DESAI SAKSENA & ASSOCIATES

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Friday Tax Alert

Remittance of foreign salary into NRE account is mere application, not accrual or receipt in India under section 5(2)(a) of the Income Tax Act, 1961

Facts of the case:

- The Assessee, a non-resident, earned salary income from his employment in a company (VJP Company) in Seychelles. The salary was received in his NRE account in India. The Assessing Officer treated the salary as taxable in India under section 5(2)(a), which states that income of a non-resident received or deemed to be received in India is liable to tax in India.

- On appeal, the Assessee contended that salary earned from services rendered outside India, accrued outside India and was to be treated as received outside India and the deposit of the said salary in the NRE Account was a mere application of the salary received outside India and not receipt of income of the Assessee, so as to qualify for taxation in India under Section 5(2)(a).

Decision held by Hon'ble Income Tax Appellate Tribunal:

- As per the revenue, since the salary was credited to the Assessee's NRE account in India, therefore it was to be treated as income received in India and hence taxable in India in the hands of the non-resident Assessee, in terms of section 5(2)(a) of the Act.

- The issue stands covered in favour of the Assessee by the decision of the ITAT Agra Bench in the case of *Arvind Singh Chauhan v. ITO [2014] 42 taxmann.com 285 (Agra - Trib.)*. As rightly pointed out by the Assessee, the ITAT, in the said decision, was seized with an identical issue and interpreted **the term 'income received in India' in section 5(2)(a), to mean the first occasion when the Assessee gets the money in his own control - real or constructive. The ITAT held that the Assessee was in lawful right to receive this money, as an employee, at the place of employment. Accordingly, the ITAT held that the constructive receipt of salary took place at the place of rendering employment and the deposit of the same in the NRE bank account in India was only an application of the salary received outside India.**

- The revenue's attempt to distinguish the decision of the ITAT on the ground that it was rendered in the facts of the Assessee being a sea farer and the CBDT had clarified such Assesses to be not liable to tax in India on salary received in their NRE accounts in India, is of no consequence. The reason being that the co-ordinate Bench of the ITAT in the case of Arvind Chauhan (*supra*) did not rely on the CBDT circular while giving relief to the Assessee, but on the contrary interpreted the provision of law in this regard. The revenue was also unable to draw attention to any decision of the Higher judicial authorities holding to the contrary.

- In view of the same, the ITAT held that the salary received by the Assessee in his NRE Account does not tantamount to receipt of salary income and is therefore, not liable to tax in India by virtue of section 5(2)(a) of the Act. The addition so made to the income of the Assessee was directed to be deleted.

Kaushal Ganpatbhai Patel v. Income Tax Officer Ward - 1 (International Taxation), Ahmedabad [(2026) 183 taxmann.com 532 (Ahmedabad – Trib.)]

PE in India is entitled to a deduction of cross-charged expenses from HO under Article 7(2) of India – Singapore DTAA

Facts of the case:

- The Assessee was a company incorporated in Singapore and resident of Singapore. It was engaged in the business of providing hospitality guest service, software applications and solution and design services for individual hotels, international chain hotels and integrated resorts. The Assessee had established a branch office in India for looking after the sales and distribution business in India.

- During the year, the branch office had received the debit memo from the Head Office and accounted the same towards procurement of software products, software maintenance services and reimbursement of expenditure in connection with its operations in India.

- The Assessing Officer, without considering the fact that the expenditure was attributable to the business of the branch in India, issued a draft assessment order under section 144C(1) by disallowing the expenses.

- On appeal, the DRP directed the Assessing Officer to pass the final order accordingly in the light of the observations. In the final assessment order, the Assessing Officer made the disallowance of expense on the presumption that expenses could not be allowed in the hands of the branch office that was PE in this case, as purchase was from the same person.

- Aggrieved by the order Assessee filed an appeal before Income Tax Appellate Tribunal.

Decision held by Hon'ble Income Tax Appellate Tribunal:

- It is not in dispute that the branch office is engaged in the business of sale of products, among others in India. The sale of software products had been carried out pursuant to the purchase of the said software products from its head office. This purchase had been effected by way of a debit memo raised by head office on the branch office. Without the said purchase, the sale could not have been effected by the branch office in India**.**

- **Since the branch office is construed as a separate independent taxable entity by considering it as a PE in India, it would be entitled for deduction for cost of procurement of goods and services together with reimbursement of all expenses in order to determine the profits earned by the said PE in India. Logically, only the profits earned by the PE in India could be brought to tax and not the gross revenues. The deduction claimed by the Assessee is only to ensure that only the profits attributed to the PE in India is brought to tax**. If such deduction is denied, then the gross receipts would get taxed which would result in gross injustice and wshich would be against Article 7 Para 2 of the India- Singapore DTAA.

- The cost incurred for the procurement of software by Head Office from other parties shall be allowable as expenses in the hands of the Branch Office/PE in India for making it available on the cost to cost basis in view of the fact that the Branch Office/PE in India was solely established for the distribution of the procured software to the premium hotels in India and consequentially such expenses had to be mandatorily incurred by the Branch Office/PE for its business purposes and hence allowable as deduction.

FCS Computer Systems S PTE Ltd. v. ACIT, International Taxation [(2026) 182 taxmann.com 469 (Delhi - Trib.)]

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