Deloitte.

India | Tax & Regulatory | For private circulation only | 6 August 2018

Global Employer Services Alert

Delivering Clarity

Salary earned by non–residents for services rendered outside India is not taxable even if the employer has deducted taxes on such income in India: Delhi Tribunal

Issue no: GES/11/2018

In this issue:

Background / Facts

- Avdesh Kumar (the taxpayer), an Indian citizen, moved to Korea for the purpose of employment during the financial year 2012-13 and worked in Korea for more than 182 days during such period.
- The taxpayer received salary in Korea from his foreign employer.
- However, the employer withheld taxes in India on salary received in India as well as in Korea.
- The taxpayer, while filing his return of income in India, did not declare the salary received in Korea.
- The Assessing Officer (AO), relying on the information available in Form 26AS, added back the salary income received in Korea on the grounds that the individual was not a non–resident and taxes have been deducted on income received in Korea.
- Aggrieved by the order of AO, the taxpayer preferred an appeal before Commissioner of Income-tax (Appeals), Ghaziabad [CIT (A). During the appellate proceedings, the taxpayer put forth the contention that he had left India for the purpose of employment during the year and his stay in India was less than 182 days. Hence, he was a non–resident in India and salary received overseas for services rendered outside India was not taxable[1] despite the fact that taxes had been deducted on such income in India. However, the CIT (A) dismissed the appeal citing that the taxpayer had filed his return as a resident and had neither revised the return nor claimed change in residential status during the assessment proceedings.
- The CIT (A) further held that the non-resident status was not substantiated through the passport copy of the taxpayer. Besides, there were no details of his stay in India for the preceding four years.
- Aggrieved by the aforesaid decision of the CIT (A), the taxpayer filed an appeal before the Income Tax Appellate Tribunal, Delhi (the Tribunal).

[1] Section 6(1) and 5(2) of the Income Tax Act,1961 (the Act)

Issues for consideration

- Whether the taxpayer was non–resident as per the Act and salary received by him in Korea was exempt from tax being received for services rendered overseas?
- While deciding on the residential status, should the stay pattern of the preceding tax years be considered when the individual leaves India for employment and stays outside the country for a period exceeding 182 days in the relevant tax year?

Ruling of the Delhi Tribunal

The Tribunal dismissed the ruling of CIT (A) and held that the taxpayer was a non–resident for the financial year 2012-13. Hence, salary income received by him in respect of foreign employment was not taxable in India even though taxes had been deducted in India.

Principles derived by the Tribunal based on the provisions of the Act and earlier decisions:

- If an Indian citizen has left India for employment abroad and his stay in India is less than 182 days in a given tax year, the individual would be treated as non–resident regardless of his stay in India in the preceding years.
- Income received by a non–resident for services rendered outside India cannot be said to accrue or arise or be deemed to accrue or arise in India and hence, cannot be taxed in India notwithstanding the fact that the salary is credited into an India bank account or taxes have been deducted on such income. Receipt of salary or deduction of taxes in India cannot be a criteria for deciding on the taxability or otherwise in India, of such income.

Conclusion

The Delhi Tribunal ruling reaffirms the principles laid down in previous decisions that salary received by a non–resident in India is exempt from tax if it is for services rendered overseas. The ruling further affirms that the income will stay 'not taxable' even if taxes have been deducted in India.

Source: I.T.A. No. 747/Del/2018

Do you know about Dbriefs?

Dbriefs are live webcasts that give valuable insights on important developments affecting your business. To register, visit the Dbriefs page.

Download the report

Deloitte makes an impact that matters