

F. No. 370142/18/2020-TPL
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

New Delhi, 3rd March, 2021

Residential status of certain individuals under Income-tax Act, 1961

Section 6 of the Income-tax Act, 1961 (the Act) contains provisions relating to determination of residency of a person. The status of an individual, as to whether he is resident in India or a non-resident or not ordinarily resident, is dependent, *inter-alia*, on the period for which the person is in India during a previous year or years preceding the previous year.

2. Relaxation for Previous Year 2019-20

Considering the COVID-19 pandemic and the resultant overstay of an individual who had come to India on a visit before 22nd March 2020, circular no 11 of 2020 dated 8th May 2020 was issued by the Central Board of Direct Taxes (the Board) under section 119 of the Act to avoid genuine hardship in such cases. It was clarified that for the purpose of determining the residential status under section 6 of the Act during the previous year 2019-20 in respect of an individual who has come to India on a visit before 22nd March 2020 and:

- (a) has been unable to leave India on or before 31st March 2020, his period of stay in India from 22nd March 2020 to 31st March, 2020 shall not be taken into account; or
- (b) has been quarantined in India on account of Novel Corona Virus (Covid-19) on or after 1st March, 2020 and has departed on an evacuation flight before 31st March 2020 or has been unable to leave India on or before 31st March 2020, his period of stay from the beginning of his quarantine to his date of departure or 31st March, 2020, as the case may be, shall not be taken into account; or
- (c) has departed on an evacuation flight before 31st March 2020, his period of stay in India from 22nd March 2020 to his date of departure shall not be taken into account.

3. Residential Status for Previous year 2020-21

The Board has received various representations requesting for relaxation in determination of residential status for previous year 2020-21 from individuals who had come on a visit to India

during the previous year 2019-20 and intended to leave India but could not do so due to suspension of international flights. The matter has been examined by the Board and following facts have emerged: -

I. Short stay will not result in Indian residency

There may be a situation where a person, who was a non-resident during the previous year 2019-20, gets stranded in India by reason of the COVID19 pandemic for some time during the previous year 2020-21 ('PY 2020-21'). In such situations, there are less chances that the person would acquire residence status in India during the PY 2020-21 only for this reason as explained below: -

A. A citizen of India or a person of Indian origin may become resident in India only in one of the following situations: -

- (i) if his total income from Indian sources (i.e., other than the income from foreign sources) does not exceed fifteen lakh rupees in PY 2020-21 and he stays in India for 182 days or more during the PY 2020-21; or
- (ii) if his total income from Indian sources (i.e., other than the income from foreign sources) exceed fifteen lakh rupees in PY 2020-21 and
 - (a) he stays during PY 2020-21 for 182 days or more; or
 - (b) he stays during the PY 2020-21 for 120 days or more and also stays for 365 days or more in preceding four previous years.

B. An Individual who is not citizen of India or a person of Indian origin may become resident in India only in one of the following situations: -

- (i) if he stays during PY 2020-21 for 182 days or more; or
- (ii) if he stays during the PY 2020-21 for 60 days or more and also stays for 365 days or more in preceding four previous years.

Thus, generally, a person will become resident in India for the PY 2020-21 only if he stayed in India for 182 days or more unless he is covered by the exceptions discussed above.

II. Possibilities of dual non-residency in case of general relaxation:

Most of the countries have the condition of stay for 182 days or more for determining residency. Thus, a person in most situations will be resident in only one country since there are 365 days in a year. In fact, if general relaxation for the stay period of 182 days is provided, there may be cases of double non-residency. In such situation, a person may not become a tax resident in any country in PY 2020-21 even after staying for more than 182 days or more in India resulting in double non-taxation and end up not paying tax in any country.

III. Tie breaker rule as per Double Taxation Avoidance Agreement (DTAA):

As discussed above, a person may become resident in India in some cases even if he stays for less than 182 days in India. In that situation, there may be a case of dual residency. However, due to applicability of Double Taxation Avoidance Agreement (DTAA), such person will become resident of only one country as per the “tiebreaker rule” in the DTAA. For example, the Indo-USA DTAA contains following tiebreaker rule in Article 4(2):

“Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his status shall be determined as follows:

- (a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (centre of vital interests);*
- (b) if the State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;*
- (c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;*
- (d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.”*

Thus, as per the provisions of the Indo-USA DTAA, a person can become resident of two countries only in the following case:

- (a) he has a permanent home available to him in both countries or in none of the two countries; and
- (b) centre of vital interests cannot be determined; and
- (c) he has a habitual abode in both States or in neither of them; and
- (d) he is a national of both States or of neither of them.

Even in such situations when all the above (a) to (d) are applicable (which may be a very rare situation), the Indo-USA DTAA provides a resolution mechanism through Mutual Agreement Procedure.

It is also relevant to note that even in cases where an individual became resident in India due to exceptional circumstances, he would most likely become not ordinarily resident in India and hence his foreign sourced income shall not be taxable in India unless it is derived from business controlled in or profession set up in India.

IV. Employment income taxable only subject to conditions as per DTAA:

Further, Article related to employment income in the DTAA with different countries governs the taxation of employment income. For example, Article 16 of the Indo-USA DTAA provides following for taxation of employment income:

“DEPENDENT PERSONAL SERVICES

1. Subject to the provisions of Articles 17 (Directors' Fees), 18 (Income Earned by Entertainers and Athletes), 19 (Remuneration and Pensions in respect of Government Service), 20 (Private Pensions, Annuities, Alimony and Child Support), 21 (Payments received by Students and Apprentices) and 22 (Payments received by Professors, Teachers and Research Scholars), salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived therefrom may be taxed in that other State.

2. Notwithstanding the provisions of paragraph 1, remuneration derived by a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first-mentioned State, if:

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in the relevant taxable year;*
- (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State; and*
- (c) the remuneration is not borne by a permanent establishment or a fixed base or a trade or business which the employer has in the other State.*

3. Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operating in international traffic by an enterprise of a Contracting State may be taxed in that State.”

The DTAA distributes the taxation rights between the employee's jurisdiction of residence and the place where the employment is exercised. Salaries, wages and other similar remuneration are taxable only in the country in which the employee is resident unless the employment is exercised in the other country. Generally, as per the DTAAs, such other country (the source jurisdiction) has taxation rights only if the employee is present in that

country for more than 183 days or the employer is a resident of the source jurisdiction, or the employer has a permanent establishment in the source jurisdiction that bears the remuneration. Accordingly, if a USA resident under employment of a USA corporation has got stranded in India and performs employment from India, its salary will not be taxable in India unless he is present in India for 183 days or more during the PY 2020-21 or if the salary is borne by Indian permanent establishment of such USA corporation.

V. Credit for the taxes paid in other country:

Further, a resident person in India shall be entitled to claim credit of the taxes paid in any other country in accordance with the rule 128 of the Income-tax Rules, 1962.

VI. International Experience

A. The Organisation for Economic Co-operation and Development (OECD)

The Organisation for Economic Co-operation and Development (OECD) in its OECD Policy Responses to Coronavirus (COVID-19), [OECD Secretariat analysis of tax treaties and the impact of the COVID-19 crisis, Version 3 April 2020 available at <https://www.oecd.org/coronavirus/policy-responses/oecd-secretariat-analysis-of-tax-treaties-and-the-impact-of-the-covid-19-crisis-947dcb01/#section-d1e328> has provided following guidance on this matter:

"28. Despite the complexity of the rules, and their application to a wide range of potentially affected individuals, it is unlikely that the COVID-19 situation will affect the treaty residence position.

30. Two main situations could be imagined:

1. A person is temporarily away from their home (perhaps on holiday, perhaps to work for a few weeks) and gets stranded in the host country by reason of the COVID-19 crisis and attains domestic law residence there.

2. A person is working in a country (the "current home country") and has acquired residence status there, but they temporarily return to their "previous home country" because of the COVID-19 situation. They may either never have lost their status as resident of their previous home country under its domestic legislation, or they may regain residence status on their return.

31. In the first scenario, it is unlikely that the person would acquire residence status in the country where the person is temporarily because of extraordinary circumstances. There are however rules in domestic legislation deeming a person to be a resident if he or she is present in the country for a certain number of days. But even if the person becomes a resident under such rules, if a tax treaty is applicable, the person would not be a resident of that country for purposes of the tax treaty. Such a temporary dislocation should therefore have no tax implications.

32. In the second scenario, it is again unlikely that the person would regain residence status for being temporarily and exceptionally in the previous home country. But even if the person is or becomes a resident under such rules, if a tax treaty is applicable, the person would not become a resident of that country under the tax treaty due to such temporary dislocation."

Thus, it has been recognised by the OECD that DTAAs contain the necessary provisions to deal with the cases of dual residency arising due to COVID-19 situations.

B. Relief by other countries:

A study of the measures taken by different countries reveals that there is mix response some of the countries have provided relief for certain number of days subject to the satisfaction of prescribed conditions whereas some of the countries have not provided any relief. For example, USA have provided relief up to a maximum of 60 days subject to the satisfaction of certain conditions and furnishing of information in specified Form. Similarly, UK has provided relief of 60 days in exceptional circumstances depending on fact and circumstances of each case. Similarly, Australia issued guidelines for allowing relief by examining facts and circumstances. Germany has clarified that in the absence of a risk of double taxation, there is basically no factual inequity if the right to tax is transferred from one contracting state to another due to changed facts.

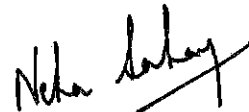
4. Conclusion

Thus, it can be seen that OECD as well as most of the countries have clarified that in view of the provisions of the domestic income tax law read with the DTAAs, there does not appear a possibility of the double taxation of the income for PY 2020-21. As explained above, the possibility of double taxation does not exist as per the provisions of the Income-tax Act, 1961 read with the DTAAs. However, in order to understand the possible situations in which a particular taxpayer is facing double taxation due to the forced stay in India, it would be in the fitness of things to obtain relevant information from such individuals. After understanding the possible situations of double taxation, the Board shall examine that, -

- (i) whether any relaxation is required to be provided in this matter; and
- (ii) if required, then whether general relaxation can be provided for a class of individuals or specific relaxation is required to be provided in individual cases.

Therefore, if any individual is facing double taxation even after taking into consideration the relief provided by the respective DTAAs, he may furnish the information in Form –NR annexed to this

circular by 31st March, 2021. This form shall be submitted electronically to the Principal Chief Commissioner of Income-tax (International Taxation) at https://nicforms.mp.nic.in/nicforms_designer/nic_form_selector.php?form_id=enRhYmxlNjAzZWY2NmIzZGI3NjIwMjEwMzAzMTg=.



(Neha Sahay)

Under Secretary (TPL)-I

Copy to the:

1. PS/OSD to FM/PS/OSD to MoS (F).
2. PS to Finance Secretary.
3. Chairman and Members, CBDT.
4. Joint Secretaries/CsIT/Directors/Deputy Secretaries/Under Secretaries, CBDT
5. C&AG of India (30 copies).
6. JS& Legal Advisers, Ministry of Law & Justice, New Delhi.
7. CIT(M&TP), Official Spokesperson of CBDT.
8. Principal of DGIT (Systems) for uploading on official website.

Form- NR

1.	Name of the taxpayer	
2.	Permanent Account Number/ Aadhaar, if available	
3.	Taxpayer Identification Number of country of residence	
4.	Country code of country in which the taxpayer was resident in the previous year 2019-20	
5.	Whether taxpayer is Indian citizen or person of Indian origin	Yes <input type="checkbox"/> No <input type="checkbox"/>
6.	Whether total income from Indian sources (i.e. other than the income from foreign sources) exceed Rs 15 lacs in previous year 2020-21	Yes <input type="checkbox"/> No <input type="checkbox"/>
7.	Total number of days expected to stay in India during the previous year 2020-21	
8.	Date of last arrival in India	
9.	Date of departure/likely date of departure	
10.	Whether he/she could not return to its jurisdiction of residence solely due to COVID-19 travel restrictions	Yes <input type="checkbox"/> No <input type="checkbox"/>
11.	Whether he/she was present in India on each of the days since last arrival to the date of departure	Yes <input type="checkbox"/> No <input type="checkbox"/>
12.	Whether the taxpayer would be resident in India due to such stay in India during the previous year 2020-21	Yes <input type="checkbox"/> No <input type="checkbox"/>
13.	Whether the taxpayer will also be resident of any country, other than India, during the previous year 2020-21	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If answer to question in row number 12 and 13 is yes, then fill row number 14-18	
14.	Country code of the country other than India where the taxpayer shall be resident in FY 2020-21	

15.	Country code of country where permanent home of the taxpayer is situated	
16.	Country code of country where centre of vital interests of the taxpayer is closer	
17.	Country code of country where habitual abode of the taxpayer is situated	
18.	Country code of country of nationality	
19	Is any income subjected to double taxation in India and in other country	Yes <input type="checkbox"/> No <input type="checkbox"/>
	If answer to question in row number 19 is yes, then fill row number 20-23	
20	Nature of income being subjected to double taxation	
21	Amount of income being subjected to double taxation	
22	Reasons for double taxation in spite of DTAA	

I _____, son/daughter of _____, hereby declare that the details given in the form are true and correct to the best of my knowledge and belief.

Signature