

## Recent amendments impacting residential status

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The spate of changes in the income-tax law in the recent times are so challenging that there seems to be an intense competition between CBDT and CBIC as regards issuing number of circulars, notifications, press releases and clarifications. It is understandable that GST was wrapped and delivered in a hotchpotch manner and therefore in its implementation, whatever was not visualized by the draftsmen, had to be clarified. But, the same logic could not be applied for income-tax except some lame reasons like rationalization of tax provisions or clarification on the amendments made or measures meant for reducing the rigours of the legal provisions for which various communications are dished out, now and then.

Besides the domestic taxation of income, too much of euphoria is created on international taxation by various forums by using high sounding expressions such as MAP, MLI, DRP, TP, GAAR, equalization levy 1.O and equalization levy 2.O. Sensible and sensitive tax professionals try to grapple with so much of information flow besides amendments to law in the midst of pandemic and soothsayers predicting that the traditional areas of tax practice viz. legal compliance, would fade away in due course of time. Given the amendments to income tax law given by way of ordinances, circulars, press releases, and notifications brought out so frequently there is terrible increase of complexity. Thus error-free compliance of income-tax by the taxpayers itself is formidable these days.

In this write up, we would discuss how the residential status which is the basic foundation for taxation of income whether domestic or international, has been impacted by the recent amendments made by the legislature.

1. **Residential status of individuals [Section 6(1)]:** The definition of a person being 'resident' in India says that (i) if he has been in India for a period of 182 days or more during the previous year; or (ii) has been in India for aggregate period of 365 days in 4 previous years preceding the previous year and 60 days or more in that previous year. These are hereinafter referred to as "**basic conditions**" in this article.

The condition (ii) given above seeks computation of number of days of stay for 5 preceding financial years. In the first 4 years the aggregate stay must exceed 365 days or more **and** in the 5<sup>th</sup> year i.e. the previous year relevant to the assessment year, his stay should be 60 days or more.

The important caveat is the number of days of stay by making reference to stay in India and it is with reference to previous year.

2. **Leaving India for employment [Clause (a) of Explanation 1 to section 6(1)]:** In the case of an **individual being citizen of India** who leaves India **for the purpose of employment**, the number of days of stay during the previous year must be 182 days or more instead of 60 days or more given in (ii) above of the 'basic conditions'. Thus, when a person being citizen of India leaves for employment outside India, stay in India for **182 days or more, will get substituted in both the basic conditions.**

In *CIT v O. Abdul Razak* [2011] 10 taxmann.com 4/198 Taxman 1/337 ITR 350 (Ker.) it was held that the term 'employment' used in section 6(1)(c) should not be ascribed technical meaning. Even, self-employment like business or profession could also be covered within the term.

This condition will also apply to persons being citizen of India who leave India in any previous year **as a member of the crew of an Indian ship** as defined in section 3(18) of the Merchant Shipping Act, 1958. The period of stay of the sailors (being the common term) in India would be reckoned by excluding both the date of arrival and departure as per rule 126.

Reference may be made to CBDT Circular No. 13/2017 dated 11<sup>th</sup> April, 2017 and Circular No.17/2017 dated 26<sup>th</sup> April, 2017 stating that salary for services rendered outside India on a foreign going ship by non-resident seafarers credited to NRE account maintained in India shall not be included in the total income merely because the salary was credited directly to the bank account maintained in India.

3. **Citizen or persons of Indian origin coming on visit to India [Clause (b) of Explanation 1 to section 6(1)]:** When a person being a citizen of India or a person of Indian origin being outside India comes on a visit to India, the number of days of stay during the previous year shall be taken as 182 days or more instead of 60 days given in (ii) above of basic conditions.

Thus when a person being a citizen of India or a person of Indian origin visits India if stays for less than 182 days during the previous year then he will not be satisfying either of the basic conditions. Therefore, he would be 'non-resident'.

**Note:** A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India (section 115C).

The above said condition of 60 days contained in basic conditions will be substituted by 120 days where the citizen of India or person of Indian origin has income other than income from foreign sources exceeding Rs.15 lakhs. In effect, the Indian income must exceed Rs.15 lakhs.

Thus if a citizen of India remaining / settled outside India comes on a visit to India and stays for more than 120 days he would satisfy (ii) of the basic conditions if his income in India (other than income from foreign sources) exceeds Rs.15 lakhs. The time limit is reduced to 120 days in the case of citizens of India or persons of Indian origin for the purpose of determining the condition (ii) contained in the basic conditions.

**Note:** Please refer point (7) discussed in the latter part of this write up.

4. **Residential status for Stateless persons [Section 6(1A)]:** The Finance Act, 2020 inserted sub-section (1A) to section 6 with non-obstante clause to override section 6(1). In the case of individual, being citizen of India having total income (excluding income from foreign sources) in excess of Rs.15 lakhs such person shall deemed to be resident in India **provided he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria or similar nature.**

However, if such person satisfies the test of being resident in India under section 6(1) then this overriding provision will not apply.

In other words, a taxpayer satisfying section 6(1) will be treated as resident. Where he does not satisfy the test of residency specified in section 6(1) then he would be put to yet another test contained in section 6(1A) to confer deemed resident status.

**Note:** Please refer point (8) discussed in the latter part of this write up.

5. **Residential status in the case of company [Section 6(3)]:** A company would be resident in India if it is an Indian company or its POEM is in India. The term "POEM" means a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance made. When a foreign company becomes resident in India because of POEM, still for the purpose of tax deduction the provisions of section 195 would apply similar to rate of tax on income @40% (vide Notification No. 29/2018 dated 22<sup>nd</sup> June, 2018).

6. **Status of not-ordinarily resident for individuals [Clause (a) of section 6(6)]:** A person is said to be not-ordinarily resident (i) if he has been non-resident in 9 out of 10 previous years preceding the relevant previous year; or (ii) has

remained India for less than 730 days during 7 previous years preceding the relevant previous years (hereinafter referred to as '**additional conditions**').

Thus while applying the conditions given above for the assessment year 2021-22, the relevant previous year is 2020-21 and previous years preceding that year are to be considered. The taxpayer's residential status for the assessment years relevant to the previous year 2010-11 to 2019-20 would be considered. Similarly, number days of stay whether less than 730 days would be with reference to stay in India from the previous year 2013-14 to 2019-20.

A person who satisfies either of the 'basic conditions' and either of the 'additional conditions' contained in **section 6(6)(a)** would be called as "resident but not ordinarily resident". Obviously, the scope of total income in the case of resident and ordinarily resident vis a vis resident but not-ordinarily resident is to be reckoned with reference to section 5.

7. **Citizen of India staying for 120 days [Clause (c) section 6(6)]:** The Finance Act, 2020 inserted Clause (c) of section 6(6) which says that citizen of India or a person of an Indian origin having total income other than income from foreign sources exceeding Rs.15 lakhs during the previous year shall be treated as resident but not ordinarily resident if he has stayed in India for 120 days or more but less than 182 days. **This condition is independent of the traditionally called "additional conditions"**. A citizen of India if has income in India exceeding Rs.15 lakhs would be treated as not ordinarily resident if his total stay exceeds 120 days but does not exceed 182 days.

The following takes the snapshot of applicability of section 6(6)(c):

- (i) If a citizen of India has stayed for 182 days or more, who satisfies (i) of the basic conditions but does not satisfy (ii) of the basic conditions, will have to check satisfaction of the additional conditions contained in section 6(6)(a). This has not been subjected to any change in the recent amendments.
- (ii) If a citizen of India has stayed for more than 120 days but less than 182 days who satisfies (ii) of the basic condition [see clause (b) of the Explanation 1 to section 6(1) ] is covered by section 6(6)(c) and would be **deemed to be resident but not ordinarily resident** on the condition his income other than income from foreign sources exceeds Rs.15 lakhs.
- (iii) If a citizen of India has stayed for less than 120 days and having income other than income from foreign sources exceeding Rs 15 lakhs, but who does not satisfy any of the basic conditions of section 6(1) would be non-resident and the recent changes do not impact residential status.

When a person is treated as resident but not ordinarily resident in which case his income outside India from a business controlled in or profession set up in India will be chargeable to tax. His other income from foreign sources would continue to remain outside the tax net.

Explanation to section 6(6) says that the expression "income from foreign sources" would mean income which accrues or arises outside India except income derived from a business controlled or a profession set up in India and which is not deemed to accrue or arise in India.

8. **Income of Indian citizens from tax-free jurisdictions [clause (d) to section 6(6)]:** There has been a hue and cry upon insertion of section 6(1A) to mean that if Indian citizens have income in India (say excluding income from foreign sources) exceeding Rs.15 lakhs, such person if not liable to pay tax in any other country, he would be deemed to be resident in India. This we discussed in point (4) above. **However, section 6(6)(d) inserted by the Finance Act,2020 w.e.f. 01.04.2021 provides the reprieve from tax by conferring the status as " resident but not ordinarily resident"**.

For example, if a person citizen of India has income in India exceeding Rs.15 lakhs and has say salary

income in tax-free jurisdiction (say, Dubai) of Rs 25 lakhs then if he has stayed for more than 120 days but less than 182 days his status would be **resident but not ordinarily resident. His salary income outside India would not be liable to tax in India.** However, if such foreign income is from business controlled in or profession set up in India, it would be chargeable to tax in the hands of RNOR.

**Taking note of basic conditions and additional conditions, it can be inferred as under:**

If a person does not satisfy both the basic conditions, he is called non-resident.

If satisfies any one of the basic conditions and any one of the additional conditions contained in section 6(6) he is called resident but not ordinarily resident.

If satisfies both the basic conditions none of the additional conditions, he is resident and ordinarily resident.

The following table gives snapshot of various situations and the resultant residential status:

<b>Situation</b>	<b>Basic conditions</b>	<b>Additional conditions</b>	<b>Residential status</b>
<b>Mr A remained in India for 190 days during the previous year 2020-21 and 400 days in aggregate in during previous years 2015-16 to 2019-2020.</b>	<b>Satisfied both basic conditions.</b>	<b>Assuming does not satisfy any of the additional conditions contained in section 6(6).</b>	<b>ROR</b>
<b>Mr B remained in India for 80 days during the previous year 2020-21 and 300 days in aggregate during previous years 2015-16 to 2019-2020.</b>	<b>Does not satisfy any of the basic conditions.</b>	<b>No need to check additional conditions.</b>	<b>NR</b>
<b>Mr C comes on a visit to India. Remained in India for 190 days during the previous year 2020-21 and 390 hundred days in previous year 2015-16 to 2019-2020.</b>	<b>Satisfied both the basic conditions.</b>	<b>Assuming he satisfies section 6 (6) (a).</b>	<b>RNOR</b>
<b>Mr D remained in India for 80 days during the previous year 2020-21 and 390 days in previous year 2015-16 to 2019-2020</b>	<b>Satisfies (ii) of the basic condition.</b>	<b>If satisfies any of the conditions of sub-sections (6)(a) or (6)(d) of section 6.</b>	<b>RNOR</b>
<b>Mr E (citizen of India) comes on a visit to India. Remained in India for 80 days during the previous year 2020-21</b>	<b>Does not satisfy any of the basic conditions.</b>	<b>No need to check additional conditions.</b>	<b>NR</b>

**and 390 days in aggregate during previous years 2015-16 to 2019-2020**

<b>Mr F (citizen of India) comes on a visit to India. Remained in India for 130 days during the previous year 2020-21 and 390 hundred days in previous year 2015-16 to 2019-2020.</b>	<b>If has income other than income from foreign sources exceeding Rs.15 lakhs, satisfies clause (b) of Expln 1 to sec.6(1).</b>	<b>Satisfies section 6(6)(c) on automatic basis.</b>	<b>RNOR.</b>
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<b>Mr G (citizen of India) remained in India for 100 days during the previous year 2020-21 and 300 hundred days in previous year 2015-16 to 2019-2020. But does not pay income-tax in the country where he resides.</b>	<b>Does not satisfy any of the basic conditions. If has income other than income from foreign sources exceeding Rs.15 lakhs, satisfies sec.6(1A)</b>	<b>Satisfies section 6(6)(d).</b>	<b>RNOR</b>
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**Note:** Readers may take note of Circular No.2 of 2021 dated 3<sup>rd</sup> March,2021 which elucidates the applicability of legal provisions for determination of residential status appropriately.

**Conclusion:** The amendments made to section 6 by way of insertion of sub-section (1A) is backed up by section 6(6) (d) and thus it has mitigated the impact and impliedly addressed the concerns of Indian citizens located in tax-free jurisdictions. Where the employees are located in jurisdiction with whom DTAA exists, the amendments would be subject to the contents of the respective treaty.

*(Source: Taxmann.com)*