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Newsflash – Chennai ITAT allows exemption under Article 15(1) of India-China DTAA where non-resident employee deputed in China to exercise employment services in China but received salary in India for administrative convenience

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Chennai ITAT allows exemption under Article 15(1) of India-China DTAA where non-resident employee deputed in China to exercise employment services in China but received salary in India for administrative convenience

For Circulation
30 September 2025

1.0 Background

1.1 Recently, the Hon'ble Chennai Bench of Income Tax Appellate Tribunal (hereinafter referred to as 'Hon'ble ITAT' or 'Tribunal') in the case of **Sivakarthick Raman v. ACIT, IT**[1] has passed a ruling wherein the salary received in India by a non-resident employee, seconded on international assignment to China, is held to be exempt under Article 15(1) of the India-China Double Taxation Avoidance Agreement ('DTAA') as the employment was exercised and the income was taxed in China.

1.2 Relying on various judicial precedents, the Hon'ble ITAT emphasized the importance of identifying the place where the employment is actually exercised and applying the relevant DTAA provisions while determining the taxability of cross-border employment income.

2.0 Facts of the Case

2.1 Mr. Sivakarthick Raman ('the Assessee'), was an employee of BMW India Pvt Ltd ('BMW India') and was deputed on an international assignment to BMW Brilliance Automotive Limited ('BMW China') during FY 2021-22. He was assessed as a non-resident as he was not present in India at all during the year under consideration and was rendering services/exercising employment in China.

2.2 The Assessee received a gross salary of INR 1,22,09,830 for services rendered in China. For administrative convenience, this salary was paid by BMW India into the Assessee's Indian bank account. However, the Assessee duly offered the entire salary to tax in China by filing a Return of Income there.

2.3 During the period of assignment of the Assessee to BMW China, the Assessee's payroll remained in India for administrative convenience and hence taxes were duly withheld at source by BMW India in respect of salary received by the Assessee in India for employment exercised/services rendered in China. The same was reflected in the Assessee's Form 16 and updated Form 26AS for the relevant financial year.

[1] Sivakarthick Raman v. ACIT, IT [2025] 176 taxmann.com 491 (Chennai - Trib.)

2.4 As the Assessee qualified as a resident of China under Chinese domestic tax law and as a non-resident of India under Income-tax Act, 1961 ('the Act'). He filed his return of income in India disclosing the salary reported in Form 16/Form 26AS. However, he claimed an exemption under Article 15(1) of the India–China DTAA read with section 90 of the Income-tax Act, 1961, thereby seeking a refund of INR 41,72,850.

2.5 However, The Assessing Officer ('AO') denied the exemption, holding that the salary was taxable in India since it was paid and received in India. The Dispute Resolution Panel (DRP) upheld AO's view, leading to the present appeal before the Tribunal.

3.0 Contentions of the Revenue

3.1 The Revenue contended that the Assessee did not change employer and continued to remain on the payroll of the BMW India. As there was an ongoing employer-employee relationship between the Assessee and BMW India, the income received by the Assessee is taxable in India under section 15 of the Act. This section provides that any salary due from an employer shall be chargeable to tax under the head "Salaries."

3.2 According to the provisions of section 5(2) of the Act, the total income of a non-resident for any previous year includes all income derived from any source which is received or deemed to be received in India during that year by or on behalf of such person. Based on this, salary received by the Assessee would be taxable in India.

3.3 It was further argued that tax credit for taxes paid in China under Article 23 of the DTAA is available only to residents of India. Since the Assessee was a non-resident in India, he was not entitled to claim the benefit of this Article. Consequently, the salary shown in Form 16 was subjected to tax in India.

4.0 Contentions of the Assessee

4.1 The Assessee submitted that both the Employment Agreement with BMW China and the Inter-company Cross Charge Agreement between BMW India and BMW China were placed on record, clearly evidencing that BMW China was the legal and economic employer during the period of assignment. It was further explained that the Assessee continued to receive salary and benefits in India solely due to administrative convenience, as the payroll remained with BMW India. Therefore, the Revenue's contention that the existence of salary payments from BMW India implies an employer-employee relationship with BMW India even during the period of employment in China was asserted to be factually and contractually incorrect.

4.2 Section 15 of the Act governs the chargeability of salary income, providing that salary is generally taxable on an accrual basis, irrespective of actual receipt. However, in cases where salary is received in advance, such income becomes taxable on receipt basis. This indicates that the default rule under the Act is taxability upon accrual, with the only exception being advance salary, which is specifically taxed upon its receipt.

4.3 The Assessee further contended that section 5(2) of the Act defines the scope of total income for a non-resident, limiting taxability in India to income that is accrued, deemed to accrue, received,

or deemed to be received in India. Importantly, the use of the phrase "subject to the provisions of this Act" at the beginning of section 5(2) implies that its application is subordinate to other provisions of the Act. Consequently, if the charging provisions elsewhere in the Act do not treat a particular receipt as taxable, such income cannot be brought to tax under section 5(2) of the Act.

Further, as per section 9(1)(ii) of the Act, income under the head "Salaries" shall be deemed to accrue or arise in India only if it is earned in India. The explanation to this section clarifies that income is considered earned in India if the services are rendered in India.

Therefore, salary received in India for services rendered in China would not be taxable in India under section 5(2), read with section 9(1)(ii) and section 15(1)(a) of the Act.

4.4 The Assessee submitted his Indian passport and tax returns filed in China to establish the duration of his stay in China, thereby demonstrating that he was a tax resident of China for the relevant financial year. In support of his claim, the Assessee also relied on the decision in *Maya C. Nair*[2], where the Bangalore Tribunal held that the absence of a Tax Residency Certificate ('TRC') cannot be a ground for denying DTAA benefits if the Assessee has furnished sufficient evidence of his stay in abroad for the year under consideration.

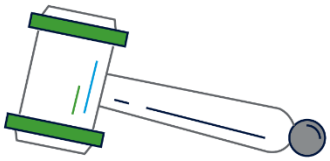
4.5 The Assessee further argued that Article 1 of the India-China DTAA clearly states that treaty benefits of DTAA are available to a person who is a resident of one or both of the contracting states. Since the Assessee was a resident of China during the relevant period, he was eligible to claim benefits under Article 15 of the India-China DTAA.

4.6 The Assessee also referred to the OECD Model Convention commentary on Article 15, which states that employment is considered to be exercised in the location where the employee is physically present while performing the duties for which the salary is paid. Additionally, the Assessee cited Klaus Vogel's commentary on Dependent Personal Services [Article 15(1) or Article 16(1)], which similarly asserts that, as a general rule, employment is exercised at the place where the employee is physically present for the purpose of carrying out their job responsibilities.

4.7 The Assessee further contended that Article 15(1) should be interpreted independently of Article 23. Article 23 applies only when an individual is a resident of India and, therefore, their global income, including salary or benefits received in China, is taxable in India. In such cases, India allows a credit for taxes paid in China against Indian tax liability on the doubly taxed income. However, in the present case, the Assessee is seeking a refund of taxes deducted in India under the Act, not claiming credit for taxes paid in China under Article 23. Since the Assessee is not a resident of India and his global income is not taxable in India, Article 23 of the India-China DTAA is not applicable to him.

[2] Maya C Nair, Bangalore vs ITO (IT) I.T. A. No.2407/Bang/2018 (Banglore-Trib.)

5.0 Decision of the Hon'ble ITAT



5.1 The Tribunal found the above issue already decided by it in assessee' s own case for AY 2020-21[3] and other rulings[4] having similar facts wherein the Tribunal held that:

- The provisions of section 5(2) of the Act are subjected to other provisions of the Act. The regular salary accrued to any assessee is chargeable to tax in terms of Sec.15(*a*) of the Act. Even as per the provisions of section 9(1)(*ii*) of the Act, salary income could be deemed to accrue or arise in India only if it is earned in India in respect of services rendered in India.

- The bench, reading down Article 1 and Article 15 of India-Australia DTAA, held that the treaty benefit shall be applicable to persons who are residents of both India as well as Australia. Therefore, the contention of the revenue that the assessee being a non-resident and hence treaty benefit cannot be extended to assessee, is incorrect.

- Accordingly, the salary so earned for work performed in Australia would be taxable in Australia.

- The issue is covered in assessee's favor by various judicial precedents including the decision of Hon'ble Karnataka High Court in DIT V/s Prahlad Vijendra Rao[5]; decision of Hon'ble Bombay High Court in CIT V/s Avtar Singh Wadhawan[6]; decision of Hon'ble Calcutta High Court in Sumana Bandyopadhyay V/s DDIT[7] as well as CBDT Circular No.13/2017 dated 11/04/2017.

5.2 Since, the identical facts exist in the present appeal, the Tribunal held that the salary income for services rendered in China has been rightly offered tax by the assessee in China and directed the AO to allow the benefit of exemption under Article 15(1) of the DTAA between India and China.

6.0 Our Comments

6.1 The Chennai Tribunal, reaffirming its earlier rulings, has held that salary received in India by a non-resident employee for services rendered outside India and which has already been offered to tax in the foreign jurisdiction is not taxable in India under Article 15 of the DTAA.

6.2 Both the employers and the employees should carefully assess all the documents/ communication during cross-border secondment arrangement wherein it should clearly reflect who is the legal

[3] Sivakarthick Raman v. ACIT (IT) [2023] IT TP (A) No. 13/ Chny/ 2023

[4] Nanthakumar Murugesan v. ITO (IT) [2024] 165 taxmann.com 304 (Chennai-Trib.), Shri Kanagaraj Shanmugam v. ITO (IT) [2022] ITA No.2936/Chny/2018 (Chennai- Trib.), Paul Xavier Antony Samy v. ITO (IT) [2020] 115 taxmann.com 143 (Chennai - Trib.), Mridula Jha Jena v. IT [2025] 171 taxmann.com 175 (Mumbai -Trib.), Shri Ramesh Kumar AE v. ITO [2023] IT(TP)A 51/Chny/2018 (Chennai- Trib.)

[5] DIT (IT) v. Prahlad Vijendra Rao [2011] 198 taxman 551 (Karnataka)

[6] CIT v. Avtar Singh Wadhwan [2001] 115 taxman 536 (Bombay)

[7] Smt. Sumana Bandyopadhyay v. DDIT(IT) [2017] 88 taxmann.com 847 (Calcutta)

employer and responsible to bear the cost of salary. If the salary cost is effectively borne by the Indian entity, the exemption under Article 15 may be challenged.

6.3 It is also imperative to note that the taxpayer must obtain a Tax Residency Certificate (TRC) from the overseas jurisdiction and maintain travel records/ related documentation. In addition, other documentary evidence such as the return of income and proof of taxes paid should be maintained to substantiate that the taxpayer is a resident of the overseas jurisdiction and has paid tax thereon in respect of salary income.

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This Newsflash summarizes a recent decision by the Chennai ITAT, which granted an exemption under Article 15(1) of the India-China DTAA, holding that a non-resident employee deputed to China for employment services is eligible for the exemption, even if the salary was received in India for administrative convenience. It may be noted that nothing contained in this Newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain thereof and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this Newsflash.

30 September 2025