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SITG No. 251

Mitesh Vijay Gulati

v.

Income Tax Officer

A person who stayed outside India partially for employment and partially for other purpose and is in India for less than 182 days will be a non-resident

29.03.2025

[2025] 172 taxmann.com 382 (Mumbai - Trib.)[10-02-2025]

Jain Shrimal & Co.

Facts of the Case

- Assessee, filed his income tax return for the Assessment Year (A.Y.) 2016-17, claiming the status of a **non-resident (NR)**.
- He asserted that he had been outside India for **210 days**, which included **182 days** of employment and **28 days** spent searching for employment.
- The Assessing Officer (AO) excluded the 28 days spent seeking employment and recognized only 182 days as time spent abroad for employment purposes.
- Based on this, the AO classified the assessee as a **resident** and included his salary income and NRE interest income in his total taxable income.

Assessee's Contention

- Assessee contended that since he was outside India for **210 days**, his stay in India was limited to **156 days**, making him eligible for non-resident status.
- Further, he claimed that **seeking employment abroad** should be considered part of **employment-related travel** and should not be excluded while determining residential status.
- He also submitted certificates from Eathern Marine Consultants, Texas and Gogonut Grove... INC, Miami, U.S.- based firms, confirming his visits to their offices for employment-related purposes.
- The assessee referred to **Explanation 1 to Section 6** of the Income-tax Act, 1961, emphasizing that seeking employment abroad falls within the ambit of "employment outside India.“
- Accordingly, assessee pleaded that his salary income and NRE interest should not be taxed in India.

Revenue's Contention

- The AO excluded the 28 days spent in the U.S. for employment-seeking purposes, as there was no salary receipt for that period.
- The Revenue argued that, in the absence of an **employment contract or salary slip**, these 28 days could not be considered as employment-related.
- Further, it was contended that 182 days limit is available to a citizen only if he is outside India for the purpose of employment since for the 28 days he was not outside India for employment purpose and accordingly either it should be considered as he was in India for more than 182 days or since he is in India for more than 60 days in current year and 365 days in previous 4 years he will be resident for tax purpose.
- Accordingly, assessee's claim of being a non-resident for A.Y. 2016-17 is rejected and his foreign salary of Rs.86,21,402 and NRE interest of Rs.2,77,787 is taxable in India.

Legal provisions

Section 6 of the Act:

(1) An individual is said to be resident in India in any previous year, if he—
(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or
(b) [***]
(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 ;

Legal provisions

Article 4 of India – USA DTAA:

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, citizenship, place of management, place of incorporation, or any other criterion of a similar nature, provided, however, that

(a this term does not include any person who is liable to tax in that State in respect only of income from sources in that State; and
(b) in the case of income derived or paid by a partnership, estate, or trust, this term applies only to the extent that the income derived by such partnership, estate, or trust is subject to tax in that State as the income of a resident, either in its hands or in the hands of its partners or beneficiaries.

Legal provisions

Article 4 of India – USA DTAA:

(2) Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows :

(a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests) ;
(b) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode ;
(c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
(d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.

Ruling

- Hon’ble Tribunal found the certificates from the U.S. firms to be valid, reinforcing the claim that the visit was related to employment.

- Reference was made to **CIT vs. O. Abdul Razak [2011] (Kerala High Court),** where 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 **Hon'ble Co-ordinate Bench of the Tribunal as well, in the case of Suresh Nanda v. ACIT, Central Circle 13, New Delhi (2012) 23 taxman.com 386 (Delhi)** also dealt with an identical issue and has held that residential status of the person for the purpose of section is to be determined **only on the basis of number of days stay in India** and there is no restriction for number of days spent abroad and if the period of stay in India is less than 182 days then the status to be applied, would be of non-resident and his global income cannot be taxed in India in such case.

Ruling

- Hon’ble ITAT overruled the decision of the AO and CIT(A) and held that:
  - Residential status should be determined solely based on the number of days spent in India. During the year assessee stayed in India for 156 days and outside India for 210 days.
  - There is no statutory requirement that employment outside India must be evidenced by a salary receipt.
  - The assessee was a non-resident for AY 2016-17, and hence, his foreign salary income and NRE interest income could not be taxed in India.

Our Comments

- Considering the judgement can we say that if an assessee is outside India for the purpose of seeking employment will it still be considered under explanation 1 of section 6(1) or the assessee has to first go for some employment purpose where he is actually employed and later if he seeks employment it will still be considered as a travel for employment purpose.

- Further, it has been also mentioned in the judgement as to what will not be included in employment would be going outside India for purposes such as tourists, medical treatment, studies, or the like.

- However, still it is not clear that the individual who go out for the purpose of PhD wherein he is studying as well as working outside India would be covered under explanation 1 or not?

Section/Article	Section 6 of the Income Tax Act 1961 and Article 4 of India-USA DTAA
DTAA/Country	India & USA
Court	Mumbai – Tribunal
Date of decision	10.02.2025

Note: Case law name in Red- in favor of the revenue, Green-In favor of the Assessee, Orange = Partial

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