BENEFIT UNDER EXPLANATION TO SECTION 6(1) WHETHER AVAILABLE TO EMPLOYEES DEPUTED OUTSIDE INDIA OR SENT ON A FOR ONSITE ASSIGNMENTS

Narendra Jain & Rashmi Bajaj, ACA

Summary

Under the Income Tax Act, 1961 (hereinafter referred as "Act" for brevity) the scope of taxable income depends on residential status of assessee. In case of individual section 6(1) lays down the tests for determining the residential status. Explanation to section 6(1) provides relaxation to these tests in the form of extending the 60 day test to 182 day test. These relaxations are applicable if certain conditions are satisfied. One such case is where a citizen of India leaves India for the purpose of employment. The question that arises for consideration is whether this benefit can be availed by person leaving India on a deputation or onsite assignment. Based on the available judicial rulings, in our opinion the benefit can be availed by a person leaving India on a deputation.

1. <u>Background and Law:</u>

The determination of correct residential status of an assessee is of paramount importance because the scope of total income as per section 5 of the Act depends on it. A person who is a resident is liable to tax in respect of his whole income received or deemed to be received, accruing or arising or deemed to be accrued or arose to him in India and also outside India. On the contrary a non-resident is liable only in respect of income received or deemed to be received, accruing or arising or deemed to accrue or arise in India. It implies that the income derived by such non-residents from any source outside India is immune from taxation under the Act. The third category of the assessees having status of 'Not ordinarily resident' within the meaning of section 6(6) are subject to tax in respect of income received or accruing or arising or deemed to be received, accrued or arose in India unconditionally and insofar as the income accruing or arising outside India is concerned, it would be put to tax only if it is derived from a business or profession controlled from India.

To summarize, the incidence of tax on an individual based on his residential status is as follows:

- Resident and ordinarily resident is taxable on his global income.
- Resident but not ordinarily resident is taxable in respect of India sourced income and income from foreign business controlled from India.
- Non-resident is taxable in India only in respect of India sourced income.

Section 6(1) of the Act provides the basic conditions of determination of residential status. An individual is said to be a resident of India if his stay in India is for 182 days or more during the financial year. However, if his stay is less than 182 days but equal to or more than 60 days during the financial year, then he is said to be resident of India provided his stay during four preceding previous years is 365 days or more.

The exceptions to the aforesaid rule of residence has been provided in Explanation (a) and (b) to section 6(1) of the Act which provides that the period of 60 days referred above shall be extended to 182 days in the following situations:

- *Indian citizen leaving India during the previous year for the purpose of employment outside India; or*
- Indian citizen leaving India as a member of crew of an Indian ship during the previous year; or
- Indian citizen or a person of Indian origin coming to visit India during the pervious year.

An individual, who has already been in India for a period of 182 days or more, would any way be regarded as resident. An Individual, who stays in India for a period of less than 60 days, would be regarded as non-resident. It is in relation to an Individual who does not fall in either of the above categories that the Explanation would become relevant. Therefore, if any person is able to argue that the Explanation applies to him, he can stay in India upto 181 days and still contend that he is non-resident. The income earned by him outside India will then not be liable for tax under the Act.

Based on the above, the question that arises for consideration is whether a person employed with Indian company and who is deputed outside India or who is sent for an onsite assignment can take the benefit of Explanation to section 6(1) of the Act. If it can be argued that these employees are covered by the Explanation to section 6(1) of the Act, then in the year of transfer they would acquire the status of non-resident by staying less than 182 days in India.

As per the Explanation, an Indian citizen leaving India during the previous year for the purpose of employment outside India shall get the benefit of extended 182 day rule. Therefore, to get the benefit of the extended stay one should satisfy the following twin conditions:

- The individual should be an Indian citizen; and
- He should *<u>leave India during the previous year for the purpose of employment outside India</u>*.

Assuming that the first condition is satisfied, the question that arises for consideration is whether the employees deputed outside India or sent outside India for onsite assignment would satisfy the second condition. To answer this question one has to interpret the above underlined words.

The above underlined words have not been defined under the Act. At first blush it would appear that to take benefit of the Explanation, an individual would have to show that he has taken a new job outside India. He would then be leaving the country to take-up such employment. The relaxation would then be available only to a person taking-up a job abroad and not to a person who is sent by the Indian employer for deputation or onsite assignment abroad.

The Bombay Tribunal in the case of *K Y Patel 33 ITD 714* held that a person merely undertaking tours abroad *in connection with his employment in India* would not be eligible for this relaxation. In this case the assessee was employed by an Indian company and was paid salary in India. The assessee was on tour to foreign country on 12 occasions. Based on the above facts, the Tribunal held that *"context in which the word 'leaves' has been used in the Explanation (a) to clause (c) of sub-section (1) of section 6 can have only a restricted and well defined meaning inasmuch as 'leaving' should not only be physical one but also with the intention of staying abroad on a permanent or semi-permanent basis. Merely undertaking tours abroad in connection with one's employment in India cannot attract the application of Explanation (a) so as to convert a resident into a non-resident"* (emphasis supplied). Therefore merely undertaking tours in connection with employment would not qualify for benefit under Explanation to section 6(1) of the Act.

However, in the above case the Tribunal has not dealt with the situation of employees of an Indian company going outside India on deputation or onsite assignments. As per the *Concise Oxford Dictionary* the term "employment" means *the action or the condition of employing; a person's work or profession*. As per *P Ramanatha Aiyar's Advanced Law Lexicon, third edition* the term "employment" includes *services or occupation in which a person works for another and in which there is a relationship of employer and employee*. Therefore, *"for the purpose of employment outside India"* could also mean for the purpose of rendering service outside India. The employee, who renders service abroad, under a contract of service, could also then fall under the Explanation. The Explanation does not restrict itself to a new employer-employee relationship coming into existence. If such were the intention, the explanation would probably have more appropriately used the words – *"to take-up a new employment outside India"*.

Authority for Advance Ruling (AAR) had an occasion to consider a similar situation in the case of *British Gas India P Ltd 2006-TIOL-06-ARA-IT*. In this case, British Gas India (P) Ltd, part of the BG Group, a leading international energy company with expertise across the natural gas spectrum had assigned certain employees including Mr. Manish Gupta to BG Group entities outside India. Mr. Manish Gupta was working with the Indian company from February 2002. With effect from July 1, 2005, he was deputed to BG, UK, for two years. In the financial year 2005-06, he spent less than 182 days in India. The question was whether he should be considered a non-resident for tax deduction at source.

The AAR observed that *"A careful reading of Explanation (a) of section 6 would show that the requirement of the <u>Explanation is not leaving India for employment but it is leaving India for the purposes of employment outside India</u>. For the purpose of the Explanation, an individual need not be an unemployed person who leaves India for employment outside India. Therefore, the fact that Manish Gupta was already an employee at the time of leaving India is hardly material or relevant. For all these reasons, we hold that Manish Gupta is not a resident in India in the financial year 2005-06* (Emphasis Supplied).

The Bangalore Tribunal in the case of *Ram Sagar Chaudhari Vs. III ITD (1989) 31 ITD 21* has also taken a similar view. In this case the assessee was deputed to Nigeria by its employer on 29-6-1980. The Tribunal observed that the assessee was eligible for benefit under Explanation to section 6(1) and held as follows:

"The assessee was a citizen of India. He had left India in the previous year ended on 31-3-1981 for the purpose of employment in Nigeria. Hence, as he was not in India during that year for 182 days, he could not be regarded as being a resident within the meaning of section 6(1)(c) either, by virtue of the Explanation which had been on the statute with effect from 1-4-1983."

2. Conclusion:

Based on the above it can be argued that the benefit of Explanation under section 6(1) should be available to employees deputed outside India. However in case of employees who are sent for onsite assignments for shorter period the benefit of Explanation under section 6(1) may not be available. This for the reason that in such a case, leaving India is in connection with employment and not for the purpose of employment.