IN THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "D", MUMBAI

BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.4227/M/2023
Assessment Year: 2016-17

Mr. Mitesh Vijay Gulati, 153/4, Yug Dharma Towers, Opp. Inorbit Mall, Goregaon (W), Motilal Nagar, Mumbai - 400104 **PAN: AADPG3242M**	Vs.	**Income Tax Officer,** **Int. Tax Ward-2(3)(1),** Air India Building, Narmian Point, Mumbai - 400021
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Gaurav Kabra, Ld. A.R.
Revenue by : Ms. Rajeshwari Menon, Ld. Sr. DR

Date of Hearing : 31.01.2025
Date of Pronouncement : 10.02.2025

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 10.10.2023, impugned herein, passed by the Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2016-17.

2. In the instant case, the Assessee had declared his total income of Rs.8,37,250/- by filing his original return of income on 30.07.2016, which was subsequently revised by filing revised return on 16.07.2017 declaring total income at Rs.10,87,740/- and the same was processed u/s 143(1) of the Act.

2.1 Subsequently, the case of the Assessee was selected for scrutiny and therefore statutory notices were issued to the Assessee, whereby the Assessee was asked to furnish documentary evidence in support of his claim being non-resident of India during the year under consideration.

2.2 The Assessee filed certain documents viz a viz copies of employment contracts for different periods in support of his claim qua services being rendered by the Assessee outside India. Further, the Assessee has claimed that the Assessee during the year under consideration remained out of India for a period of 210 days in total for the purpose of employment and therefore remained in India for a period of 156 days (366-210) since the year involved 2016 was leap year and therefore the Assessee has rightly claimed the status of Non-resident of India and the income of Rs.1,26,91,190/-inter-alia income comprises salary of Rs.86,21,402/- and NRI interest income of Rs.2,77,787/- as exempt income from taxation in India.

3. The AO though considered the claim of the Assessee, however, excluded the stay of 28 days in the USA and accepted the remaining period of 182 days spent by the Assessee out of India for the purpose of employment and ultimately treated the status of the Assessee as "resident of India" being stayed in India more than 182 days in the relevant AY and made the addition of Rs.88,99,189/- being the salary income of Rs.86,21,402/- & NRE interest income of Rs.2,77,787/- and added the same in the total taxable income of Rs.10,87,740/- as declared by the Assessee by filing revised return of income on 16.07.2017, mainly by observing as concluding as under:

> *"9. Findings given by the undersigned considering the facts involved in the case of the assessee.*
>
> > *A. In view of the above discussed facts, the assessee left India for the U.S.A. during the previous year 2015-16 for 28 days for the purpose other than employment. Further, the assessee has not shown salary receipt for the period of 28 days in the return of income filed for the A.Y. 2016-17 either as taxable income or as exempt income. All these facts go on to corroborate that the assessee left India during the previous year under scrutiny assessment proceeding for purposes other than employment.*
> >
> > *B. It is germane to reproduce here the relevant extract of section 6(1) of the Act which reads as under:*
> >
> > *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; 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;

C. Interpretations of the provisions contained in section 6(1)(c) of the Act vis-à-vis facts of the case of the assessee:

As per the Explanation 1(a) to section 6(1)(c) of the Act, the period of stay in India for 182 days or more in the Previous Year is required for a citizen of India to be resident in India who leaves India only for the purpose of employment. In other words, if a citizen of India leaves India during the Previous Year 2015-16 consisting of 366 days for the purpose of employment for at least 185 days, then his period of stay in India would be less than 182 days and accordingly the citizen of India would be considered as non-resident in India as per the provisions of Section 6(1)(c) rws section 2(30) of the Act. However, as per details available with this office and as discussed herein above, the assessee was outside India for the purpose of employment for 181 days only and for 28 days in the U.S.A. for purposes other than employment.

D. In view of the above, the assessee leaves India during the Previous Year under proceeding partly for the purpose of employment and partly for the purpose other than employment. However as per the Explanation 1(a) to section 6(1)(c) of the Act, stay in India for 182 days or more is required for a citizen of India to be resident in India who leaves India during the Previous Year for the purpose of employment only. Here, in the instant case, the assessee being the citizen of India leaves India for a period of 181 days only for the purpose of employment during the Previous Year 2015-16 as against the minimum number of 185 days of stay outside India by the assessee for the purpose of employment.

E. As per the details submitted by the assessee and as discussed above, the total number of days of stay in India during the Previous Years 2014-15, 2013-14, 2012-13 and 2011-12 comes to 733 days as contended by the undersigned and 687 days as contended by the assessee which is more than 365 days in either way.

F. Further as discussed above, the assessee stayed in India during the year under proceeding for 157 days which is more than 60 days period of stay in India.

G. Thus, during the year under assessment, the assessee stayed in India for a period of more than 60 days and within four years immediately prior to the year under proceeding, the assessee was in India for a period of more than 365 days.

H. In view of the above, it is hereby held that the assessee is resident in India as per the provisions of section 6(1)(c) of the Income Tax Act, 1961 as against the contention of the assessee being non-resident in India for the A.Y. 2016-17.

10. Further, vide show-cause notice dated 10.12.2018, the assessee was asked to explain as to why aggregate income of Rs: 88,99,189/-comprising salary income of Rs. 86,21,402/- and interest accrued/credited of Rs. 2,77,787/-in NRE account of the assessee claimed to be exempt from taxation by the assessee on the ground of being non-resident in India not be brought to tax in India as per the provisions of Section 5(1) of the Act contemplating the assessee to be resident in India?

11. In response, vide submission dated 17.12.2018, the assessee submitted his reply contending that the assessee is non-resident in India and accordingly above income is not chargeable to tax in India. However, as discussed above, the contention of the assessee about the assessee being non-resident in India is rejected by the undersigned holding that the assessee is resident in India for the A.Y. 2016-17. Accordingly, as per the provisions of section 5(1) of the Act. salary income of Rs. 86.21.402/- earned outside India by the assessee is hereby brought to tax in India. Further, NRE interest income of Rs. 2.77.787/- claimed to be exempt from taxation by the assessee on the ground of being non-resident in India as per provision of section 10(4) of the Act is hereby brought to tax as per the provisions of section 5(1) of the Act considering the assessee to be resident in India. Thus, total addition of Rs. 88,99,189/ being the salary income of Rs. 86,21,402/- and NRE interest income of Rs. 2,77,787/- is hereby made to the total taxable income of Rs. 10,87,740/- declared by the assessee in the revised Return of Income filed on 16.07.2017. Penalty proceeding u/s. 271(1)(c) rws 274 of the Act is hereby separately Initiated for furnishing inaccurate particulars of income.

12. Subject to the above discussion, the total income of the assessee is hereby assessed as under:

Total income as per the revised	*Rs. 10,87,740/-*

Return of Income filed on 16.07.2017	
Add: Salary income (as discussed above)	*Rs. 86,21,402/-*
Add: NRE interest income (as discussed above)	*Rs. 2,77,787/-*
Total Income	*Rs. 99,86,929/-*

4. The Assessee, being aggrieved, challenged the said addition before the Ld. Commissioner, who by considering the claim of the Assessee, declined to entertain the same mainly on the following reason:

> *"I agree with the stand taken by the A.O. that the applicant is resident in India for the A.Y. 2016-17 as per the provisions of section 6(1)(c) of the Act. That there is difference between employment and official work from employment requirement. The Assessee has not received any salary for the said period of 28 days, which is not possible in the real-world scenario of employer employee relationship. The AO has rightly held that the Assessee was outside India by 181 days being the difference between 209 days of total stay outside India and 28 days of stity in the USA for the purposes of other than employment. The AO has rightly pointed out that during the year under consideration the Assessee stayed in India for a period of more than 60 days and within 4 years immediately prior to the year preceding, the Assessee was in India for a period of more than 365 days. The AO has rightly made the addition of salary income of Rs.86,21,402/- and NRE interest income of Rs. 2,77,787/- to the total income of the Assessee".*

5. The Assessee, being aggrieved, is in appeal before us.

6. We have heard the parties and perused the material available on record. We observe that the authorities below noted in the respective orders that the Assessee during the year under consideration was out of India for 209 days, whereas the Assessee

has demonstrated and not refuted by the Ld. DR that the Assessee during the year under consideration was out of India for 210 days.

6.1 The only controversy involved relates to 28 days stay in the USA, which the Assessee has claimed that he went to the USA for seeking the employment and tried to get the employment but could not get succeeded. The Assessee has claimed that going outside India for the purpose of employment, does not mean that the actual services have to be rendered for employment, but if someone goes outside India for the purposes of searching employment, then also the purpose can be construed as "purpose of employment outside India".

6.2 On the contrary the Ld. DR vehemently supported the orders passed by the Authorities below by submitting as under:

1. *That as per the submissions made by the assessee dt. 19/12/2018, it is seen that the assessee has stayed outside India for 210 days during the F.Y. 2015-16.*

2. *During the period **26.02.2016 to 31.03.2016** the appellant has shown the number of days of stay outside India as 34 days. The year 2016 being a leap year the number of days in February consist of 29 days and hence the number of days of stay outside India works out to 35 days in this period. Therefore, the total number of days of stay outside India for the Appellant works out to 211 days.*

3. *In the above circumstances the period of stay of the Appellant in India will work out to 183 days worked out as under:*

Total number of days in FY. 2015-16 (April 2015 to March 2016)	*366 days*
(2016 being Leap year February will have 29 days)	*(211 days less 28 days)*

LESS: No of days of stay outside India	*183 days*
NO OF DAYS OF STAY IN INDIA	***183 days***

In the above circumstances the assessee during the AY under consideration was a resident in India.

4. *With regard to the issue whether the Appellant's stay in USA for 28 days during the period from 28.04.2015 to 26.05.2015 has to be considered as stay outside India for the purpose of employment it is submitted as under:*

The issue of whether the term 'employment outside India' includes 'doing Business' by the taxpayer, came up for consideration before the Hon'ble Kerala HC in CIT v/s Abdul Razak, (2011) 337 ITR 350 (Kerala) wherein the Hon'ble Court while deciding the issue in favour of the taxpayer took into consideration the CBDT circular no 346 dated 30/06/1982 and 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. ***Therefore, the Hon'ble Kerala HC, however, held that the term "employment" should not mean going outside India for purposes such as tourists, medical treatment studies, or the like.***

The assessee has not earned any income during the period of his stay in USA and also not been able to produce any evidence with regard to his business or profession in USA. ***In the circumstances the period of 28 days of the Appellant's stay in USA should not be considered as being for the purpose of employment and should be reduced from the number of days of stay outside India.***

5. *In view of the above the number of days of stay in India in the case of the Appellant for the F.Y 2015-16 works out 183 days and he is a resident during the F.Y. 2015-16"*

6.3 We have given thoughtful considerations to the peculiar facts and circumstances of the case and observe that Eathern Marine Consultants situated at Texas and Gogonut Grove... INC, Miami has given certificates to the Assessee for visiting their offices from 11.05.2015 to 13.05.2015, 18.05.2015 to 20.05.2015 and from

20.05.2015 to 24.05.2015. In the absence of any contrary material, these documents cannot be doubted, however still if we exclude 28 days from 210 days then it comes to 182 days on which the Assessee remained outside India for employment. As 2016 was a leap year and therefore considering 366 days, if we exclude 182 days spent by the Assessee for the purposes of employment outside India, then it will come to 186 days, on which the Assessee remained in India as construed by the Authorities below.

6.4 The provision of section 6(1) of the Act mandates that for the purpose of this Act, individual is said to be resident in India in any previous year if he is in India in that year for a period or periods amounting to all in 182 days or more. Further having within the four years preceding that year being in India for a period or periods amounting to 365 days or more is in India, for a period or periods amounting in all to 60 days or more in that year.

6.5 From clause (a) of section 6(1) of the Act, it is clear that if an individual stays in India for a period or periods amounting to 182 days or more, then he should be considered as a resident in India.

6.6 Explanation 1 prescribes: if an individual being a citizen of India leaves India as a member of crew of an Indian ship or for the purposes of employment outside India for 182 days, then 60 days is to be substituted by 182 days for considering the stay in India within that year

6.7 During the year under consideration, admittedly the assessee stayed in India only for a period of 156 days (365-210) and thus claimed that he has stayed in foreign country for a period of 210 days in total for the purposes of employment. However, both the authorities declined to accept the claim of the assessee, mainly on the reason that the Assessee left India for the USA for 28 days for the purposes other than employment as the Assessee went to USA for seeking career and business opportunities and has not produced any employment contract/appointment letter or salary slip for the period of 28 days.

6.8 On the aforesaid facts and considerations, following question emerge:

> *"Whether the Assessee who went to a foreign country in search of employment and stayed in India for a period less than 182 days in the preceding year, is entitled to claim the exemption qua income earned out of India, being non-resident of India during that year, as per explanation 1 to section 6 of the Act?*

6.9 The Hon'ble Kerala High Court in the case of CIT v/s O. Abdul Razak, [2011] 337 ITR 350 (Ker.) has 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.

6.10 Though the Hon'ble Kerala High Court has interpreted the term-" employment" in wide terms however also held that the term-

"employment" should not mean going outside India for purposes such as tourists, medical treatment, studies, or the like. For completeness and ready reference, the findings arrived at by the Hon'ble High Court read as under:

> *"4. In order to decide the question, the scope of explanation (a) to Section 6(1)(c) of the Act has to be examined, which reads as follows: -*
>
> > *"6. For the purpose 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; 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. 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;) There is no controversy on facts in as much as the assessee was in India for only 177 days in the previous year relevant for the assessment year 1989-90, and unless it is established that explanation (a) to sub clause (c) of Section 6(1) of the Act is not available to the assessee, he cannot be treated as a resident in India for the purpose of assessing his global income including the business income earned abroad during the previous year. Obviously, explanation (a) is an*

> *exception to Section 6(1)(c) of the Act, under which 60 days residence referred to in clause (c) is substituted to 182 days if the assessee went abroad in the previous year for the purpose of employment. Admittedly, the assessee went abroad on 24/09/1988 only to take up business there. If the business undertaken and carried on by the assessee in the previous year abroad amounts to employment within the meaning of explanation (a) to Section 6(1) (c) of the Act, then the assessee is entitled to the status of non-resident declared by the CIT (Appeals), which is confirmed by the Tribunal.*

5. The contention of the learned senior counsel appearing for the Revenue is that employment necessarily involves employer employee relationship with terms of employment and only under an employer a person can be employed. Learned senior counsel appearing for the assessee, on the other hand, contended that employment in the context of explanation(a) includes self-employment, and taking up and continue business is also employment for the purpose of the above explanation.

6. During hearing, learned senior counsel for the revenue has relied on the decision of the Supreme Court in Lakshminarayan Ram Gopal & Son Ltd. v. Government of Hyderabad (1954) 25 ITR 449. We do not think the decision is applicable to the facts of this case. Learned senior counsel for the assessee has relied on the Memorandum explaining the provisions of the Finance Bill introducing the Explanation, contained in 134 ITR 137 (St.) [Para 35 of the Finance Bill), which reads as follows:

> *"(iii) It is proposed to provide that where an individual who is a citizen of India leaves India in any year for the purposes of employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the 'test' of residence in (c) above will stand modified to this extent in such cases." Similarly, the Central Board of Direct Taxes issued Circular No. 346, dated 30-6-1982, which reads as follows:*
>
> > *"7.3 With a view to avoiding hardship in the case of Indian citizens, who are employed or engaged in other avocations outside India, the Finance Act has made the following modifications in the tests of residence in India:*
> >
> > *(i) & (ii) ** (iii) Where an individual who is a citizen of India leaves India in any year for the purposes of*

employment outside India, he will not be treated as resident in India in that year unless he has been in India in that year for 182 days or more. The effect of this amendment will be that the test of residence in (c) above will stand modified to that extent in such cases."

7. What is clear from the above is that no technical meaning is intended for the word "employment used in the Explanation. In our view, going abroad for the purpose of employment only means that the visit and stay abroad should not be for other purposes such as a tourist, or for medical treatment or for studies or the like. Going abroad for the purpose of employment therefore means going abroad to take up employment or any avocation as referred to in the Circular, which takes in self-employment like business or profession. So much so, in our view, taking up own business by the assessee abroad satisfies the condition of going abroad for the purpose of employment covered by Explanation (a) to section 6(1)(c) of the Act. Therefore, we hold that the Tribunal has rightly held that for the purpose of the Explanation, employment includes self-employment like business or profession taken up by the assessee abroad. We therefore dismiss the appeal filed by the revenue."

6.11 The Hon'ble Co-ordinate Bench of the Tribunal as well, in the case of Suresh Nanda vs. 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.

6.12 Further, the Hon'ble High Court of Delhi in the case of CIT Vs. Suresh Nanda (2013) 352 ITR 611 (Del) affirmed the aforesaid judgment by reiterating as under:

"That it is apparent that section 6(1)(c) makes it clear that an individual would be a resident of India in any previous year if he was in India in that year for a period or periods amounting in all to 182 days or more. The respondent/assessee, clearly, is not such an individual because in none of the years in question did, he stay in India for 182 days or more. The respondent/assessee clearly, is not such an individual because in none of the years in question did, he stay in India for 182 days or more. In the present case, although, the respondent/assessee has, in the preceding 4 years been in India for a period in excess of 365 days in India, however in none of years he has been in India for a period in excess of 182 days. Therefore, the Tribunal is absolutely right in concluding that the respondent/assessee was not a resident of India".

6.13 From the aforesaid analyzations, we are of the considered view that the Assessee who went to a foreign country partially for employment and partially for in search of employment and stayed in India for a period less than 182 days in the preceding year, is entitled to claim the exemption qua income earned out of India being non-resident of India during that year, as per explanation 1 to section 6 of the Act. Thus, the question posed is answered accordingly.

6.14 Admittedly the Assessee in the instant case during the AY under consideration, was out of India for a period of 210 days in total, for the purposes of employment (182 days) and in search of employment (28 days) and remained in India for a period of less than 182 days. The Coordinate Bench in Suresh Nanda vs. ACIT, Central Circle 13, case has categorically held, as approved by the Hon'ble High Court in CIT Vs. Suresh Nanda case (2013) 352 ITR

611 (Del) *"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"*. And therefore, the Assessee in this case is entitled to get the status of non-resident for the claiming the income earned from outside India, as exempt from taxation in India. Even it is not the case of the Department that the Assessee had visited foreign countries exclusively for other purposes such as **tourists, medical treatment, studies, or the like** as outlined by Kerala High Court in the case of CIT V/s O. Abdul Razak (supra). Thus, in the absence of relevant contrary material, the certificates issued by the concerns at USA {Texas and Miami} cannot be sidelined and cannot be construed that the Assessee visited foreign countries for the specific and exclusive purposes other than the employment. Therefore, for the just decision of the case and substantial justice, we are inclined to allow the claim of the Assessee to the effect that he visited outside India for a period of 210 days in total for the purposes of employment and remained in India for a period of less than 182 days in total during the AY under consideration and therefore entitled to claim the exemption sought for, being non-resident of India during the AY under consideration and thus such claim is allowed. Resultantly the addition is deleted.

7. In the result appeal of the Assessee is allowed.

Order pronounced in the open court on 10.02.2025.

Sd/-	**Sd/-**
(GIRISH AGRAWAL)	**(NARENDER KUMAR CHOUDHRY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.