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Newsflash: Determination of Residential Status of Certain Individuals under Income-Tax Act, 1961 with regards to the Covid-19 Situation



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1.0 Background

In India, the residential status of an individual is determined based on number of days of his or her physical stay in India. Section 6 of the Income Tax Act, 1961 ('IT Act') defines parameters to determine the residential status of an Individual which is based on the number of days stay in India during the relevant previous year. In this newsflash, we have analysed the recent CBDT Circular no. 2 dated 3 March 2021, wherein it has provided guidance on determination of residential status of such individual, whose movement was restricted due to Covid related restrictions.

2.0 Relaxation for Financial Year 2019-20:

Central Board of Direct Taxes (CBDT) vide Circular no. 11 of 2020 dated 8 May 2020 had provided relief to certain individual who came to India on a visit before 22 March 2020. It stated that the period from 22 March 2020 to 31 March 2020 shall be ignored for the purpose of counting the number of days for determining the residential status under section 6 of the IT Act for the assessment year 2020-21 (FY 2019-20). The aforesaid circular applicable for previous year 2019-20 has been summarized as under:

Individual who has come to India	Arrival	Departure	Period of Stay in India to be excluded while determining Residential Status
On a visit	before 22 March 2020	Unable to leave India on or before 31 March 2020	from 22 March 2020 to 31 March 2020
	before 22 March 2020	departed on an evacuation Flight on or before 31 March 2020	From 22 March 2020 to 31 March 2020
On a visit but Quarantined in India due to	On or after 1 March 2020 but before 22 March	Departed on an evacuation Flight on or before 31 March	The date on which he was Quarantined to the date of his departure

COVID-19	2020	2020	
	On or after 1 March 2020 but before 22 March 2020	Unable to leave India on or before 31 March 2020	the date on which he was Quarantined to 31 March 2020

3.0 Residential Status for Financial year 2020-21 – Certain Clarifications

CBDT has recently issued circular no. 2 dated 3 March 2021, wherein it has provided existing conditions as per the IT Act under which an individual coming to India on a visit will be considered as resident in India. Determination of residential status under certain circumstances in case of a person coming to India on a visit is tabulated hereunder:

Particulars	Citizen of India or a Person of Indian Origin (PIO)	Other than Citizen of India or a Person of Indian Origin (PIO)
Residential status for FY 2020-21 under IT Act		
• Stay in India is 182 days or more	Resident	Resident
• Stay in India is less than 182 days but more than or equal to 120 days and • Stay in India is 365 days or more in preceding 4 FYs	Non- Resident If Indian income less than Rs. 1.5 million	Resident
	Resident If Indian income more than Rs. 1.5 million	
• Stay in India is less than 120 days but more than 60 days and • Stay in India is 365 days or more in preceding 4 FYs	Non- Resident	Resident
• Stay in India is less than 60 days or • Stay in India is less than 365 days in preceding 4 FYs	Non- Resident	Non- Resident

The Board has stated that an individual can be resident only in one country considering the days stay criteria as most of the countries have the condition of stay for 182 days or more for determining residency. However, in case of situation where there is dual residency / double taxation then the individual can claim the benefit under Double Taxation Avoidance Agreement (DTAA) or also may claim credit of the taxes paid in any other country to avoid double taxation.

In case of dual residency, tie breaker rule as per relevant DTAA can be applied i.e. an individual will be resident of the country in which:

- He has a permanent home
- His personal and economic relations (centre of vital interests) are closer
- He has an habitual abode
- He is a national

3.1 Employment income taxable only subject to conditions as per DTAA

Article contained in relevant DTAA pertaining to dependent personal services governs the taxation of employment income. The DTAA distributes the taxation rights between the employee's jurisdiction of residence and the place where the employment is exercised. The article related to dependent personal services is more or less similar in most of the DTAA's. Article 16 of the Indo-USA DTAA provides that salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is exercised in the other Contracting State then its remuneration will be taxable in that other Contracting State only under following situations:

- the recipient is present in India for 183 days or more during the relevant taxable year or
- if the salary is borne by a permanent establishment of such employer in the other state or
- the remuneration is paid by, or on behalf of, an employer who is not a resident of the other State

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 financial year 2020-21 or if the salary is borne by Indian permanent establishment of such USA corporation.

3.2 International Experience : Relief by Other Countries & OECD Guidance on COVID -19 Crisis

The Circular also provides a reference to the measures or steps taken by other countries in order to provide a relief to the taxpayers with respect to the issue of double taxation. Similarly, it has also referred to the OECD policy response to COVID -19 crisis issued by OECD Secretariat.

The Guidance Note with respect to the change of the residence status of individuals provides as follows:

With respect to a situation where 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 say India by reason of the COVID-19 crisis and attains domestic law residence in India, the OECD has clarified that if a tax treaty is applicable, the person would not be a resident of that country for purposes of the tax treaty and such a temporary dislocation should therefore have no tax implications.

The second case could be where a person is working in a home country say, UK and has acquired residence status there, but they temporarily return to their "previous home country" say, India because of the COVID-19 situation. In such a case, 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. But even if the person is or becomes a resident

temporarily and exceptionally in the previous home country 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, the CBDT Circular takes into consideration that even the OECD has recognized that DTAA's contain the necessary provisions to deal with the cases of dual residency arising due to COVID-19 situations and accordingly the tie-breaker rules as mentioned in the DTAA would apply in such case.

3.3 In case of Dual Residency / Double Taxation issues, application to be made in Form-NR by 31 March 2021

CBDT has provided no relief for exclusion of the number of days stay in India for FY 2020-21. CBDT vide the said circular has stated that there may not be a possibility of double taxation of the income for FY 2020-21 considering the provisions of the IT Act read with the relevant DTAA's.

As such, every individual who has come to India on a visit and has got stranded in India by reason of the COVID19 pandemic during the previous year 2020-21, is required to determine his/her residential status in India based on current tax provision. If there is a situation where an individual is resident of 2 countries then he/she may apply the Tie breaker test as per the relevant DTAA.

However, if any individual is still facing dual residency/double taxation even after taking into consideration the relief provided by the respective DTAA's, then he/she may furnish the information in Form-NR by 31 March 2021 to the Principal Chief Commissioner of Income-tax (International Taxation) who in turn, will examine the situation and provide specific / general relaxation, if required.

3.4 Other Aspects - Guidance on PE / POEM Exposure not forming part of the CBDT Circular

The OECD has analysed tax treaty provisions to determine the potential impact of travel restrictions caused due to lockdown in various countries on exposure to PE, POEM and change in residential status of an individual in light of COVID-19 pandemic and issued guidance on 3 April 2020 titled "**Analysis of Tax Treaties and the Impact of COVID-19 Crisis.**"

However, it is notable that there is no guidance provided by CBDT Circular No. 2 dated 3 March 2021 with respect to Permanent Establishment (PE) / Place of Effective Management (POEM) exposure resulting from the physical stay of such individuals. Thus, though the said CBDT Circular provides light on the residential status of individual, other significant aspects which are directly impacted by the change in the residential status of the individuals such as exposure to PE and POEM is not provided by the CBDT Circular and awaited from the Government.

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This newsflash summarizes the CBDT's Circular on the determination of residential status of certain Individuals under Income-Tax Act, 1961 with regards to the Covid-19 Situation . It may be noted that nothing contained in this newsflash should be regarded as our opinion and facts of each case will need to be analyzed to ascertain applicability or otherwise of the said notification and appropriate professional advice should be sought for applicability of legal provisions based on specific facts. We are not responsible for any liability arising from any statements or errors contained in this newsflash.

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