SATURDAY INTERNATIONAL TAX GYAN !!!

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SITG No. 163

Ms. Amrita Jhaveri
Vs
Deputy Commissioner of Income-tax (IT)

The assessee who is a foreign resident can not be asked to explain the assets located outside of India and the income earned by such a person cannot be brought to tax and that too on the basis of general information from the foreign authorities

22.07.2023

Jain Shrimal & co

[2023] 150 taxmann.com 371 (Mumbai) [09-05-2023]

Facts of the Case

- The assessee is an individual who is married to a British citizen and is settled in London. She has been outside India since F.Y. 1999-2000 to date and therefore, her residential status undisputedly is a non-resident. Even prior to F.Y. 1999-2000, i.e. from the year 1989-90, she was not ordinarily resident.

- As a non-resident, the assessee was maintaining an NRE account and NRO account in India. Along with, the assessee was filing the return of income in India in the status of a non-resident in respect of income chargeable to tax in India in accordance with the provisions of the Income Tax Act, which generally comprises capital gains and income from other sources like dividend, interest, etc.

- The assessee filed an ITR in India declaring an income of Rs. 15,86,134 for the A.Y. 2006-07, and similarly for the A.Y.2007-08, with an income of Rs. 461,12,441.

- The Investigation Wing received certain information from the French Government that various persons in India held bank accounts in HSBC bank, Geneva, which encouraged the wing to conduct inquiries, and a large number of people were identified as holding accounts and asked to disclose balances in these accounts to tax.

- One such beneficiary of such an account was the assessee in the present case (i.e., Ms. Amrita Jhaveri) who opened an account in the name of her company named Amaya Ltd.

- The A.O. believed that such account of the assessee was taxable in India and hence issued a re-opening notice on the ground that income had escaped assesseement.

Assessee’s Contention

- The Ld. Counsel states that the accounts held were in the name of Amaya Ltd. which is a company registered as a Limited company in the Republic of Seychelles, and the assessee is an owner, sole shareholder, beneficiary, and director of Amaya Ltd.

- The assessee was married to a British citizen but she happens to be an Indian resident and visits India for short durations. In any of the last 20 years, she has never stayed in India for 182 days or more. Hence, she shall be treated as a non-resident for tax purposes in India.

- The deposits and credits in the relevant accounts were accumulated out of her earnings from her salary, the sale of art work, and through receipts and commissions for facilitating the sale of paintings overseas. Drawing an inference from the same, the deposits in HSBC Geneva are because the paintings were bought in and also sold to foreign countries.

- The Ld. Counsel further reiterates that the assessee is a non-resident and such transactions took place outside Indian Territories and have no tax nexus with India, she should not be required to produce the same.

Assessee's Contention

- The Ld. Counsel mentioned the important point that the deposits/ credits relate entirely to buying and selling art work and income received by way of commission for facilitating the sale of paintings, apart from savings through salary earned or transfer resulting from investments in term deposits.

- As the Ld. Counsel states that Ms. Jhaveri bought some paintings from Indian parties and has imported them to territories outside India, and she made the payment for the same. Income arising from such transactions shall not constitute income deemed to accrue or arise in India and income arising from such sale is not liable to be taxed in India as the assessee was a non-resident at the time of sale.

- The Ld. A.O. re-iterates that receipt or deposits neither originate nor arise directly or indirectly:
  i. Through or from any asset or source of income in India.
  ii. Through or from any property in India.
  iii. Through or from the transfer if a capital asset situated in India.

Revenue's Contention

- Ld. A.O. while stating reasons for re-opening the case, clearly stated that the information was received in the form of the document under Article 28 of DTAA from the French authorities that certain persons are holding bank accounts in HSBC Bank, Geneva. On this basis, the Investigation Wing conducted inquiries and observed a large number of such assessee.

- The Ld. A.O. believes that since the assessee was the director, the company was a mere legal entity that operated through the actions of human conduit subsequent to 18.01.2006, and hence it appears that such company ceased to exist or for other reasons, the balances have been transferred in the name of the assessee. This further proves that the control of funds and knowledge of sources of such bank accounts at all points in time was with the assessee, which refused to share with the IT department despite providing numerous opportunities to do so.

- The Ld. A.O. further states the assessee was asked very specifically to give the full details of the trail of credits in the account if the same has been sourced from other entities, on which the assessee kept her complete silence.

- The Ld. A.O. claims that the assessee has an interest in India since as per the base note the legal address of the assessee is in India only which was not offered any explanation despite asking for a specific question.

Revenue's Contention

- The Ld. A.O. mentioned on record that the assessee chose not to produce the bank statements and the source of deposits made in the respective bank account even after providing various opportunities to do so during the assessment proceedings which further strengthened the prima facie presumption that the said accounts being undisclosed and sourced from India, resulting in the possibility of tax evasion.

- Therefore, the Ld. A.O. assumes that the submission made by her AR are mere time-consuming tactic and to pose a stonewall before the eyes of the tax authority.

- The Ld. A.O. believes the fact that a large number of assesses have confirmed the existence of such bank accounts in HSBC Geneva, proves the credibility of information received under DTAA. Therefore, the Ld. A.O. states "I have a reason to believe that the assessee holds the above-mentioned bank account in HSBC, Geneva which is an asset located outside India, and the income in relation to such assets has escaped assessment for the A.Y. 2007-08, for which as per section 149(c), 16 years time limit is available.

Legal Provisions

Section 149(1)(c) [Time Limit of notice] of the Income Tax Act states that:

if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

Section 148A (Conducting inquiry, providing opportunity before issue of notice u/s 148) of the Income Tax Act states that:

The Assessing Officer shall, before issuing any notice under section 148,—

(*a*) conduct any inquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;

(*b*) provide an opportunity of being heard to the assessee, [23][***] by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of inquiry conducted, if any, as per clause (*a*);

© consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (*b*);

(*d*) decide, on the basis of material available on record including the reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (*c*) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (*b*) expire

Legal Provisions

Section 9 [Income deemed to accrue or arise in India] of the Income Tax Act states that:

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

Explanation 1.—For the purposes of this clause—

(*a*) in the case of a business, other than the business having business connection in India on account of significant economic presence, of which all the operations are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations carried out in India ;

(*b*) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export ;

(*c*) in the case of a non-resident, being a person engaged in the business of running a news agency or of publishing newspapers, magazines or journals, no income shall be deemed to accrue or arise in India to him through or from activities which are confined to the collection of news and views in India for transmission out of India ;

(*d*) in the case of a non-resident, being—

(*1*) an individual who is not a citizen of India ; or

(*2*) a firm which does not have any partner who is a citizen of India or who is resident in India ; or

(*3*) a company which does not have any shareholder who is a citizen of India or who is resident in India,

no income shall be deemed to accrue or arise in India to such individual, firm or company through or from operations which are confined to the shooting of any cinematograph film in India;

Legal Provisions

Schedule FA as per the Income Tax return instructions states that:

The schedule needs to be filled up by a resident assessee. Mention the details of foreign bank accounts, financial interest in any entity, and details of immovable property or other assets located outside India. This should include details of any account located outside India in which the assessee has signing authority.

Even the Schedule FA of 2015 explains the object behind various amendments made by the Finance Act, 2012 in section 139(1) which only refers to the cases of resident assessees. Thus, the assessee being a non-resident was not required to disclose any asset held outside India in the return of income to be filed in India. This basic tenet has been missed by the A.O. while recording the reasons as well as in the assessment order.

Article 28 (Exchange of Information) of India- France DTAA:

1. The competent authorities of the Contracting States shall exchange such information (including documents) as is necessary for carrying out the provisions of the Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention, insofar as the taxation thereunder is not contrary to the Convention, in particular, for the prevention of fraud or evasion of such taxes. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that Contracting State. However, if the information is originally regarded as secret in the transmitting State, it shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes which are the subject of the Convention. Such persons or authorities shall use the information only for such purposes but may disclose the information in public court proceedings or in judicial decisions.

Legal Provisions

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation :

(a) to carry out administrative measures at variance with the laws or administrative practice of that or of the other Contracting State ;

(b) to supply information or documents which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State ;

(c) to supply information or documents which would disclose any trade, business, industrial, commercial, or professional secret or trade process or information the disclosure of which would be contrary to public policy.

Ruling

- The Hon’ble Mumbai ITAT states that the entire edifice for reopening is based on some “Base Notes” received by the Government of India under Article 28 of DTAA which formed the basis for entertaining the belief of Indian tax authorities as discussed earlier.

- Prior to the issuance of a notice, the Ld. A.O. should have seen that these bank accounts were provided to the ADIT in the year 2011 and then again in the year 2013 and at no point did they seek any clarification with regard to any various entries appearing in the said bank account.

- The department before us seeks to rely upon section 149(1)(c) to justify the availability of an extended time period of 16 years within which notice can be issued, but such extended time period shall only be applicable for reopening the assessment of persons who are residents and are required to disclose the assets outside India, whereas in the present case, the assessee was non-resident, which was never disputed even by the Ld. A.O. and for a non-resident there is no obligation to disclose any such foreign asset in its ITR.

- The reasons recorded by the A.O. were not only vague and general but without any application of mind and material which was on file right from the year 2011 to 2014. It is said because even by going with “Base Note”, nowhere on record it has been brought on record that the said entity Amaya Ltd. is fictitious or some kind of transparent entity.

Ruling

- The Hon’ble ITAT clarifies that **nothing** related to ‘Income deemed to accrue or arise in India’ can be presumed on some hypothesis or surmise that the assessee might have earned income from India which was transferred or deposited in HSBC, Geneva. Especially because not even a single entry in the said bank statements refers to any remittance from India or through some indirect channel where money was transferred from India and found its final destination in the said bank accounts. This means that the A.O. can not invoke Section 9 of the Income Tax Act to the facts of the case.

- The Hon’ble finally held “We are not going into this aspect of the merits of the case, because in our opinion the reason recorded by the Ld. A.O. itself does not confer any jurisdiction to the A.O. to re-open the case of an NR u/s 147 of the act based on some vague and general information as noted in the reasons recorded and without ascribing how income chargeable to tax has escaped assessment in India. Therefore, on the legal issue alone, the entire proceedings u/s 147/ 148 are quashed and consequentially entire re-assessment order is held as ‘null & void’. Accordingly, on the legal issue both the appeals of the assessee are allowed.”

Our Comments

- It is important for the assessee, especially the Non-residents to have an awareness and legal knowledge so that they have a fair idea of what information they are required to share with the tax authorities and to the extent which it should be shared, of course after ensuring that they are in full compliance with the local tax laws of the respective countries. If needed, the opinion of the tax or legal expert should be sought beforehand to avoid any kind of complications or unnecessary penalties in the future.

- To issue a notice to an assessee u/s148/ 148A, it is important for the Ld. A.O. to prove that there is some income in the first place which fulfills the definition of ‘income’ and such income which was subjected to tax but tax is not paid or such income has escaped assessment. The Ld. A.O. should also ensure that he/ she can not and should not issue notice without having any specific information or material in hand. Such notice should not be based upon the general information, surmises or conjecture.

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Ms Amrita Jhaveri
(assessee)

The company is located in Seychelles, and the assessee is the owner, only shareholder, sole beneficiary and director of the company.

Amaya Ltd.

The assessee holds bank accounts in HSBC

HSBC, Geneva

On the basis of general information received from the French government, the Ld. A.O. in India issued notice to the assessee and believed that her income had escaped assessment.
He also believes that since the asset is located outside India, should be reported despite being a non-resident, and hence the case can be re-opened for up to 16 years.

French Govt.

The French Government passed certain information to the Investigation Wing of Indian tax authorities that various persons in India held bank accounts in HSBC under the Article 28 of DTAA

Indian Tax Authorities

The Hon'ble ITAT held that since the assessee is a non-resident and hence the assessee is not under any obligation to report the foreign assets located outside India in the ITR, nor the Ld. A.O. can get the benefit of re-opening the case up to 16 years. Also, such issuance of notice can not be made only relying on the general information received from the foreign government.

Hence the appeal of the assessee was allowed by the Hon'ble Mumbai Tribunal.

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Section/Article	Section 149(1)(c), 148A, 9 of Income Tax act.
DTAA/Country	Article 28 of India – France DTAA
Court	ITAT Mumbai Tribunal
Date of decision	09.05.2023

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