Tax Hotline

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DOUBLE TAX WHAMMY FOR MOBILE EXECUTIVES

The Authority for Advance Rulings ("**AAR**") has recently ruled, in the case of *S. Mohan v. Director of Income-tax (International Taxation), Chennai [2007-TIOL-11-ARA-IT]*, that a non-resident employee ("**Applicant**") employed with Infosys Technology Ltd., an Indian company ("**Employer**") would be taxable in India on his income from deputation with the Employer's foreign affiliate situated in Norway ("**Foreign Co**"). It was further held that the Applicant would not be entitled to relief under the provisions of Articles 16 and 25 of the India-Norway tax treaty ("**Treaty**") as he had not paid income tax in Norway either voluntarily or otherwise.

In this case, the Applicant was employed with the Employer from May 16, 2005 to March 31, 2006, during which time he was sent to Norway on deputation. As he remained outside India for a period exceeding 183 days in the financial year 2005-06, he claimed that he was a non-resident for Indian income tax purposes, and therefore not required to pay Indian income tax on his income from deputation. The salary received by him in India was received in Indian rupees, upon which he paid income tax and subsequently sought a ruling with regard to his tax liability.

The issue under consideration was whether the salary paid by the Employer to the Applicant, for rendering services outside India, could be taxable in India, considering that there exists a tax treaty between India and the country in which the Applicant was resident.

The AAR examined Article 16 of the Treaty on "dependant personal services", as per which the remuneration earned by a provider of dependant personal services, would be taxable in the state of residence of such employee. Where the dependant personal services are rendered in the other contracting state, the remuneration may be taxed in the other state as well. However, if certain conditions contained in Article 16(2) are satisfied, for example if the period of stay of the employee is less than 183 days in the aggregate days in any two consecutive years in the other contracting state, the remuneration shall be taxable only in the state of residence.

In this case, the AAR examined the provisions of the Treaty and held that the exception contained in Article 16(2) may not apply as the Applicant had stayed in Norway for a period exceeding 183 days in financial year 2005-06. Therefore, upon a plain reading of Article 16 and the interpretation contained in the OECD Commentaries, as right to tax would lie with the state of residence as well as the other contracting state, both Norway and India should have the right to tax such income.

The AAR also considered Article 25 of the Treaty, the provision relating to the elimination of double taxation, which provides that where the income earned by a resident of India may be taxed in Norway, India shall deduct the amount of income tax paid in Norwayfrom the tax payable in India. However, in this case, as the Applicant failed to provide any proof that he was taxed in Norway or that he had paid income tax to the State of Norway, it was held that the Applicant was liable to pay tax in India and he was not eligible to get any relief under the provisions of the Treaty. The AAR also considered the ruling in the case of *British Gas* [285 ITR 218] and held that the ruling would not be applicable to the instant case due to a difference in facts.

This ruling is relevant for the determination of the income of non-resident employees sent on deputation abroad, as it specifies that it may not only be India but also the other contracting state which may have a right to tax the same income, depending on the provisions contained in the relevant treaty. In a cross border world with a growing trend of mobile executives, this ruling could have a significant impact on the taxation of such mobile executives.

- Mansi Seth & Shreya Rao

Source: AAR Ruling in the case of S. Mohan v. Director of Income-tax (International Taxation), Chennai [2007-TIOL-11-ARA-IT]

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