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India | Tax & Regulatory | 24 January 2015

GES Alert

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Stock option perks to be prorated based on stay in India for non-residents/not ordinarily residents

Issue no: GES/5/2015

In this issue:

Facts of the case

- Mr. Anil Bhansali (“assessee”), an employee of M/s. Microsoft India (R&D), Hyderabad (“employer”), qualified as a not ordinarily resident for Assessment Year (“AY”) 2007-08 and filed his return of income admitting income earned/received in India.
- The assesse was granted stock options by his then employer, Microsoft Corporation, USA between August 2002 and September 2005. These options vested in AY 2007-08 in which year the employer deducted tax at source on the stock option perquisite and also disclosed the perquisite and tax deducted in Form 12BA and Form 16 respectively.
- The assessee offered to tax the proportionate value of stock option perquisite (amounting to INR 10,562,088) relating to his stay in India and claimed the remaining (INR 4,418,625) as exempt while filing his return of income.
- The Assessing Officer (‘AO’) called for information from M/s Microsoft India and ICICI bank (where the assesse had his account), based on which he added the total stock option perquisite value of INR 14,980,713 and the difference between the perquisite value reported in Form 16 and credits appearing in the bank statement (INR 3,046,287) to the income offered to tax by the assessee.
- On appeal, the Commissioner of Income Tax (Appeals) [CIT(A)] confirmed the additions made by the AO.
- Aggrieved by the CIT(A)’s order, the assessee preferred an appeal before the Hyderabad Tribunal.

Issues before the Tribunal

The primary issues before the Tribunal were:

- Whether stock option perquisite can be apportioned based on the number of days of stay in India during the vesting period in case of individuals qualifying as non-residents/not ordinarily residents?
- Whether the AO was correct in treating the difference between the perquisite value

reported in Form 16 and credits appearing in the ICICI bank statement as income?

Ruling of the Tribunal

The Tribunal held as under:

- Facts and figures have not been examined by the AO and learned CIT(A) before making the additions;
- The residential status of the assesse as “not ordinarily resident has been accepted by the AO, hence income accruing or arising outside India cannot form part of his total income unless it is from a business or profession controlled in India;
- Salary shall be deemed to accrue or arise in India if it is earned in India towards services rendered in India (section 9(1)(ii) of the Income-tax Act, 1961);
- Article 16(1) of the India-US Double Taxation Avoidance Agreement provides that salary derived by a resident of USA in respect of employment exercised there shall be taxable only in USA;
- OECD commentary also confirms the position that stock option perquisite should be taxed in proportion to the number of days of stay in each country;
- It cannot be concluded that the entire stock option perquisite is taxable in India because the stock rewards are treated as part of salary in the Form 16 issued by the employer;
- Merely because the money was received in India, the entire amount cannot be taxed without ascertaining how much of the same is attributable to services rendered in India,
- If the assessee is able to demonstrate that the perquisite value of INR 4,418,625 is attributable to services rendered in USA, same cannot be subjected to tax in India.

Laying down the above reasoning and principles, the Tribunal remanded the case back to the AO to verify the correctness of the assessee’s claim relating to the perquisite offered to tax and also to examine if the remaining value (INR 4,418,625) related to services rendered in USA. The AO was also directed to re-examine the taxability or otherwise of the differential remittance (INR 3,046,287) based on evidence on record and affording reasonable opportunity of being heard to the assessee.

Comments

Pro-ration of stock options has been a contentious issue ever since Fringe Benefit Tax (FBT) was abolished since the Income-tax Act, 1961 is silent on this issue. Though assesses have been relying on the FBT circular No 9/ 2007 and the OECD Commentary for pro rating the benefit of stock income (to exclude the portion relating to the period of employment outside India between grant and vest date), this has not been without dispute.

In such scenario, this ruling along with the Delhi High Court ruling in the case of Robert Arthur Keltz (ITA No. 57 of 2014 dated 23.07.2014) laying down clear principles and directions on pro-ration of stock option perquisite could clear the air and help in minimizing future litigation.

Source: ITA No. 220/Hyd/2014 dated 21 January 2015

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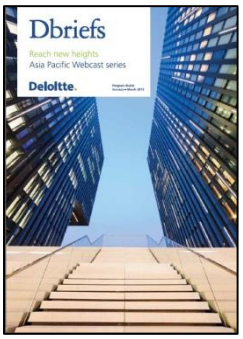

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