

# TAX FLASH NEWS

5 March 2021



## Clarification on residential status of individuals for financial year 2020-21

### Background

Section 6 of the Income-tax Act, 1961 (the Act) deals with the provisions relating to residency of an individual. The residential status of an individual in India (Ordinarily resident (ROR) or a non-resident (NR) or a not ordinarily resident (NOR)) is dependent, inter-alia, on the period of stay in India during a particular financial year (FY) or past FYs.

Many non-residents had to extend their stay in India, in view of the lockdown and suspension of international flights owing to the outbreak of Covid-19, which may have resulted in change of their residential status.

The Central Board of Direct Taxes (CBDT), vide Circular No. 02 of 2021 dated 3 March 2021, issued a clarification in respect of residency of NRIs/ foreign visitors whose stay in India during the FY 2020-21 had got extended due to the Covid-19 lockdown.

### Details of the Circular

#### Relaxation for FY 2019-20<sup>1</sup>:

Earlier, CBDT had issued relaxation<sup>2</sup> pertaining to number of days of stay in India for determining the residential status for the FY 2019-20 in respect of individuals who had come to India on a visit before 22 March 2020 and had intended to leave India on or before 31 March 2020.

#### Residential status for FY 2020-21:

The CBDT, vide the Circular has re-iterated the existing provisions of the Act and the Double taxation avoidance agreements.

- As per the Act<sup>3</sup>:

An individual (NR in FY 2019-20), who got stranded in India during the FY 2020-21 only because of

Covid-19 lockdown, might become a resident of India for the FY 2020-21 only if he had stayed in India for 182 days or more unless he is covered under inter-alia the below exceptions:

- Indian Citizen or person of Indian origin may qualify to be a resident of India in one of the following situations:
  - total income not exceeding INR 1.5 Million and staying in India for 182 days or more; or
  - total Income, other than income from foreign sources, exceeding INR 1.5 Million and staying in India for 182 days or more (or) for 120 days or more plus 365 days or more in previous four years put together.
- An Individual who is not citizen of India or a person of Indian origin would qualify as a resident 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.
- No general relaxation due to possible dual non-residency:
 

The CBDT has not provided any general relaxation on 182 days of stay, as it is of the view that, an individual may not qualify to be a resident of any jurisdiction (and end up not paying taxes in any jurisdiction) in spite of staying more than 182 days in India.
- Double taxation avoidance agreements (DTAA):
  - An individual would become an ultimate resident of only one jurisdiction as per the tie-breaker rule under the relevant Article of the DTAA that India has with many countries (eg: Article 4 as per US DTAA). The tie-breaker rule generally provides for the following order of tests to determine the residency:

<sup>1</sup> Please refer our flash news: [Period of stay in India during lockdown not to be counted for determining residential status of NRIs, foreign nationals \(kpmg.com\)](#) for detailed analysis on the same.

<sup>2</sup> vide Circular no 11 of 2020 dated 8 May 2020

<sup>3</sup> Section 6 of the Act

- Permanent Home
  - Where there is a permanent home in both countries, your centre of vital interests.
  - Habitual Abode
  - Nationality
  - Mutual Agreement between countries
- It is pertinent to note that even where an individual qualifies to be a resident of India for a said FY, he would most likely qualify to be a NOR and accordingly only India sourced income would be subjected to tax in India.
- DTAA's cover taxability of employment income specifically, wherein the salaries wages and other similar remuneration are taxable only in the country in which the individual employee is resident unless the employment is exercised in the other country.
- DTAA's provide an option of claiming a short stay exemption on remuneration received by a resident of another country for employment services rendered in India upon satisfaction of certain conditions<sup>4</sup>. For instance, in case a tax resident of USA under employment of a USA corporation had got stranded in India and renders employment services from India, such individual salary may not be taxable in India unless he was present in India for 183 days or more during the FY 2020-21 or if the salary is borne by Indian permanent establishment of such USA corporation.
- Additionally, a resident of India would also be entitled to claim credit<sup>5</sup> of taxes paid in any other jurisdiction on any double taxed income in India.
- CBDT also placed reliance on the clarifications<sup>6</sup> provided by The Organisation for Economic Co-operation and Development (OECD) wherein the OECD had alluded that DTAA's contain the necessary provisions to deal with the cases of dual residency arising due to COVID-19 situations. The circular highlights this with the following illustration:
    - An individual temporarily away from his home country and getting stranded in the host country due to COVID-19:
 

It is unlikely that such individual would qualify to be a resident of the host country as per the domestic tax law. However, even if such individual qualifies as a resident, then he would not be a resident of such host country as per DTAA (due to temporary dislocation) and accordingly there would be no significant change in tax implications.
    - An individual working in current home country (resident of such country) but getting stranded in his previous home country due to COVID-19:
 

It is unlikely that the individual would regain residence status for being temporarily and exceptionally in the previous home country. However, even if such individual qualifies as a resident, then he would not be a resident of such country as per DTAA (due to temporary dislocation) and accordingly there would be no significant change in tax implications.
- Further, CBDT is also cognizant and refers to the fact that few countries have provided relief with respect to residential status in view of COVID-19 situation, depending on fact and circumstances of each case and subject to satisfaction of certain conditions.
  - Doubly taxed income- Way forward:
 

CBDT has stated that in case an individual would be subjected to double taxation in spite of considering relief under the DTAA's, such individual would be required to furnish information in Form-NR, electronically, on or before 31 March 2021, with the Principal Chief Commissioner of Income-tax (International Taxation). Upon receipt of the relevant information the CBDT would analyse/ examine the necessity and type of relaxation to be provided, if any, as applicable.

## Our comments

The CBDT has clarified certain aspects with respect to residency/ dual residency and has re-iterated the fact that the Act read with relevant DTAA mitigates the possibility of double taxation in spite of situations arising on account of Covid-19 lockdown. In a scenario where a specific income of an individual may be taxed in more than one jurisdiction by virtue of residency, the CBDT has provided an opportunity for such an individual to file Form-NR, as applicable, with details inter-alia regarding nature of income subject to double taxation, reason for the same, etc. This would enable CBDT to determine the need for a general/ specific relaxation depending on the facts pattern.

<sup>4</sup> For instance, refer Article 16(2) of India USA DTAA

<sup>5</sup> In accordance with Rule 128 of the Income-tax Rules, 1962

<sup>6</sup> OECD Policy Responses to Coronavirus (COVID-19)

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