

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-13703-2021 (O&M)
Date of Decision: 14.12.2021

Kenneth Malcolm Holland

....Petitioner

Versus

Deputy Commissioner of Income Tax, International Taxation, Gurgaon

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE PANKAJ JAIN**

Present : Mr. Pankaj Garg, Senior Advocate, with
Mr. Milind Garg, Advocate,
for the petitioner.

Mr. Kunal Sharma, Senior Standing Counsel,
for the respondent.

PANKAJ JAIN, J.

1. The present writ petition has been filed seeking a writ of certiorari for quashing order dated 29.12.2020 (Annexure P-1), whereby claim of the petitioner for grant of certificate of residence has been rejected by the authorities. The petitioner herein prays for further direction to the authorities to award him benefit under the provisions of Article 22 of the India-US Double Taxation Avoidance Treaty (herein after referred to as 'the Treaty').

2. The case of the petitioner is that he is a USA national, who has been appointed in India as a Dean-cum-Professor in O.P. Jindal Global University w.e.f. 01.01.2020. He joined his services in India on 01.02.2020 and owing to the Covid-19 pandemic, he departed from India on 21.03.2020.

At the time of payment of his salary, he was issued Form-16 by his

employer under the provisions of Section 203 of the Income Tax Act, 1961 (hereinafter referred to as '1961 Act'), showing tax deducted at source on salary.

3. Aggrieved by deduction of tax at source, the petitioner represented to the authorities invoking Article 22 of the Treaty and claimed exemption.

4. Vide the impugned order, the authorities have rejected the claim of the petitioner with the following observations:

“02. XXX XXX XXX your reply has been considered but not found tenable as it is again reiterated that the provisions of Tax Residency Certificate (TRC) is required for those foreign nationals who have come to India for a specified period and are claiming a relief under the DTAA on their Indian income. However, as per the details provided in your application it is noted that you have arrived in India on 01.02.2020 and departed from India on 21.03.2020 and till date you are outside India. As your stay in India is 49 days during the F.Y. 2019-20 as per the documents submitted by you, which is less than 182 days therefore, you are a Non-Resident for the F.Y. 2019-20 and F.Y. 2020-21 under the provisions of Section 6 of the Income Tax Act, 1961.

XXX XXX XXX

3.2. In light of the Rule 21AB(3) of the Income Tax Rules, 1962, a resident of India may apply for TRC and you being a Non-Resident cannot apply for TRC. Further, it is difficult to envisage a situation at this stage for determining the residential status for the upcoming years.

4. In view of the above, this office considers you as a Non-Resident, therefore, your application for TRC may be treated as disposed-off.”

5. Hence, this writ petition.

6. The petitioner claims that Article 22(1) of the Treaty clearly provides that the assessee who visits a contracting State for a period not exceeding two years for the purpose of teaching and who has immediately

before that visit been a resident of the other contracting State shall be exempted from tax by the first mentioned contracting State for a period not exceeding two years from the date he first visits that State for such purpose. Thus, for giving the aforesaid exemption, the petitioner applied and the claim has been wrongly rejected. The petitioner for the purpose of satisfying the authorities on his eligibility has submitted his passport depicting his nationality of USA, letter of appointment letter and Form-16, which fulfills the conditions as required under law.

7. Learned counsel for the petitioner further submitted that the petitioner is not an assessee under Section 2(7) of the 1961 Act as no tax is payable by him for a period of two years by virtue of the provisions of Article 22 of the Treaty.

8. Response has been filed on behalf of the respondent-Deputy Commissioner of Income Tax, International Taxation, Gurgaon.

9. In the written statement, the authorities has defended their order of dismissing the claim of the petitioner with respect to the grant of TRC. The respondents assert that the certificate for claiming benefits under Double Tax Avoidance Agreement is issued to individuals who have stayed in India during the relevant Financial Year for a period of 182 days or more or for 60 days or more in relevant year and 365 days or more in preceding 4 years immediately to the relevant financial year. The petitioner having a stay of merely 49 days does not fulfil any of the conditions and thus, he is not entitled to benefit of the Treaty. It has further been submitted that Section 90 of the 1961 Act read with Rule 21AB of the Income Tax Rules, 1962, provides a comprehensive procedure qua residents as well as non-

residents for claiming relief under the Treaty and the claim of the petitioner sans merit when tested on the touchstone of the aforesaid provisions.

10. We have heard the learned counsel for the parties and have carefully gone through the pleadings.

11. There is no denial to the fact that the two countries i.e. India and USA have a treaty by the name of India-U.S. Double Tax Avoidance Agreement executed between them under Section 90 of the 1961 Act. Section 90 of the 1961 Act reads as under:-

“90(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income-tax under this Act and income-tax in that country or specified territory, as the case may be, or

(ii) income-tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, or

(c) for exchange of information for the prevention of evasion or avoidance of income-tax chargeable under this Act or under the corresponding law in force in that country or specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income-tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be,

and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

(2A) Notwithstanding anything contained in sub-section (2), the provisions of Chapter X-A of the Act shall apply to the assessee even if such provisions are not beneficial to him.

(3) Any term used but not defined in this Act or in the agreement referred to in sub-section (1) shall, unless the context otherwise requires, and is not inconsistent with the provisions of this Act or the agreement, have the same meaning as assigned to it in the notification issued by the Central Government in the Official Gazette in this behalf.

(4) An assessee, not being a resident, to whom an agreement referred to in sub-section (1) applies, shall not be entitled to claim any relief under such agreement unless a certificate of his being a resident in any country outside India or specified territory outside India, as the case may be, is obtained by him from the Government of that country or specified territory.

(5) The assessee referred to in sub-section (4) shall also provide such other documents and information, as may be prescribed.

Explanation 1.—For the removal of doubts, it is hereby declared that the charge of tax in respect of a foreign company at a rate higher than the rate at which a domestic company is chargeable, shall not be regarded as less favourable charge or levy of tax in respect of such foreign company.

Explanation 2.—For the purposes of this section, "specified territory" means any area outside India which may be notified as such by the Central Government.

Explanation 3.—For the removal of doubts, it is hereby declared that where any term is used in any agreement entered into under sub-section (1) and not defined under the said agreement or the Act, but is assigned a meaning to it in the notification issued under sub-section (3) and the notification issued thereunder being in force, then, the meaning assigned to such term shall be deemed to have effect from the date on which the said agreement came into force.

Following Explanation 4 shall be inserted after Explanation 3 to Section 90 by the Finance Act, 2017, w.e.f. 1-4.2018 :

Explanation 4.—For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined

in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government.”

12. For the proper adjudication of the controversy in hand, it will also be appropriate to reproduce Article 22 of the Treaty.

“Article 22 : Payments Received by Professors, Teachers and Research Scholars

1. An individual who visits a Contracting State for a period not exceeding two years for the purpose of teaching or engaging in research at a university, college or other recognised educational institution in that State, and who was immediately before that visit a resident of the other Contracting State, shall be exempted from tax by the first-mentioned Contracting State on any remuneration for such teaching or research for a period not exceeding two years from the date he first visits that State for such purpose.

2. This Article shall apply to income from research only if such research is undertaken by the individual in the public interest and not primarily for the benefit of some other private person or persons.”

13. Section 90 of the 1961 Act is an enabling provision for the Central Government to enter into an agreement with the Government of any country outside India for granting relief to the assessee in respect of various issues including for avoidance of double taxation of income. However, the relief of double taxation of income under the Treaty is subject to the condition of the assessee providing a certificate of his being a resident in any country outside India or specified territory outside India as enumerated under Section 90(4) of the 1961 Act.

14. Thus, in order to claim benefit from double taxation as provided under Article 22 of the Treaty, the petitioner is required to submit a certificate of him being a resident in country outside India i.e. USA in the present case from the Government of USA.

15. The claim of the petitioner is totally misfound. The objective of

the Treaty is to avoid double taxation and not to avoid taxation. In order to claim benefit in India, the petitioner has to provide TRC from the Government of USA which admittedly he does not possess. Case of the petitioner in our view is hit by Section 90(4) of the 1961 Act which contemplates that a non-resident assessee claiming benefit under the double taxation avoidance agreement is not entitled for such benefit unless the said assessee obtains TRC from the country of which he is resident. In the absence of TRC as contemplated under Section 90(4) of the 1961 Act and having his source of income based in India, the petitioner cannot claim exemption under Article 22 of the Treaty.

16. Finding no merits in the present case, the writ petition is dismissed.

(PANKAJ JAIN)
JUDGE

(AJAY TEWARI)
JUDGE

14.12.2021
adhikari

Whether speaking/non-speaking	:	Yes/No
Whether reportable	:	Yes/No