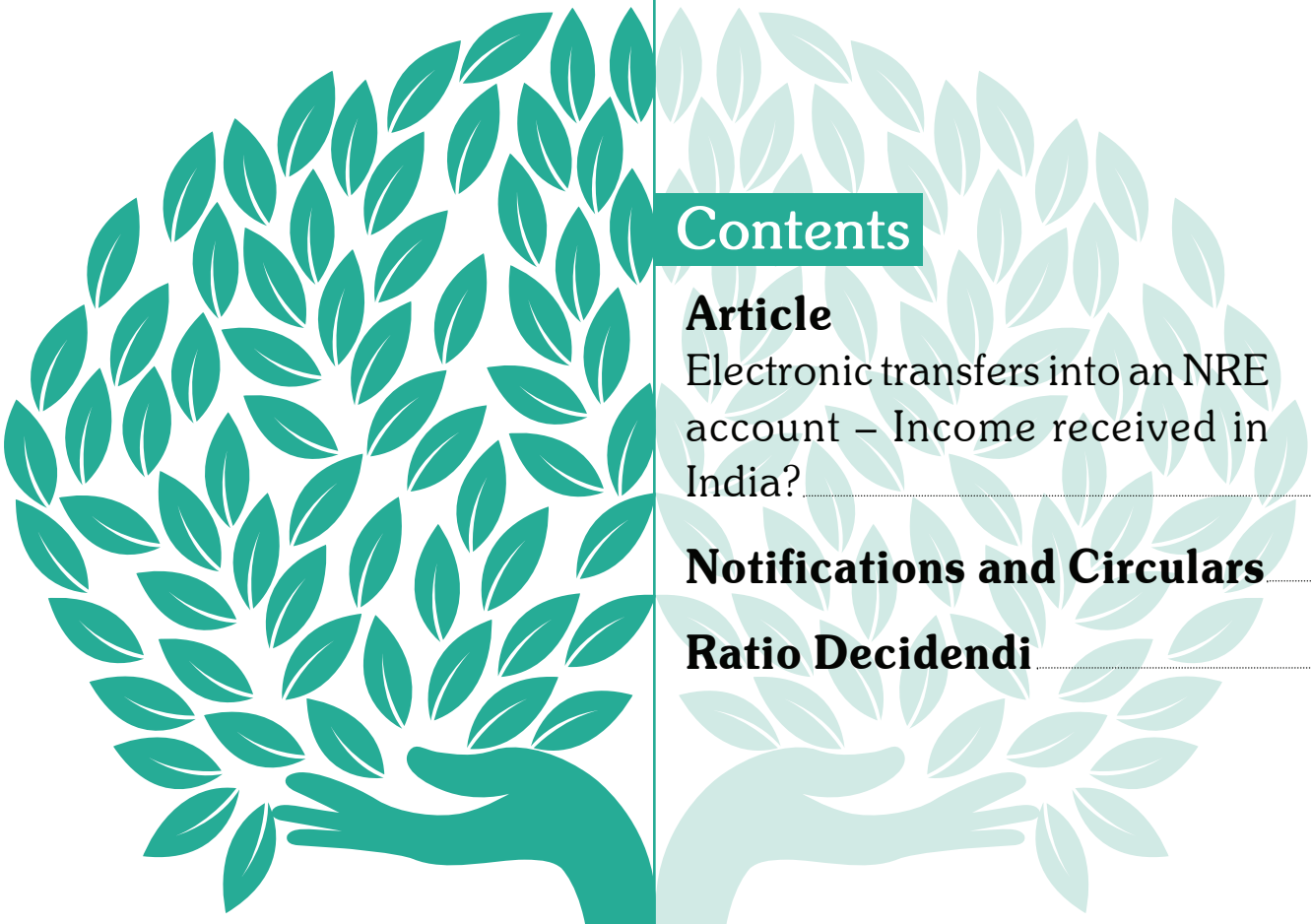

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Electronic transfers into an NRE account – Income received in India?

A brief critique of the judgement of Kolkata bench of the Income Tax Appellate Tribunal in the case of Tapas Kumar Bandopadhay vs DDIT [2016]70 taxmann.com50(Kolkat-Trib)

By **Gayatri Sridharan**

The new era of the global citizen or the peripatetic Indian brings with it its unique problems at the level of taxation. The Income Tax Act, 1961, (Act) has introduced its own dose of confusion and the judicial interpretations thereunder have only served to confound the common man further.

In the case on hand the assessee, a marine engineer was employed by two overseas enterprises [Singapore entities] on board a ship for a major part of the previous year. He was thus statutorily accepted to be a non-resident for the year. This non-resident had opened an NRE account with two banks in India.

To digress, an 'NRE account' is simply an account which can be opened and operated only by 'non- residents'. Its chief feature being that money from this account is freely repatriable unlike other accounts, the account can be operated from anywhere in the world (even high seas) and further as per RBI regulations interest earned on such accounts is not taxable in India.

Section 5(2) of the Income Tax Act (Act) brings to tax all income received or deemed to be received or accrued or deemed to have accrued in India.

While Section 9(1)(ii) creates a deeming fiction on what could be an accrual or deemed accrual in respect of salary received/receivable by a non- resident, there is no clear explanation in the Act with respect to amounts/income which has been received or deemed to have been received.

In the case on hand the Hon'ble Income Tax appellate Tribunal was most probably of the view that the assessee clearly did not fall within the four corners of Section 9(1)(ii) as the conditions mentioned in that subsection with regard to rendering of services in India is clearly not fulfilled. It has however refrained from commenting on the applicability or otherwise of this section. The short grounds on which the appeal was decided was;

- Income was received in India because the Singapore entity remitted the salary into the NRE account maintained by the assessee in two banks in India.
- The assessee having rendered services on the high seas was not a resident of any state and therefore he was pre-empted from seeking shelter under any Double taxation avoidance agreement.

This decision leaves many questions unanswered….

It is established law that in case of moneys paid to the banker or other agent of the assessee the time and place of payment to the banker, broker or other agent are the time

and place of receipt by the assessee for the purpose of this act.

In *Ogale Glass Works Ltd* vs *CIT 25 ITR 529(SC)* it was held that if a cheque is sent by post, the receipt would be at the place where the cheque is posted if such mode of payment was at the express request of the recipient. There the assessee was a company which was carrying on business in an Indian State (outside British India) and its liability to Indian Income-Tax depended upon its receipt of money within British India. The assessee had to be paid for goods supplied to the Government of India and at his request the Government of India agreed to make payments by cheques which were drawn in Delhi on a Bombay bank and were posted in Delhi and received by the assessee in the Indian State. It was held that the post office was the agent of the assessee and that the payments were received in Delhi. The principle of that case applies equally to the facts of this case the remittances were made from a foreign bank which transferred such sums to the assessee's NRE account. By applying the principle in *Ogale's* case if we presume the Indian bank to be an agent of the assessee/marine engineer then the transfer took place in Singapore as the employer gave instructions based on its agreement with the marine engineer to its bank in Singapore /foreign territory only. If the transaction took place in Singapore ,the transmission of money in US dollars could only have taken place thereafter. In the1950s when the transactions referred to *Ogale's* case took place there was no electronic transfer available.The courts therefore still held that the time and place of handing over the cheque to the post office constituted the time and place of receipt. In the present case also, applying the same principle, the time and place of clocking in the transaction at Singapore is the time and place of receipt by the assessee.

The payment was therefore received in foreign territory [*place where the employer's bank was situated*] when the funds were transferred to the assessee's name.

Further, the Hon'ble Tribunal declined relief under the Double Taxation Avoidance Agreements on the ground that the assessee was not a resident 'of any other state'. It is not clear as to which state the ship on which the assessee was employed belonged to. As that would be the determining factor for residential status, the Hon'ble Tribunal has while ignoring a number of high court decisions applied the ratio in the case of *Capt. A.L. Fernandez* vs *ITO* [*81ITD203 (Mum)(TM)*] where it was established that assessee was on board an Indian vessel. It was employed by the Indian Government and as the salary was purportedly received in India the same was held to be taxable in India. The major difference being that *AL Fernandez was employed by an Indian company* unlike the marine engineer in question.

Assuming that the assessee was on board an Indian vessel, the assessee was admittedly a non-resident, his employers were undoubtedly non-residents; as such since the source of income and the place of service is outside India, how justified was the Tribunal in ignoring the

principles of international taxation ?

Further, the employers were foreign entities with no permanent establishment in India. Article 15.3 of the OECD commentary on the Model Tax Convention on Income and Capital states that remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic may be taxed in the contracting state in which the place of effective management of the enterprise is situated. If that be so, then even if the assessee was mistaken about its state of residence why did not the Tribunal examine this aspect before applying the maxim *ut res magis valeat quam pereat* i.e., a statutory provision is to be interpreted so as to make it workable rather than redundant?

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Notifications and Circulars

Investment by resident in a startup incentivised

By Notification No. 45/ 2016 dated 14-6-2016, the central government has notified a resident who makes any consideration exceeding face value for issue of shares of a start company under 'classes of persons' under clause ii of Section 56 (2) (vii b) of Income Tax Act, 1961. As per Section 56 (2) (vii b) where a company not being one in which public are substantially interested, receives from a resident any consideration for issue of shares that exceeds the face value of shares the aggregate of the consideration that exceeds the fair market value of shares is taxable as income from other sources. The central government is empowered to notify the classes of persons to whom the provisions shall not apply. Accordingly, as per this notification, excess consideration over the face value of the shares of a startup entity paid by a resident will not be taxable under Section 56 (2) (vii b) of the Act. A start up is defined as company in which public are not substantially interested and which, as per Notification dated 17-2-2016 issued by the DIPP, is working towards innovation, development, deployment of new products driven by technology or intellectual property and its turnover for any of the financial years (upto 5 years from date of incorporation) has not exceeded INR 25 crores.

Equalisation Levy implemented from 1-6-2016, Rules notified

Vide Notification No. 37/2016 dated 27-5-2016, Central Government has notified 01st day of June 2016 as the date on which Chapter VIII of Finance Act, 2016 (Equalisation Levy) shall come into force. Central Government has notified Equalisation Levy Rules, 2016 by way of Notification No.38/2016. The Rules inter-alia prescribe the manner of filing statement, Form for filing appeal before CIT(A) and Form for filing appeal before ITAT in relation to Equalisation Levy.

Amendment to Rule 8D

By way of Notification No. 43/2016 dated 2-6-2016 central government has amended the provisions of Rule 8D of Income Tax Rules,

1962. Sub-rule (2) of Rule 8D is amended to provide that expenditure in relation to income which does not form part of total income shall be aggregate of the amount of (i) expenditure directly relating to income which does not form part of total income and (ii) an amount equal to 1% of annual average of monthly averages of opening and closing balances of the value of investment, income from which does not or shall not form part of total income. The amount referred in clause (i) and (ii) shall not exceed the total expenditure claimed by the assessee. Sub-Rule (3) to Rule 8D has been omitted. The amendments made to Rule 8D would be effective from 2-6-2016.

Clarification regarding cancellation of registration u/s 12AA in certain circumstances

It has been clarified by way of Circular No.21/2016 dated 27-5-2016 that the registration of the trust shall not be cancelled merely on the ground that the cut-off specified in Section 2(15) of the Income Tax Act, 1961 is exceeded in a year. The Circular states that cancellation of registration may cause additional hardship to assessee, particularly due to tax liability on accreted income as per provisions of the newly introduced Chapter XII-EB. Thus if the cut-off specified in proviso to Section 2(15) is exceeded in a year, the tax exemption would be denied to that institution in that year and the cancellation of the registration under Section 12AA of the Act would not be required, unless cancellation becomes necessary on the ground(s) prescribed in the Act.

Assessee not required to establish that bad debt is irrecoverable

Circular No. 12/2016 dated 30-5-2016 clarifies that in light of the amendments brought to section 36(1)(vii) and section 36(2) of the Act vide Finance Act, 1987, the assessee would not be required to establish that the debt has become irrecoverable. A claim of bad debt shall be admissible under Section 36(1)(vii) of the Act if it is written as irrecoverable in the books of accounts of the assessee and fulfills conditions specified in section 36(2) of the Act. Despite this amendment, disputes had been arising and the Circular states that no appeals should henceforth be filed nor should existing matters be pressed upon.

Certain clarifications on Collection of Tax at Source

CBDT has issued clarifications in relation to amendments to provision of section 206C (Collection of Tax at Source) of the Income Tax Act, 1961. The clarifications provide the scope of the amended provisions of sub-section (1D) of the Act and newly inserted provisions of sub-section (1F) of the Act. [*Refer tax update for Circular No. 22/2016 dated 8-6-2016 for details*]

Ratio decidendi

Payment for performance guarantee is not interest as per Article 12 of India-Denmark DTAA

Assessee sold wind turbine generators for which the performance guarantee was provided by its holding company in Denmark. The assessing authority disallowed the expenditure on the ground that such payment

to holding company attracted deduction of tax at source. On an examination of the facts the Tribunal held that such payment could not be characterised as interest within the meaning of Article 12 of the double taxation avoidance agreement between India and Denmark. [*Vestas Wind Technology India P Ltd* v. *ACIT* [2016]69 taxmann.com382 (Chennai-Trib)]

Pre-construction activities not to be considered for ascertaining eligibility of deduction under Section 80IB(10)

Section 80IB(10) confers deductions to housing projects commencing construction after 1/10/1998 and completing the same within a prescribed time frame. The assessee had commenced construction from 15/10/1998 and therefore claimed the deduction. The assessing authority however discovered that the preconstruction activities in the nature of *digging of bore wells , removal of hutment dwellers, getting electricity construction, putting up compound walls, security cabins etc.* were commenced much prior to 1/10/1998 and disallowed the deduction. The High Court held that such pre-construction activities should not be taken into reckoning to deny the assessee the benefit of deduction u/s 80IB (10) of the Income Tax Act. [*Ravi Appasamy* v. *ACIT* [2016]69 taxmann.com305 (Madras)]

No international transaction can be inferred, absent an agreement to share / reimburse AMP expenditure

The assessee a wholly owned subsidiary of a French company had incurred AMP expenditure. The Tribunal observed that the expenditure was incurred for products sold in the Indian market and the brand of the AEs was not promoted. On a consideration of the fact that there was no agreement between the assessee and the AEs for sharing AMP expenses, payment made by the assessee under the head AMP expenses to unrelated domestic parties and the inability of the TPO to prove that the expenses were incurred not for the business of the assessee in India, the tribunal held that there was no international transaction. [*L'Oréal India (P) LTD* v. *DCIT* [2016]69taxmann.com419 (Mum-Trib)]

Documentation for intra-group services cannot be more burdensome than for services from un-related parties

The assessee had received intra group services for which the TPO had determined the arm's length price at NIL without undertaking any FAR analysis as required by law on the ground that the assessee did not obtain any benefit of such services and the services provided by the foreign AE were either not required or were incidental services or stewardship services or duplicate services and unwarranted. The Tribunal in view of the overwhelming evidence produced by the assessee was of the view that rendering of services must be seen from the point of view of the assessee and the assessee cannot be asked to maintain evidence of services rendered by the AEs higher than that which is expected from a businessman receiving such services from an unrelated provider. [*GE Money Financial Services (P) Ltd.* V. *ACIT,* [2016]69taxmann.com420 (Delhi-Trib)]

No penalty under Section 271G if all details provided before completion of the TP order

The case of the assessee company was referred to the transfer pricing officer who did not draw any adverse inference with respect to the international transactions entered into by the assessee and held the same to be at arm's length. The transfer pricing officer however levied a penalty under Section 271 G on the ground that the assessee had filed the TP study belatedly as also some of the information sought by him. The Tribunal held that in view of the fact that the revenue failed to point out which information was not specifically provided by the assessee as also of the fact that no adjustment was made to the price declared by the assessee and that though a TP study is not a specified document under Rule 10 D but was any way filed before the passing of the order by the TPO, the levy of penalty under Section 271 G was not justified. [*Worlds Windo Impex India Pvt. Ltd.* v. *ACIT* [2016] 69 Taxmann.com 406 (Del – Trib)]

Interest under Section 244 A is payable on refund arising on account of double taxation relief under Section 90

The assessee became entitled to refund. Interest on refund under Section 244A was however denied on the excess tax paid which was refunded in consequence of the Double Taxation Avoidance Agreement Relief granted to the assessee. The Tribunal held that relief under Section 90 of the Act is to be allowed while computing the tax liability in India by virtue of credit being given to the extent that tax has been paid abroad. Therefore, the tax payable is to be computed on the income to be assessed. Thereafter the credit which is available to the assessee in view of DTAA is to be taken into account and if there is any excess which the assessee has paid into the Indian Treasury then he is entitled to the refund of the same which would also carry interest under Section 244 A. [*CIT* v. *Tech Mahindra Ltd.*, [2016] 69 taxmann.com402 (Bombay)]

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