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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of Decision : 24th April, 2012.

\+ ITA 165/2009

COMMISSIONER OF INCOME TAX ..... Appellant
Through Mr. Deepak Chopra, sr. standing counsel with Mr. Harpreet Singh Ajmani, Adv.

versus

SHRI ANANT JAIN ..... Respondent
Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

1. By order dated 22.9.2009, the following two substantial questions of law in this appeal which pertains to assessment year 2001-02 in the case of Anant Jain were admitted for hearing: -

> "a) Whether ITAT was correct in law in deleting the addition of Rs.37,44,026/- made by the Assessing Officer treating the same as profit in lieu of salary under Section 17(3)(i) of the Act?
>
> b) Whether proviso to Section 5(1) would apply to the amount of Rs.37,44,026/- received by the assessee so as to exclude the same from the total income of the assessee?"

2. We have heard the counsel for the appellant. There is no appearance on behalf of the respondent-assessee.

3. The Assessing Officer noticed that in Form No.24 relating to tax deduction at source issued/filed by M/s. Enron Expat Services Inc. ₹81,14,499/- were shown as allowances paid claimed to be exempt. The Assessing Officer observed that the respondent-assessee had received salary from An Internet Architech (I) Pvt. Ltd. in his capacity as a managing director. Some amount was also received from 100% subsidiary of Enron Expat Services Inc. though this aspect is not very clear.

4. The Assessing Officer asked the respondent-assessee to give the break-up and justify exemption of ₹81,14,499/-. The assessee explained that he had received leave encashment according to the number of years of service, which was subsequently described as severance and vacation encashment paid by the erstwhile employer of the respondent-assessee in USA for services rendered outside India. It was further stated that the total payment received was ₹24,69,944/- and tax was deducted at source in USA and if the figure of tax deducted at source was taken into consideration, the total amount paid was ₹37,44,026/-.

5. The Assessing Officer was not satisfied with the reply furnished by the assessee and he did not agree that the aforesaid payment was for severance and vacation encashment or paid to the assessee for services rendered outside India. He held that ₹37,44,026/- was received by the assessee as his profit in lieu of salary which was payable by the employer under the employer-employee relationship and therefore, taxable under Section 17(3)(ii) of the Income Tax Act, 1961 ('Act', for short).

6. The assessee succeeded before the CIT(Appeals). The assessee explained that he was an employee of Enron Corporation, USA from 1991 till November, 1999 and during this period he was a non-resident Indian. It was stated that ₹37,44,026/- represented retirement benefits received from the previous employer on the termination of employment in November, 1999. This amount had accrued outside India for employment rendered outside India and was received outside India and taxed in USA. It was stated that this amount was not taxable in India under provisions of Section 5(1)(c) read with Section 9(1)(ii) of the Act. It was further stated that the status of the assessee in the assessment year in question was "not ordinary resident", there was no nexus between the severance/vacation/retirement and the payment made by the erstwhile employer; and the services which had been rendered in

India after November, 1999. Before the CIT(Appeals), the assessee had filed a letter dated 27.02.2003 issued by former foreign employer in support of his contention. Copy of the said letter has not been placed on record. We also do not have copy of the Form-24 or any of the replies of the assessee on record. The CIT(Appeals) after examining the said letter, opined:

> "6.5 I have carefully gone through the reasons as stated in the impugned assessment order as also the contentions of the appellant. On the basis of the evidence adduced there is no doubt that the receipt of the impugned amount was on account of the past services rendered by the appellant to his previous foreign employer (Enron USA) outside India at a time when he was a Non-resident. Evidently this can not be deemed to have accrued or arisen in India and does not come under the purview of section 9(1)(ii). And also since at the time of receipt of payment the status of the appellant was that of "not ordinary resident", the retirement benefits thereof were not taxable in view of the specific provisions of proviso to section 5(1)(c)."

7. On further appeal by the Revenue before the Tribunal, in the impugned order the following findings have been recorded: -

> "15. We have heard both the parties. The ld. CIT (Appeals) on the basis of certificate filed has recorded a finding that the receipt of the impugned amount was on account of part services rendered by the assessee to his previous foreign employer outside India. Under section

5 of the I.T. Act, the total income of any previous year of a person who is a resident includes all incomes from whatever source derived, which is received or deemed to be received in India in such year by or on behalf of such person; or accrues or arises or is deemed to accrue or arise to him in India during such year; or accrues or arises to him outside India during such year. Proviso to sub-section (1) provides that in case of a person Not Ordinarily Resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India. There is no dispute that the impugned amount was received by the assessee from his foreign employer as retirement benefit for the services rendered outside India. There is also no dispute that the foreign employer i.e. M/s. Enron, USA, did not carry on business in India. The assessing officer has merely added the amount on the ground that the salary certificate issued by the employer does not specifically mentioned that the amount was received on account of retirement benefits for the services rendered outside India. Therefore, as per proviso to section 5(1) the amount received will not fall under the total income of the assessee. Further under section 9(1)(ii) of the Act the income which falls under the had 'salaries' if it is earned in India shall be deemed to accrue or arise in India. Since the impugned amount has not been earned in India it will not be deemed to accrue or arise in India within the meaning of section 9(1)(ii) of the Act. Accordingly, we do not find any infirmity in the order of CIT(A) deleting the addition."

8. It is clear from the factual findings recorded by both CIT(Appeals) and the Tribunal that the payment in question was received towards retirement benefit/severance/vacation engagement from the erstwhile employer on termination of employment in November, 1999. The erstwhile employer was based in USA and services were rendered to the erstwhile employer in USA. In view of the aforesaid factual position, elucidated and accepted by both the CIT(Appeals) and the Tribunal, we do not think the said amount can be taxed in India, as the status of the respondent-assessee during the year in question was that of "not ordinary resident". The said income did not accrue or arise in India. The tribunal has rightly held that in terms of Section 6 and Section 9(1) (ii) of the Act, the amount/income had not accrued/deemed to be accrued /paid in India The questions of law are accordingly answered in the affirmative, that is, against the Revenue and in favour of the assessee. The appeal is dismissed with no order as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

APRIL 24, 2012
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