

# Salary received in NRE account not taxable on receipt basis if services rendered outside India: ITAT Kolkata

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## Summary

As per the provisions of the Income-tax Act, 1961 (the Act), a non-resident is taxed on income received by it in India, among other things. The Kolkata bench of the Income Tax Appellate Tribunal (ITAT), in a recent decision<sup>1</sup>, held that mere receipt of salary by an individual in his Indian Non-resident External (NRE) account for services rendered in Nigeria is not taxable in India on receipt basis under the Act. The ITAT, while arriving at its conclusion, also held that the place where services have been rendered is relevant for determining whether income of a non-resident is taxable in India or outside India.

## Facts of the case

- The taxpayer, a non-resident individual, was employed with a company located in Nigeria and was rendering services in Nigeria.
- During tax year 2010-11, the employer remitted his salary directly in the taxpayer's NRE account maintained in India.

## Taxpayer's contentions

- The taxpayer contended that the salary is taxable on due or receipt whichever is earlier. It was argued that since the services have been rendered in Nigeria, the salary has accrued in Nigeria. In support of his argument, the taxpayer placed relied on various rulings.<sup>2</sup>

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<sup>1</sup> Deepak Kumar Todi v. DDIT, International Taxation [ITA No.1918/ Kol/ 2017]

<sup>2</sup> Ranjit Kumar Bose vs ITO [ITAT (Col) 18 ITD 230]; Director of Income tax vs Shri Prahlad Vijendra Rao [ITA No. 1137/ Bang/ 2008] confirmed by Kar. HC [(2011) 239 CTR 107] , CIT vs Avtar Singh Wadhwan [247 ITR 260 (2001) (Bom-HC)]

- The taxpayer further argued that the remittance directly to India by his employer was made based on his instructions. It was also contended that the lawful right to receive such income was established in Nigeria and hence the receipt in India was merely a constructive receipt.

## Revenue's contentions

- The revenue contended that the taxpayer has received whole salary in India by way of direct remittance by the foreign employer and accordingly, the first receipt and control of money is in India only.
- The tax department also contended that the income was not taxed in Nigeria under the local laws and hence not taxing the income in India on receipt basis would lead to a situation of double non-taxation of the income.
- The tax department argued that place where the salary becomes due is irrelevant if an income is taxable on receipt basis.

## ITAT's decision

- The ITAT, placing reliance on a High Court ruling<sup>3</sup>, held that the place where services have been rendered is relevant for determining place of accrual of salary income in the hands of taxpayer. Further, the ITAT held that where an income has already accrued outside India, it should not be taxable in India on receipt basis.
- Accordingly, the ITAT held that since the services have been rendered outside India i.e. Nigeria, the salary income has accrued in Nigeria and accordingly, the same will not be taxable in India on subsequent receipt.
- As regards tax department's contention of double non-taxation of income, the ITAT, based on documentary evidence, noted that tax was deducted at source in Nigeria from the salary income. Hence, it concluded that there is no case of double non-taxation of income.

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<sup>3</sup> Utanka Roy v. DIT, International Taxation (W.P. No. 369 of 2014)

## **Our comments**

Taxation on receipt of salary in India has been a cause of litigation for non-resident outbound employees, who while render the services abroad, prefer to receive their salary in their home state i.e. India. While the courts have decided that salary received in India has to also have its place of accrual in India, it is imperative that the government comes out with a clarification circular, given that many individual taxpayers are being subjected to avoidable litigation on this account.

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