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Tax alert: FRRO data, visa stamping relevant for determining residential status

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The Chennai Bench of the Income-tax Appellate Tribunal has held that, based on facts, the taxpayer was a resident in India within the meaning of section 6 of the Income-tax Act, 1961 (ITA) and accordingly, the global income of the taxpayer was taxable in India.

In a nutshell

The provisions of section 6 of the ITA including explanations are to be given a conjoined reading and cannot be read in silos.

FRRO is the authorized government agency to keep track on the movement of foreigners and citizens within the country's borders. Being a central government agency, FRRO's data cannot be suspected or doubted.

The taxpayer might have travelled overseas visits in furtherance of business interests. However, the evidence, qua his overseas visits, in possession of the Revenue, indicates that those visits were not in the realm of exclusive business visits so as to exclude him from the Indian tax net.

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Background:

- The taxpayer[1], an individual, is engaged in the business of setting up of restaurants and bakeries under his own brands and other brands, in partnership with brand owners, in India and overseas. He has holding companies, assets and financial interests in various countries, including India.
- In the return of income filed for the relevant years[2] under consideration, the taxpayer claimed his status as non-resident and thus, declared the income earned in India only.
- During the course of search proceedings, the Assessing Officer (AO) based on verification of documents, information obtained from the FRRO[3], copies of visa and passport etc., observed the following:
  - The taxpayer had stayed in India for more than 182 days during AYs 2013-14 and 2014-15, thereby satisfying condition under section 6(1)(a) of the Income-tax Act, 1961 (ITA).
  - Further, the taxpayer had stayed in India for more than 60 days in each AYs 2013-14, 2014-15 and 2019-20 and more than 365 days in immediately preceding 4 AYs. Thus, the taxpayer also satisfied the condition under section 6(1)(c) of the ITA.
  - The taxpayer's overseas travel was meant for social purpose/visitor's purpose and not for employment/business purpose, as noted from the stampings on copies of visas and passport.
  - The period of stay in India would be counted from the time the taxpayer actually /physically left/entered India and not from mere stamps on passports.
  - Merely furnishing the tax residency certificate (TRC) from United Arab Emirates (UAE) in the name of the taxpayer did not confer the residential status to taxpayer in UAE, as per Article 4 of the India-UAE tax treaty.

  Accordingly, the taxpayer's residential status was determined as resident in India and global income was brought to tax in India.
- Aggrieved, the taxpayer filed an appeal before the Commissioner of Income-tax (Appeals) [CIT(A)] who allowed the taxpayer's appeal.
- Aggrieved, the Revenue filed an appeal before the Chennai Bench of the Income-tax Appellate Tribunal (ITAT).

Relevant provisions in brief:

Relevant extract of Section 6 of the ITA

"(1) For the purposes of this 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…

…(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

[1] Deputy Commissioner of Income Tax v. M. Mahadevan [ITA No. 1824 to 1826/Chny/2024] (Chennai ITAT)

[2] Financial Years (FYs) 2012-13, 2013-14 and 2018-19 corresponding to Assessment Years (AYs) 2013-14, 2014-15 and 2019-20

[3] Foreigners Regional Registration Office

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...

... (4) Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India."

Decision of the ITAT:

The ITAT noted that the controversy was whether the global income of the taxpayer was liable for taxation in India or not exigible in India. The sub-issues seminal to the controversy were whether:

- The taxpayer had stayed for more than 182 days in India to be made exigible to taxes in India?
- The taxpayer's travel to overseas locations for social visits / tourists purposes would exclude it from Indian tax net?
- The taxpayer was a resident of UAE to avoid taxation in the country? Whether the taxpayer was having extensive overseas business interest and his overseas travels would exclude taxpayer from Indian tax net?
- The income-taxes paid in foreign jurisdictions would save the taxpayer from taxation in India?

Whether the taxpayer satisfied the conditions under section 6 of the ITA?

- The first and foremost condition to be satisfied by the taxpayer to claim that he is not exigible to the provisions of the ITA is that during a year he should not have been "in India" for a period of 182 days or more. Thus, if a person was in India for a period exceeding 182 days or more, he/she shall be deemed to be resident in India and consequently its global income would be taxed.
- The provisions of section 6 of the ITA including explanations are to be given a conjoint reading and cannot be read in silos.
- Section 6(1)(a) of the ITA prescribes the period of 182 days while section 6(1)(c) provides that a residency shall be deemed if a person stays in preceding 4 years for 365 days or more or in all to 60 days or more.
- Further, section 6(4) of the ITA postulates that residence of a person shall be deemed in a year, if the control and management of his affairs is situated in India.

In the case under consideration, the taxpayer not only satisfied conditions under section 6(1)(a) but also satisfied conditions under section 6(1)(c) and 6(4) of the ITA.

Whether FRRO data can be relied upon for taxpayer's period of residence in India?

- Every sovereign nation has full authority to keep a track of all foreigners entering or exiting its boundary. This activity is performed by the FRRO a Central Government department under Union Ministry of Home Affairs. Different countries call their FRRO's with different names although the nature of work remains the same.
- FRRO is the authorized government agency to keep a track upon movement of foreigners and citizens at country's borders. The agency being a Central Government agency, its data cannot be suspected or doubted.
- The agency is mandated to keep on real time basis data of entry and exit of foreigners and citizens at country's borders.

Therefore, the reliance placed upon the FRRO data by the Revenue for calculating the period of stay of the taxpayer in the country was to be accepted.

Whether the overseas travels were for business purpose in case visas granted by foreign jurisdictions

specified the visit as for social or tourist purposes?

- It is an accepted international practice that every country restricts its visas for a specific purpose. Whenever a visa is granted by a foreign jurisdiction for employment or business, clear stipulations are made. The principal idea being to ensure that the income earned in foreign jurisdiction gets locally taxed or governed by tax treaties, if any. No country grants visa for employment or business purposes liberally.
- A person could travel to a foreign country several times for tourist purposes depending upon the available tourist attractions. Further, tourist visits were also undertaken to revive social contacts.
- The taxpayer might have travelled overseas in furtherance of its business interest, however the evidence, qua his overseas visits, in possession of the Revenue indicates that those visits were not falling in the realm of exclusive business visits so as to exclude him from Indian tax net.
- The investment or shareholdings of the taxpayer across various entities did not mean that he was engaged in the business, it only indicated that interest of the taxpayer held in various entities, and anyone can hold investment in any entity across the globe. It was not necessary for the direct link between the travel to those countries and the purpose of travel must be the business in those entities in which they have their investment.

In view of the above, the conclusion that all the visits of the taxpayer to foreign locations were for business purpose was not correct.

Whether the taxpayer was a resident of UAE in terms of Article 4 of the India-UAE tax treaty?

- The taxpayer had contended that because he was a resident of UAE for which a TRC was issued, he was beyond the purview of section 6 of the ITA.
- In the case under consideration, the taxpayer stayed for more than 182 days in India in accordance with the provisions of section 6(1) of the ITA, therefore, Article 4 of the India-UAE tax treaty would not be applicable.

In view of the above, the ITAT held that the taxpayer was a resident in India within the meaning of section 6 of the ITA and therefore, the taxpayer's global income was taxable in India. Further, the AO was directed to verify the foreign taxes paid by the taxpayer and allow necessary credit in accordance with law.

Comments:

Taxpayer's residential status is relevant in determining whether his global income is taxable in India or not. Taxpayer's may undertake business trips or social trips which is relevant for determining the applicable threshold for Indian residency.

This ruling, while holding that the taxpayer is resident in India, has held the following:

- The provisions of section 6 of the ITA including explanations are to be given a conjoined reading and cannot be read in silos.
- FRRO is the authorized government agency to keep track on the movement of foreigners and citizens within the country's borders. Being a central government agency, FRRO's data cannot be suspected or doubted.
- The taxpayer might have travelled overseas visits in furtherance of business interests. However, the evidence, qua his overseas visits, in possession of the Revenue, indicates that those visits were not in the realm of exclusive business visits so as to exclude him from the Indian tax net.

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

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