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Tax alert: Taking up employment outside India to include business or profession, for determining residential status

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The Mumbai Bench of the Income-tax Appellate Tribunal (ITAT) has rendered its decision that leaving India for the purposes of 'employment outside India' would also include leaving India for business or profession, for determining residential status of a taxpayer under Explanation 1(a) to section 6(1) of the Income-tax Act, 1961. Accordingly, even if the taxpayer went to Mauritius as an investor in a Mauritian company, the taxpayer was entitled to claim the benefit of the extended period of 182 days.

In a nutshell

For determining the residential status, Explanation 1(a) to section 6(1) of the ITA, inter-alia, extends the period of 60 days and substitutes the same to 182 days, in case of a citizen of India who has left India for the purpose of employment outside India.

For Explanation 1(a) to section 6(1) of the ITA, going abroad for the purpose of employment, also means going abroad to take up self-employment such as business or profession. However, it should not mean going outside India for purposes such as tourism, medical treatment, studies, or the like.

Even if the taxpayer has left India for the purpose of business or profession, the same is considered to be for the purpose of employment outside India under Explanation 1(a) to section 6(1) of the ITA.

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Background:

- The taxpayer[1] is an individual.
- During audit proceedings for the Financial Year (FY) 2012-13, corresponding to Assessment Year (AY) 2013-14, the taxpayer filed his return of income with the Assessing Officer (AO) claiming his residential status as **'Non-Resident'** and accordingly, did not offer his global income to tax in India. In this regard, the taxpayer submitted that:
  - — He went to Mauritius for the purpose of employment with a Mauritius company (M Co), for the post of 'Strategist – Global Investment' of M Co for a period of three years.
  - — The taxpayer left India for the purposes of employment in Mauritius. Therefore while determining the residential status, the period of 60 days as per section 6(1)(c) of the ITA was to be substituted with 182 days as per Explanation 1(a) of section 6(1) of the Income-tax Act, 1961 (ITA).
  - — The taxpayer stayed in India for 176 days and went to Mauritius during the year under consideration and was 'non–resident' as per the provisions of section 6(1)(c) read with explanation 1(a) to section 6(1) of the ITA [relating to determination of residential status of a taxpayer].

  Relevant extract of section 6(1) of the ITA and Explanation 1 thereof:

  "6. For the purposes of this Act,—

  (1) An individual is said to be resident in India in any previous year, if he -

  …(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, ***is in India for a period or periods amounting in all to sixty days or more in that year****.*

  Explanation 1.—In the case of an individual,—

  (a) ***being a citizen of India, who leaves India*** *in any previous year as a member of the crew of an Indian ship as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), or* ***for the purposes of employment outside India****, the provisions of sub-clause (c) shall apply in relation to that year as if for the words* ***"sixty days"****, occurring therein, the words* ***"one hundred and eighty-two days"*** *had been substituted;…"*
- The AO did not agree with the taxpayer's submissions and held that the taxpayer left India in the relevant FY as an 'investor' on a business visa which is usually taken by an investor and not by an employee who leaves India for employment. Accordingly, the AO held that:
  - — The residential status of the taxpayer in the year under consideration was 'Resident' and the taxpayer was not entitled to take benefit of Explanation 1(a) to section 6(1) of the ITA.
  - — Since the taxpayer stayed in India for a period of 176 days (which was more than 60 days) in the current FY and was in India for a period of more than 365 days within 4 years preceding the current year, the taxpayer was held to be a 'Resident' as per the provisions of section 6(1)(c) of the ITA.

  Accordingly, the global income i.e. income received by the taxpayer from M Co, was added to the total income of the taxpayer. While concluding the same, the AO also considered that the taxpayer was holding 100% shareholding in M Co, from which the taxpayer received salary and fees for negotiation and obtained investments for the company.

[1] ACIT-5(4), Mumbai vs. Nishant Kanodia [2024] ITA No. 2155/Mum/2023 (Mumbai - Trib.)

- Aggrieved, the taxpayer filed an appeal before the Commissioner of Income-tax (Appeal) [CIT(A)], which agreed with the taxpayer's contention and held that the taxpayer was away from India for the purpose of **employment outside India** and was accordingly entitled to take the benefit of Explanation 1(a) to section 6(1)(c) of the ITA.
- Aggrieved, the Revenue filed an appeal and in the course of the appellate proceedings, the matter reached before the Mumbai Bench of the Income-tax Appellate Tribunal (ITAT).

Decision of the ITAT:

The ITAT noted that the question for their consideration was the residential status of the taxpayer in the year under consideration. In this regard, the ITAT noted / observed as follows:

- Under section 6(1) of the ITA, an individual is said to be resident in India in any FY, *inter alia*, if:
  - — he has within four years preceding the relevant year been in India for a period of 365 days or more; and
  - — is in India for a period of 60 days or more in the relevant year.
- In the case under consideration, the taxpayer was in India for a period of 365 days in the 4 years preceding the relevant year. Explanation 1(a) to section 6(1) of the ITA further extends the period of 60 days and substitutes the same to 182 days in case of a citizen of India who has left India for the **purpose of employment outside India**.
- Since during the year, the taxpayer stayed in India only for a period of 176 days, therefore, it became necessary to decide whether the taxpayer left India for the purpose of employment outside India during the year under consideration.
- The issue of whether the term *'employment outside India'* includes *'doing Business'* by the taxpayer, came up for consideration in an earlier ruling[2] of the Kerala High Court (HC) wherein, after considering an earlier Central Board of Direct Taxes (CBDT) Circular[3], it was held that no technical meaning can be assigned to the word *'employment'* used in the Explanation and thus going abroad for the purpose of employment also means going abroad to take up self-employment like business or profession.

  The aforesaid High Court interpreted the term 'employment' in wide terms, but it should not mean going outside India for purposes such as tourism, medical treatment, studies, or the like.
- In earlier other rulings[4], it was held that even if the taxpayer has left India for the purpose of business or profession, the same was considered to be for the purpose of employment outside India under Explanation 1(a) to section 6(1) of the ITA.
- Accordingly, even if it was accepted that the taxpayer went to Mauritius as an investor in M Co, in which he held 100% shareholding, the taxpayer was entitled to claim the benefit of the extended period of 182 days, as provided in Explanation 1(a) to section 6(1) of the ITA, for the determination of residential status.
- Since the taxpayer stayed in India only for a period of 176 days during the year, which was less than 182 days, the taxpayer rightly claimed to be a 'Non-Resident' during the year.

In view of the above, the ITAT affirmed the order of the CIT(A) of determining the residential status as 'non-resident' and thereby deleting the addition made by the AO of the foreign income earned by taxpayer in computing its total income.

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[2] CIT v/s O. Abdul Razak [2011] 337 ITR 350 (Ker HC)

[3] Circular no.346 dated 30 June 1982

[4] i) K. Sambasiva Rao v/s ITO, [2014] 42 Taxmann.com 115 (Hyd–Trib.), (ii) ACIT v/s Jyotinder Singh Randhawa, [2014] 46 Taxmann.com 10 (Del-Trib.) and

(iii) ACIT v/s Col. Joginder Singh, [2014] 45 Taxmann.com 567 (Del-Trib.)

Comments:

Indian individuals often go outside India for the purposes of employment or for carrying out business or profession. Such taxpayers would earn foreign income. In case of taxpayers qualifying as residents of India, typically, global income is taxable in India. In case of non-residents, certain foreign sourced income / income accruing outside India may not be taxable in India. Accordingly, the determination of residential status (non-resident vs resident), under the provisions of ITA, becomes important for the purpose of examining the taxability of such foreign income.

For determining the residential status, Explanation 1(a) to section 6(1) of the ITA, inter-alia, extends the period of 60 days and substitutes the same to 182 days in case of a citizen of India who has left India for the purpose of employment outside India. There often arises controversy that the condition of being in India in the relevant financial year for a period of 182 days, would only be applicable if the taxpayer leaves India for 'employment outside India' under a typical employee-employer arrangement and whether this would also include going outside India for its own business or profession?

The ITAT in this ruling, while specifically dealing with the aspect of 'residential status' of a taxpayer, has reiterated the following principles:

- For Explanation 1(a) to section 6(1) of the ITA, going abroad for the purpose of employment also means going abroad to take up self-employment like business or profession. However, it should not mean going outside India for purposes such as tourists, medical treatment, studies, or the like.
- Even if the taxpayer has left India for the purpose of business or profession, the same is considered to be for the purpose of employment outside India under Explanation 1(a) to section 6(1) of the ITA.

Taxpayers with similar facts may want to evaluate the impact of this ruling to the specific facts of their cases.

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