AUTHORITY FOR ADVANCE RULINGS (INCOME TAX), NEW DELHI

Mrs. Smita Anand, China, *In re*

JUSTICE DR. ARIJIT PASAYAT, CHAIRMAN
T.B.C. ROZARA, MEMBER
A.A.R. NO. 1091 OF 2011
FEBRUARY 19, 2014

Ajay Vohra, **Vishal Kalra** and **Anshul Sachar** *for the Applicant.* **Rajeev P. Singh** and **Vikram S. Sharma** *for the Department.*

RULING

1. The applicant Mrs.Smita Anand is an Indian citizen and a person of Indian origin. She was working with Hewitt Associates(India) Private Limited from April, 2002 till September, 2007. On September 22, 2007, the applicant left India for the purpose of employment with Hewitt Consulting (Shanghai) Company Limited, which is a company incorporated in China. The applicant's employment with Hewitt (Shanghai) commenced on October 1, 2007. During her employment in China, she visited India and her stay in India in a particular year never exceeded 182 days. She returned to India on February 12, 2011 after resigning from her employment in China with effect from January 31, 2011. During the financial year 2010-11 which is the relevant year in this application, her total stay in India was 119 days. The applicant continues to enjoy status of non-resident as per domestic tax laws of India during the financial year 2010-11.

2. During the financial year 2010-11 relevant for assessment year 2011-12, the applicant realized proceeds from exercise of ESOPs and RSUs which were awarded to her by her employer in China, vested and exercised by her during the tenure of her employment with Hewitt China. The entire grant, vesting the exercise of the ESOPs and RSUs happened during the course of employment with Hewitt China. The proceeds in US Dollars upon exercise of ESOPs & RSU's was credited in applicant's name to her individual account with Morgan Stanley Smith Berne US from where the money was remitted to her Indian savings account after conversion into Indian rupees, during the financial year 2010-11 and before returning to India on 12th February, 2011.

3. Presenting the above facts, the applicant seeks ruling of this Authority on the following questions:-

> 1. Whether Ms. Smita Anand (hereinafter referred to as the "Applicant"), a non-resident Individual as per the provisions of the Income-tax Act, 1961 ("the Act"), is taxable in India in respect of amount of proceeds received in US and subsequently remitted into her Indian savings bank account in the FY 2010-11, upon exercise of following options / stocks which were granted to the applicant by her employer in China and which were vested as well as exercised by her during the tenure of her employment with Hewitt China:
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> (*i*) Historic Restricted Stock Units ('RSU's) awarded under an Employees Stock Incentive Scheme by her employer Hewitt Consulting (Shanghai) Co. Ltd (hereafter referred to as "Hewitt, China"); and
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> (*ii*) Converted stock options of AON Corporation awarded in lieu of historic stock options of Hewitt (hereinafter referred to as ' ESOP'), as a result of global merger of Hewitt with AON Corporation.

4. The application was admitted under section 245R(2) and while admitting the application the Authority left the question as to whether the applicant is a resident or a non-resident, to be considered

while deciding the application under section 245R(4).

5. It was submitted that the applicant's stay in India for the financial year 2010-11 being less than 182 days and the applicant being on employment in China, her status continues to be non-resident during the financial year 2010-11 in terms of Explanation (a) to section 6 of the Income-tax Act, 1961(hereinafter referred to as the Act). The applicant has not returned to India with the intention to permanently stay or settle in India but on a visit to meet her family and friends. The residential house property owned by the applicant (jointly with her husband) has been let out till June,2011 and if the applicant's intention would have been to primarily reside in India, the applicant would have requested the tenants of such property to vacate the premises, close to the period of arrival to India. The applicant has been travelling to different locations for holiday and to meet with family and friends and relatives or at the hotels after her return from China. The applicant's alien employment permit was also valid till March 31, 2012 and she could return to China and seek employment in China within that period. During the financial year 2010-11, the applicant came to visit India and her total stay in India being less than 119 days, it was asserted that her residential status should be treated as non-resident in view of Explanation (b) to section 6(1) of the Act.

6. Regarding the ESOPs & RSUs it was submitted that those were granted to the applicant during her employment with Hewitt China as a gesture of appreciation and motivation being a foreign employee, both the grant and exercise of the ESOPs & RSUs took place before the date of her resignation from Hewitt China and the remittance to India after first crediting to her Bank Account in USA took place before her return to India and hence the remission of the money on conversion of the ESOPs & RSUs is not taxable in India.

7. The Revenue on the other hand contended that provision of Explanation (a) or (b) to section 6(1) of the Act is not applicable in the case as the applicant returned to India after resigning from her employment in Hewitt China. It was submitted that the applicant's case does not fall within the ambit of Explanation (b) to section 6(1) of the Act. Relying on the Explanatory notes to the Finance Act relating to the amendments of proviso of 6 of the Act, it was argued that if the applicant is given benefit of the said Explanation (b), it will go against the legislative intent which was to confer the benefit on the persons who are in employment and coming to India on short visits during their employment. It was submitted that if the applicant has come to India permanently after leaving his employment outside India then Explanation (b) to section 6(1) of the Act will not be applicable. Decision of the ITAT Bangalore Bench in the case of *Manoj Kumar Reddy Nare* v. *ITO* (132 TTJ 328) 2009 was cited in support of the contention, wherein it was held-

> "Considering the legislative history of amendments and the purpose for which the amendments have been introduced, one has to consider the entry of the person in India during the previous year. If all the entries in India for the purpose of a visit then the period of 60 days as mentioned in section 6(1)(c) will be substituted to 182 days.
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> However, if in the previous year, the assessee has come to India permanently after leaving his employment outside India, then the Explanation (b) will not be applicable."

8. We have considered the rival contentions of the applicant and the Revenue. Though the question relates to taxability of the amount of proceeds received in India on conversion of ESOPs & RSUs granted to the applicant during her employment in Hewitt China, the main issue is the residential status of the applicant as taxability of the receipt depends on the residential status of the applicant during the financial year 2010-11. The arguments of both the applicant and the Revenue are based on the provisions of section 6(1) of the Act which is reproduced as under:-

> **Residence in India.**

Section 6. 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 - 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 eight-two days" had been substituted;

(*b*) being a citizen of India, or a person of Indian origin within the meaning of Explanation to clause (e) of section 115C, who, being outside India, comes on a visit to India in any previous year, 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."

9. There are two conditions in section 6 of the Act, when an individual is said to be resident in India in any previous year namely sub-section (a) and sub-section (c); sub-section (b) was omitted by the Finance Act 1982 w.e.f. 1.4.1983. The requirement of sub–section (a) is not met by the applicant as her stay during any of the previous year after going abroad for employment is less than 182 days. Regarding the requirement of subsection (c), the applicant's stay in India during preceding four years i.e. financial year 2006-07 to financial year 2010-11 as tabulated by the learned counsel of the applicant is as under :-

FY	*Assessment Year*	*Total stay in India (Days)*	*Status*	*Remarks*
2006-07	2007-08	337	Resident	Stay in India more than 182 days
2007-08	2008-09	178	Non resident	Applicant left India on September 22,2007 for employment in China. Total stay in India during FY 2007-08 less than 182 days under Explanation (a) to section 6(1) of the Act
2008-09	2009-10	48	Non resident	Stay in India during FY 2009-10 less than 60 days
2009-10	2010-11	62	Non resident	Stay in India during FY 2010-11 less than 182 days under Explanation (b) to section 6(1) of the Act
2010-11	2011-12	119	Non resident	Stay in India during FY 2010-11 less than 182 days under Explanation (b) to section 6(1) of the Act

It is seen from the tabulation that the total stay in India of the applicant for the preceding four years is 407 days which is more than 365 days. However, the total stay during the relevant assessment year 2011-12 is 119 days. Submission of the applicant is that in terms of Explanation (a) and/or (b) to section 6(1) of the Act, the period of stay in India should be 182 days or more and the applicant's total stay in India during the period is 119 days and therefore, her residential status is non-resident during the relevant previous year. The Revenue's contention is that Explanation (a) or (b) to section 6(1) of the Act

is not applicable in the applicant's case and her total stay in India during the previous year being more than sixty days, the applicant's status is resident in India and the amount received during the previous year from any source is taxable in India.

10. We are of the view that Explanation (a) to section 6(1)(c) is applicable only in a particular year when a person leaves India. In the context of the application and the arguments made by the learned counsel of the applicant, Explanation (a) will read like this-

> "Being a citizen of India, who leaves India in any previous year for the purpose of employment outside India, the provision of sub-clause (c) shall apply in relation to that year as if for the words "60 days", occurring therein, the words "182 days" had been substituted".

"In relation to that year" relates to the previous year in which a person leaves India. In effect if a person leaves India in any particular year for the purpose of employment outside India and if his/her stay in India in that particular year is for a period or periods amounting in all to 182 days, his/her status will be resident in India. This is not the case in the present applicant's case. The applicant left India on 22nd September, 2007 for the purpose of employment with Hewitt Consulting (Shanghai) Company Limited, China. The relevant FY in which the applicant left India for the purpose of employment was therefore 2007-08 which is not the subject matter in this case. Besides the applicant left India in September, 2007 and come back to India on 12th February, 2011 after resigning from her employment in China effective on 31st January, 2011. In the decision of the ITAT Bangalore Bench in the case of *Manoj Kumar ReddyNare* v. *ITO* (*supra*) it was held that the assessee has come to India after leaving his employment outside India, the Explanation (a) to section 6(1)(c) will not be applicable. That being so the total stay in India of the applicant for the preceding four years is for a period amounting to more than 365 days and total stay in India for the FY 2010-11 is for a period amounting in all to 119 days which is more than 60 days, requirements of sub-section (c) of section 6(1) is met by the applicant to become a resident in India.

11. Regarding the arguments relating to Explanation (b) to section 6(1)(c) of the Act, the test is whether the applicant had come on a visit to India in the previous year 2010-11 as a non-resident. There is no denying of the fact that the applicant had come to India from China after resigning from her employment. It cannot be said that the applicant is a non-resident in that particular year as this is the point in dispute now. If she is not a non resident, one limb of the Explanation falls. The other issue is whether she came to India only for a visit. The learned counsel for the applicant argued that was so and the Revenue submitted that she did not come to India only for a visit as her return to India is after resigning from her employment in China. The facts and circumstances of the case make us to believe that the applicant did not come to India only for a visit. The learned counsel's argument that the applicant's employer card was valid upto 31.3.2012, the applicant was considerably exploring possibility of job outside India, the residential house property owned by the applicant jointly with her husband had been let out till June, 2011, the applicant visited her friends and relatives in different parts of India and also travelled different locations on holidays, the children of the applicant were staying abroad at the time when applicant came to India etc., are not sufficient to conclude that the applicant came to India on a visit only. The applicant could very well resign even during the validity period of the employer's card and that is what she has done. The activities mentioned by the learned counsel need not be necessarily proof of a visit, even a person staying permanently in India also does those activities. If a person returns to India after a long period of absence there is all the more reason he or she will like to go to visit relatives and friends in different places. Those activities are not necessarily indicators of a visit. When the applicant resigns from her employment in China, the reason for return to India does not seem to be only for a visit. The learned counsel could not give us information whether the applicant left India thereafter for any employment. In such circumstances we do not agree with the learned counsel that the applicant came to India only for a visit. On facts and circumstances of the case we hold that Explanation

(b) to section 6(1)(c) of the Act is also not applicable in the applicant's case.

12. The ruling of this Authority in the case of *Anurag Chaudhary* reported in 232 ITR 293, cited by the learned counsel for the applicant in support of his argument does not consider whether Explanation (a) to section 6(1)(c) of the Act is only for a particular year in which a person leaves India for employment, as we do now. We do not think that the said Ruling is applicable in this case. The submission of the learned counsel for the applicant based on the decision of the Bangalore Bench of ITAT in the case of *Manoj Kumar Reddy Nare* (*supra*) is also not acceptable as facts of the case in Manoj Kumar Reddy Nare were different. In that case the assessee visited India during the period when he was working in USA.

13. To conclude, we hold that the applicant's case does not fall under Explanation (a) or (b) to section 6(1)(c) of the Act and having fulfilled the requirements of section 6(1)(c) of the Act her status will be resident in India. Consequently, the amount of proceeds received in India on conversion of ESOPs and RSUs awarded to her by her employer in China will be taxable in India.