



Income Tax ki Pathshala

RESIDENTIAL STATUS INCOME TAX

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Discussion

- Key Pillars of Taxation
- Residential Status ; Citizen ; FEMA ; PIO
- Impact of residential status – Income Scope and Computation ; Tax Rate
- Detailed Discussion on RoR, R-NOR and NR
- International Tax Concepts – PoEM, PE, SEP and Equilisation Levy
- Practical Aspects

Key Pillars for Tax Impact

- **How to determine accurate tax impact for an event or transaction?**
 - Year of Income
 - Type of person
 - **Residential Status**
 - Type of Income

Resident vs Citizen vs FEMA

- **Citizenship** – holds Indian passport or OCI – Static
- **Tax resident** – Depends on stay / Control – Dynamic
- **FEMA resident** – Depends on stay / purpose – Dynamic
- **Person of Indian Origin** : 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;

Why determination of residential Status is important

- **Scope of Income (Section 7 and Section 9)**

Resident (ROR)

Received or deemed to receive in India

Accrue or arises or deemed to accrue or arise in India

Accrues or arises OUTSIDE INDIA

Resident but Not ordinarily Resident (R- NOR)

Received or deemed to receive in India

Accrue or arises or deemed to accrue or arise in India

Global Income if controlled from India

Non-Resident (NR)

Received or deemed to receive in India

Accrue or arises or deemed to accrue or arise in India

Why determination of residential Status is important

Availability of Deductions / Exemptions – Computation of Income

Deductions NOT allowed for Non-resident (NR)

Sec 80C: Investment in Public Provident fund (PPF) (Not allowed to open a new PPF account. However, a PPF account opened while you are a resident is allowed to be maintained.)
Investment in National Saving Certificate (NSC)
Post Office 5year Deposit scheme
Senior citizen savings scheme
Sec 80CCG: Investment in Rajiv Gandhi Equity Saving Scheme (RGESS)
Sec 80DD: Deduction for maintenance including medical treatment of dependent handicapped as defined under section
Sec 80DDB: Deduction for medical treatment of dependent handicapped (as certified by a prescribed specialist)
Sec 80U: Deduction allowed to a tax payer who himself suffers from disability
No deduction for special income cases (Section 115A)

Deductions allowed for Non-Resident

Sec 80C
LIC premium; Tuition Fees ; Principal repayment of home loans; Unit Linked Insurance Plan (ULIP); Equity Linked Tax Saving Scheme (ELSS)
Sec 80D: Medical Insurance
Sec 80E: Interest paid on Education loan
Sec 80G: Payments made in the form of eligible Donations
Sec 80TTA: Interest on Savings Bank Account
Section 54 series exemptions – Capital gain
DTAA benefit: Not claimable in India by a resident

Why determination of residential Status is important

Taxation Rates and Compliances

- **TDS provisions – amount paid vs Income earned**
 - 1% u/s 194IA vs Section 195 on capital gain
 - 10% u/s 194J vs 20% u/s 195 on FTS
 - 10% u/s 194I vs 20% / 30% on rent
- **Rate of Income Tax**
 - Same for Individuals (except 60+ years) (old and new tax regime)
 - Different for corporate taxation 15%/22%/25%/30% vs 40%
 - Special rates for non-residents for special income – FTS/ Royalty/ Dividend/ Interest – without any deduction
- **Tax Compliances**
 - Type of ITR and Forms
 - Schedules of ITR

Definitions

Section 2(30) : "**non-resident**" means a person who is **not** a "resident" [and for the purposes of sections 92, 93 and 168, includes a person who is not ordinarily resident within the meaning of clause (6) of section 6];

Section 2(42) : "**resident**" means a **person** who is resident in **India** within the meaning of section 6 ;

Section 2(25A) : "India" means the **territory of India** as referred to in article 1 of the Constitution, its **territorial waters**, seabed and subsoil **underlying such waters, continental shelf**, exclusive **economic zone** or any other **maritime zone** as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976), and the **air space above its territory and territorial waters;**]

Definitions

Section 2(31) "person" includes—

- (i) an individual,
- (ii) a Hindu undivided family,
- (iii) a company,
- (iv) a firm,
- (v) an association of persons or a body of individuals, whether incorporated or not,
- (vi) a local authority, and
- (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

[Explanation.—For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority or juridical person was formed or established or incorporated with the object of deriving income, profits or gains;]

Definitions

Structure of **Section 6** which defines **Resident**

- **6(1) and 6(1A)** – Individual
- **6(2)** – HUF
- **6(3)** – Company
- **6(4)** – Other persons
- **6(5)** – Uniformity for status
- **6(6)** – R-NOR – practically applicable only to an Individual

Definitions

Section 6(1) ; 6(1A) and 6(6) defines Resident Individual

6(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to **one hundred and eighty-two days or more** ; or

(b) Omitted

(c) having within the **four years preceding that year** been in India for a period or periods amounting in all to **three hundred and sixty-five days** or more, is in India for a period or periods amounting in all to **sixty days* or more in that year.**

Two situations:

1. 182 days or more in current year **or**
2. 365 days or more in last 4 years AND 60 days* in current year

Definitions

Section 6(1) ; 6(1A) and 6(6) defines **Resident Individual**

Two situations

1. 182 days or more in current year **or**
2. 365 days or more in last 4 years AND 60 days* in current year

Case Studies

Assessee	FY 2023-24 (Days)	FY 2019-20 till FY 2022- 23 (Days)	Status
Indian Citizen	90	1000	Resident
US Citizen	187	200	Resident
Individual	50	200	Non-resident

Definitions

Section 6(1) ; 6(1A) and 6(6) defines **Resident Individual**

1. 182 days or more in current year **or**
2. 365 days or more in last 4 years AND 60 days* in current year

Explanation 1 In the case of an individual,—

(a) being a **citizen of India, who leaves India** in any previous year as a **member of the crew of an Indian ship** as defined in clause (18) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958), **or for the purposes of employment outside India**, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "**one hundred and eighty-two days**" had been substituted ;

(b) being a **citizen of India**, or a **person of Indian origin** within the meaning of Explanation to clause (e) of section 115C, who, **being outside India, comes on a visit to India** in any previous year, the provisions of sub-clause (c) shall apply in relation to that year as if for the words "sixty days", occurring therein, the words "**one hundred and eighty-two days**" had been substituted
[and in case of [such person] having **total income**, other than the income from foreign sources, exceeding **fifteen lakh rupees** during the previous year, for the words "sixty days" occurring therein, the words "**one hundred and twenty days**" had been substituted].]

Individuals covered under clause (b) where Indian income is above 15 lakh are deemed to be R-NOR

Definitions

Section 6(1) ; 6(1A) and 6(6) defines **Resident Individual**

Normal resident definition:

1. 182 days or more in current year **or**
2. 365 days or more in last 4 years AND 60 days* in current year

Explanation 1 where 60 days will be extended in following situations:

- Citizen of India + Crew of Indian ship / Employment – 182 days
- Citizen of India or PIO being outside India comes to India
 - a. Total Income from Indian sources > INR 15 lakh – 120 days
 - b. Total Income from Indian sources <= INR 15 lakh – 182 days

Examples

Section 6(1) ; 6(1A) and 6(6) defines Resident Individual

Type	Income in India	FY 2023-24 (Days) 182/120/60	FY 2019-20 till FY 2022-23 (Days) *365 days	Tax Status
PIO/Col	10 Lakh	185	400	Resident
PIO/Col	16 Lakh	90	1000	NR
PIO/Col	16 Lakh	130	1000	Resident
Col+ Cayman*	17 lakh	90	50	Refer 6(1A)
US + PIO	18 lakh	190	400	Resident
US Cit	20 lakh	30	0	NR
US Cit	10 lakh	70	1000	Resident
US Cit	10 lakh	70	1000	Resident
PIO/Col	10 lakh	150	200	NR
Col/PIO	10 lakh	185	100	Resident
Col/PIO	10 lakh	185	600	Resident

Definitions

Section 6(1) ; 6(1A) and 6(6) defines **Resident Individual**

1. 182 days or more in current year **or**
2. 365 days or more in last 4 years **AND** 60 days* in current year

Explanation 1 where 60 days will be extended in following situations:

- Citizen of India + Crew of Indian ship / Employment – 180 days
- Citizen of India or PIO being outside India comes to India
 - a. Total Income from Indian sources > INR 15 lakh – 120 days
 - b. Total Income from Indian sources <= INR 15 lakh – 182 days

Section 6(1A)

Notwithstanding anything contained in clause (1), **an individual**, being a **citizen of India**, having **total income**, other than the income from foreign sources, **exceeding fifteen lakh rupees** during the previous year shall be **deemed to be resident** in India in that previous year, if **he is not liable to tax in any other country or territory by reason of his domicile or residence or any other criteria of similar nature**.

[Explanation.—For the removal of doubts, it is hereby declared that this clause shall not apply in case of an **individual who is said to be resident in India in the previous year under clause (1).**]

Individuals covered u/s 6(1A) are deemed to be R-NOR

Definitions

Section 6(6) – Resident But Not Ordinarily Resident

A person is said to be "not ordinarily resident" in India in any previous year if such person is—

(a) an individual who has been a **non-resident** in India in **nine out of the ten** previous years preceding that year, **or** has during the **seven previous years** preceding that year been in India for a period of, or periods amounting in all to, **seven hundred and twenty-nine days or less**; or

(b) a Hindu undivided family whose manager has been a non-resident in India in nine out of the ten previous years preceding that year, or has during the seven previous years preceding that year been in India for a period of, or periods amounting in all to, seven hundred and twenty-nine days or less ; or

Definitions

Section 6(6) – Resident But Not Ordinarily Resident

A person is said to be "not ordinarily resident" in India in any previous year if such person is—

...

(c) a citizen of India, or a person of Indian origin, having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year, as referred to in clause (b) of Explanation 1 to clause (1), who has been in India for a period or periods amounting in all to one hundred and twenty days or more but less than one hundred and eighty-two days; or

(d) a citizen of India who is deemed to be resident in India under clause (1A).

Explanation.—For the purposes of this section, the expression "income from foreign sources" means income which accrues or arises outside India (except income derived from a business controlled in or a profession set up in India)][and which is not deemed to accrue or arise in India].

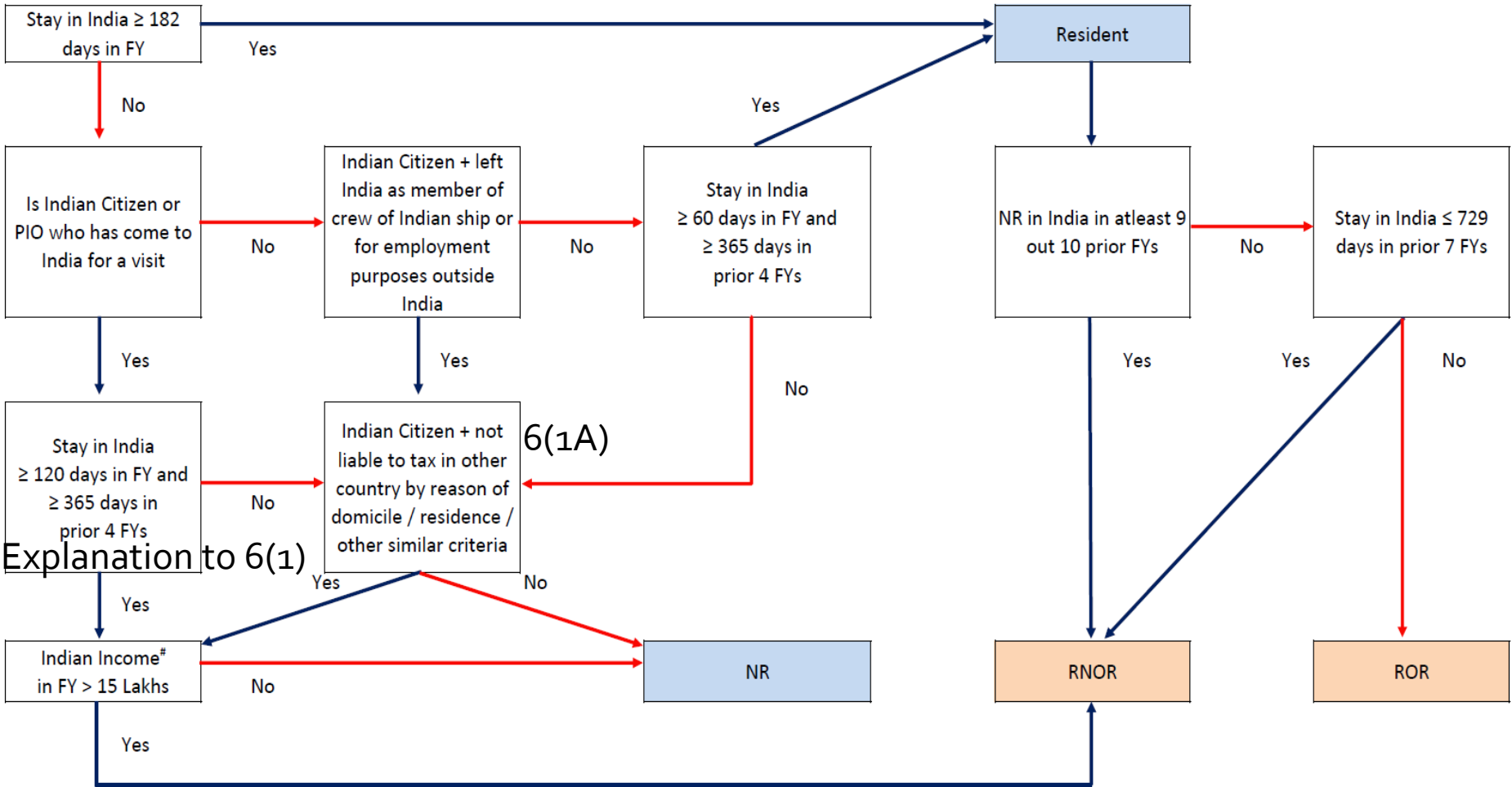
Examples

Section 6(1) ; 6(1A) and 6(6) defines Resident Individual

Type	Income in India	FY 2023-24 (Days) 182/120/60	FY 2019-20 till FY 2022-23 (Days) *365 days	DAYS IN LAST 7 YEARS > 729?	NR in 9 out of 10 years?	Tax Status
PIO/Col	10 Lakh	185	400	No	Yes	R-NOR ; 6(6)(a)
PIO/Col	16 Lakh	90	1000	Yes	Yes	NR ; 6(1) E
PIO/Col	16 Lakh	130	1000	Yes	Yes	R-NOR 6(1) E
Col+ Cayman	17 lakh	90	50	No	Yes	R-NOR – 6(1A)
US + PIO	18 lakh	190	400	No	Yes	R-NOR ; 6(6)(a)
US Cit	20 lakh	30	0	No	Yes	NR ; 6(1)
US Cit	10 lakh	70	1000	No	Yes	R-NOR ; 6(6)(a)
US Cit	10 lakh	70	1000	Yes	No	ROR ; 6(1)
PIO/Col	10 lakh	150	200	Yes	No	NR ; 6(1)
Col/PIO	10 lakh	185	100	Yes	No	ROR 6(1)
Col/PIO	10 lakh	185	600	No	Yes	R-NOR 6(6)(a)

Flow Chart

Start here



Source: GBCA Associates Publication available on internet

https://gbcaindia.com/adminpanel/images/resource_file/%7B2972b309-ed72-55a4-0760-415e7374c1b8%7Dresidential%20status%20-%20changing%20landscape%20for%20individuals.pdf

04 March 2024

How do you count days?

- Mr. X coming from USA:
 - Landed in India : 10 February 11:30 PM (as per flight ticket)
 - Immigration Arrival Stamp: 11 February 12.30 AM
 - Return ticket of 20 February 8 PM
 - Flight delayed to 21 February 3 AM

What is the no. of days stay in India?

How do you count days?

- No. of Days not defined under income tax act
- Day vs stay
- Total number of days to be counted (continuous or otherwise)
- Day of arrival and day of departure to be counted (Certain judicial precedents ignore one day if not a complete day – however no specific guidance)
- Passport stamps best way to determine number of days stay
- Special Circumstances - COVID lockdown – specific circular excluding number of days for 22 March 2020 till 31 March 2020 or if in quarantine, actual quarantine period ending by 31 March 2020.

Dual residency

- **Applies only to Individual**
- **Refer Article 4 of Double Tax Avoidance Agreements (DTAA)**
- **Tie Breaker Rule in specific order:**
 1. Permanent Home + Closer personal and economic interest
 2. Habitual Abode (Frequency, duration, and regularity of stays that are part of the settled routine of an individual's life)
 3. Nationality
 4. Competent Authority by Mutual Agreement

Definitions - Residence in India - Other Entities

Section	Provision
6(2) - HUF	A Hindu undivided family, firm or other association of persons is said to be resident in India in any previous year in every case except where during that year the control and management of its affairs is situated wholly outside India
6(3) – Company	<p>A company is said to be a resident in India in any previous year, if—</p> <ul style="list-style-type: none">• it is an Indian company; or• its place of effective management, in that year, is in India. <p>Explanation.—For the purposes of this clause "place of effective management" 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.</p>
6(4) – Other Persons	Every other person is said to be resident in India in any previous year in every case, except where during that year the control and management of his affairs is situated wholly outside India – (Eg. Firms, LLPs, AOP and BOIs)
6(5) - If a person is resident in India in a previous year relevant to an assessment year in respect of any source of income, he shall be deemed to be resident in India in the previous year relevant to the assessment year in respect of each of his other sources of income.	

6(3) – Place of Effective Management [PoEM]

- Kicks in when business is carried from India via an entity outside India to park profits outside India for tax purposes.
- PoEM guidelines issued by Income tax vide circular no.6 of 2017 dated 24 January 2017 which determine following tests (key indicators for reference) :
 - **Active Business test**
 - Passive Income < 50% of total income
 - < 50% of assets, no. of employees and payrolls expenses is not from India
 - **Key Management test:** Identification of people making key decisions and from where these decisions are made (Where does the board, etc. make decisions)
 - **Head office test** –Location where senior most staff is present
 - **Miscellaneous** - Place where company carries out business activity and maintains accounting records

6(3) – Place of Effective Management [PoEM]

- XYZ Pte is a Singapore based Company
 - Out of total 50 employees, 40 employees work from India
 - 10 employees of XYZ Pte are administrative staff and no employee with key decision making authority in Singapore
 - Total income of ABC Pte is 100 crores out of which 80 crores is from sale to Indian subsidiary
 - 90% Directors of XYZ Pte are Indian residents and board meetings happen from India

Key is foreign entity should have SUBSTANCE .. It cannot be a conduit / pass through entity

Documentation is important to substantiate PoEM

Resident Company vs Domestic Company

2(22A) "domestic company" means an Indian company, or any other company which, in respect of its income liable to tax under this Act, has made the prescribed arrangements for the declaration and payment, within India, of the dividends (including dividends on preference shares) payable out of such income ;

2(26) "Indian company" means a company formed and registered under the Companies Act, 1956 (1 of 1956), and includes—
(i)... (iii).... Provided that the registered or, as the case may be, principal office of the company, corporation, institution, association or body in all cases is in India

Therefore, a foreign company can be a resident company

Difference in **Tax Rates, benefits, exemptions, etc.**

Non-resident taxation Aspects

- **Business connection or Permanent Establishment**

Applicable when any foreign enterprise (not having direct presence) is carrying out business in India and earning income from India without having 'legal presence' in India.

Concept of profit attribution basis Function, Assets and Risk.

Fixed Place PE, Service PE, Agency PE, Construction PE

- **Significant Economic Presence:**

Foreign entities earning income in India through digital medium via Indian users. As per the notification 41/2021 dated 03 May 2021, the payment **threshold in respect of any goods, services or property** carried out by a non-resident in India, including the **provision of download of data or software** in India has been **notified as INR 2 crores (USD 0.26 Mn)**. Further, for the activity of systematic and continuous **soliciting of business activities or engaging in interaction**, the threshold for number of users has been notified as **3 lakh users**.

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Non-resident taxation Aspects

- **Equalization Levy on 'e-commerce'**
 - Applicable to a non-resident, being an e-commerce operator, who owns, operates or manages digital or electronic facility or platform for online sale of goods or online provision of services or both.
 - Here, online sale of goods or provision of services could include any service/sale of goods provided via internet or **other form of digital communication** if either the contract or the delivery is concluded online. (ERP system, Email ?)
 - Levy rate 2% and threshold of INR 2 crores per financial year ; payable by non-resident entity
 - Does not form a part of Income Tax Act. **DTAA benefit?**

Non-resident taxation Aspects

- **Special Incomes – Section 9(1)(2) onwards rws 115A**
 - Salaries
 - Interest
 - Royalty
 - Fees for Technical Services
 - Other Income via gift
- **Vodafone Hutch Case – Deriving value of shares basis business in India – Transfer of business considered as capital gain tax in India**
- **DTAA benefits available**
- **DTAA Documentation – Tax Residency Certificate (TRC) and Form 10F**
- **Income tax Compliances – If DTAA benefit taken**

Practical Way-Forward

- **Individuals**

- Determine no. of days from actual passport stamps / VISA / Tickets
- Take employment letters on record including job role
- Tax returns filed in foreign jurisdiction to determine income and tax
- Tax Residency Certificate and Form 10F
- Tax regulations of foreign country
- Tax Credit

- **Other entities**

- Certificate of incorporation / Deed / Registration
- Tax Residency Certificate and Form 10F
- Tax returns filed in foreign jurisdiction to determine income and tax
- Segments, list of offices and operations along with F.A.R.
- List of KMP and their location
- Location of board meetings held where key decisions were taken
- PoEM indicators
- Tax Credit

Q & A

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