

# Benchmarking Revolutions Private Limited

Residence provisions In India  
Under Section 6 of IT Act and  
impact on taxation  
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# Benchmarking Revolutions Private Limited

## Residence In India Under Section 6 of IT Act



### Earlier Provisions (Section 6)

- An individual is considered as resident if (Any one condition)
- Their stay is 182 days or more in current year. S.6 (1) (a)  
or
- The individual is in India for 365 days or more in 4 preceding PYs and 60 days or more in current year S.6 (1) (b)
- (Expl-1) For Indian citizen/ person of Indian origin, a) who leaves India in any previous year as a member of the crew of an Indian ship or for the purposes of employment outside India. ( b) comes on a visit to India in any previous year.
- the period, instead of 60 days or more, the period of stay for current year was 182 days or more

### Revised Provisions

- An individual who is an Indian citizen or a person of Indian origin having total income, other than the income from foreign sources, exceeding ₹ 15 lakh in the said case the period for stay in India shall be 120 days. The said amendment is only made in explanation 1(b) to section 6 and only for those person whose total income other than income from foreign sources exceeds ₹ 15 Lakh.
- Example of income includible in above threshold 15 lakhs : Dividend, Interest, Capital gain, and Rental Income earned from India. The word referred here is total income which means after deduction under chapter VI and income exempt u/s 10
- Example of income Not includible in above threshold 15 lakhs : Salary , Dividend, Interest, Capital gain, Rental Income and business Income earned from Sources outside India.
- The word referred here is total income which means after deduction under chapter VI and income exempt u/s 10

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## Concept of Deemed Resident introduced:



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Deemed Resident  
Section 6(1A)  
Applicable to  
Citizen of  
India and  
Notwithstanding  
anything in clause  
1



Not liable to tax  
in any other  
country or  
territory by  
reason of his  
domicile or  
residence



Has total Income  
other than  
foreign income  
exceeding Rs. 15  
Lakhs during the  
previous year.

- ❖ e.g: Mr. A , an Indian Citizen, stayed 40 days in India, 130 days in Singapore, 110 days in England and 85 days in Dubai having Income from INDIA exceeding ₹ 15 lacs. He was not resident in any state due to his lesser stay in all countries. Hence, Stateless and will be covered by the provisions of 6(1A) and benefit of special rate of tax will not be available to him.
- ❖ Citizen of India can normally be judged from the passport. If the assessee is holding Indian passport then he is said to be Indian citizen.
- ❖ Stateless persons to be considered as deemed residents w.e.f. FY 2020-21 .
- ❖ Indian citizen Even if not visited India, Income exceeds 16 lakhs and not taxable anywhere may come under tax net subject to DTAA provisions

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## Concept of Deemed Resident introduced:



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### a) Stateless Person :

In tax planning, there is a jargon called "Tax Nomad", wherein, individuals usually the HNI's, seeking to avoid tax would plan in such a way that they would be non-residents of all the countries imposing income-tax. That is, they plan their visits/stays in the respective countries so as to bypass the criteria of "Number of Days" required to be classified as resident.

b) **"Not Liable to Tax"** would mean that the individual does not have to pay any tax. However, under taxation jurisprudence, the term "Not liable to tax" is not the same as 'exemption from tax' or "non-payment of tax' or 'not being subject to tax'. Expression 'liable to tax' does not necessarily imply that person should actually be liable to tax; it is enough if other contracting State has right to tax such person, whether or not such a right is exercised. This has been under core consideration in a variety of judgements, including:

Union of India versus Azadi Bachao Andolan, 263 ITR 706 (SC), Emirates Shipping Line versus ACIT, 349 ITR 493 (Delhi), ITO v. Birla Sunlife Management Co. Ltd., [2010] 3 taxmann.com 782 (Mumbai – Trib.)

c) In simple terms, the impact of the amendment should be only on such Indian citizens who are not liable to tax in any country by not qualifying as resident of any country and not on those not being subject to tax under the local laws of the Country, like UAE. ( reference to circular issued on 3 rd feb) However, the interpretation of the tax authorities could differ on simply a bare reading of the section, which could potentially lead to disputes.

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## Not Ordinarily Resident Section 6(6)



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### Earlier Provisions

- Earlier , an individual is RNOR if:
- He is a non resident in 9 out of 10 PYs preceding that year or
- Has been in India during 7 preceding Pys for 730 days

### Revised Provisions

- In addition to existing provisions the following person would also qualify as RNOR:
- A citizen of India for a person of Indian origin, who visits India for a period or Periods 120 days or more but less than 182 days in that PY having total income other than foreign sources exceeding RS. 15 lakhs or
- A citizen of India who is deemed to be resident in India under clause 6(1A)

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If total income from Indian sources is up to Rs. 15 Lakh during the previous year 2020-21



Previous Year	Case-I (in days)	Case-II (in days)	Case-III (in days)	Case-IV (in days)	Case-V (in days)
2020-21	190	135	110	125	110
<b>Last 4 Previous Years</b>					
2019-20	0	0	0	0	0
2018-19	160	160	160	160	130
2017-18	150	150	150	150	110
2016-17	60	60	60	0	41
<b>Total</b>	<b>370</b>	<b>370</b>	<b>370</b>	<b>310</b>	<b>311</b>
<b>Residential Status</b>	<b>Resident in PY 2020-21</b>	<b>Non-Resident in PY 2020-21</b>	<b>Non-Resident in PY 2020-21</b>	<b>Non-Resident in PY 2020-21</b>	<b>Non Resident in PY 2020-21</b>

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## Reasoning:



**Reasoning Case-I:** Since his stay in India exceeds 182 days, he becomes a resident. Refer Condition of section 6(1)(a), no need to check for section 6(1)(b). [This is subject to satisfaction of anyone condition of section 6(6)(a), then he will be RNOR.]

**Case-II:** Since his stay in India in PY 2020-21 is less than 182 days and in the last 4 previous years exceeds 365 days, he failed to satisfy both the conditions of section 6(1)(b). Since in this case, total income is less than 15 Lakh, the period of 120 days is irrelevant.

**Case-III:** Even though his stay in the last four years exceeds 365 days but his stay during 2020-21 is less than 182 days and hence both conditions of section 6(1)(b) failed to satisfy.

**Case-IV:** His stay in PY 2020-21 does not exceed 182 days (120 days has relevance when total income exceeds Rs. 15 Lakh) and also his stay during the last four years does not exceed 365 days and hence both conditions of section 6(1)(b) failed to satisfy.

**Case-V:** Neither condition of section 6(1)(a) nor conditions of section 6(1)(b) satisfied.

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If total income from Indian sources is more than Rs. 15 Lakh during the previous year 2020-21



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Previous Year	Case-I (in days)	Case-II (in days)	Case-III (in days)	Case-IV (in days)	Case-V (in days)
2020-21	190	135	110	125	110
<b>Last 4 Previous Years</b>					
2019-20	0	0	0	0	30
2018-19	160	160	160	160	130
2017-18	150	150	150	150	110
2016-17	60	60	60	0	41
<b>Total</b>	<b>370</b>	<b>370</b>	<b>370</b>	<b>310</b>	<b>311</b>
<b>Residential Status</b>	<b>Resident in PY 2020-21</b>	<b>RNOR in PY 2020-21</b>	<b>Non-Resident in PY 2020-21</b>	<b>Non-Resident in PY 2020-21</b>	<b>Non Resident in PY 2020-21</b>



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Reasoning :



**Case-I** : Since his stay in India exceeds 182 days, he becomes a resident. Refer Condition of section 6(1)(a), no need to check for section 6(1)(b). [This is subject to satisfaction of anyone condition of section 6(6)(a), then he will be RNOR.]

**Case-II** : Since his stay in India in PY 2020-21 is more than 120 days but less than 182 days and in the last 4 previous years exceeds 365 days, he satisfies both the conditions of section 6(1)(b). Since in this case, total income is more than 15 Lakh, by virtue of provisions of section 6(6)(c), he will become 'not ordinary resident' or RNOR.

**Case-III** : Even though his stay in the last four years exceeds 365 days but his stay during 2020-21 is less than 120 days and hence both conditions of section 6(1)(b) failed to satisfy.

**Case-IV** : Even though his stay in PY 2020-21 exceeds 120 days (120 days has relevance since total income exceeds Rs. 15 Lakh) but his stay during the last four years does not exceed 365 days and hence both conditions of section 6(1) (b) failed to satisfy.

**Case-V**: Neither condition of section 6(1)(a) nor conditions of section 6(1)(b) satisfied.

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## Not Ordinarily Resident

Not Ordinary Resident

Non resident in 9 out of 10 PY Preceding that year

Has been in India for 729 days or more during 7 PY preceding that year

An Indian citizen or person of Indian Origin having total Income other than foreign sources exceeding Rs. 15lacs

A citizen deemed to be resident under clause 1A

Who being outside India, comes on visit in a previous year, has been in India for a period or periods amounting in all to 120 days or more but less than 182 days

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SR No.	Particulars	Residential Status and taxability in India		
		ROR	PNOR	NR
1	Income received or deemed to be received in India	Yes	Yes	Yes
2	Income which accrues or arises or is deemed to accrue or arise in India	Yes	Yes	Yes
3	Income which accrues or arises outside India From	Yes	Yes	No
	<ul style="list-style-type: none"> <li>- Business controlled in India or Profession set up in India</li> <li>- Other Income</li> </ul>	Yes	No	No
	Foreign Assets Disclosure Requirements under the Income Tax Act	Yes	Yes	No

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## Importance of Section 6 with respect of Double Taxation Avoidance Agreement



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- A DTAA is applicable only to person who are Residents of contracting state (Article 1)
- Therefore, residence has to be determined for the purpose of applicability of a DTAA.
- No Treaty benefit can be claimed by a person if it is not a resident of either of the contracting states.
- If an individual is a resident of both the contracting state then “TIE BREAKER TEST” is to be applied for DTAA.
- The impact of changes brought up by the change in Residential status.
  - a) Change of Income tax rates in Indian Income.
  - b) Taxability of Income accrues outside India but derived from business controlled or profession set up in India.

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## Status of residence of an individual under DTAA – General Tie Breaker Rule.

A	Permanent home	Permanent home means a home arranged and retained for permanent use; not intended for short duration
B	Economic/ personal Interest	-Place of Business/Profession -Employee -Personal interest (i.e. family and social relations Economic relations)
C	Habitual abode	Frequency, duration, and regularity of stays
D	Nationality	Country of which the individual is a national
E	Competent Authorities	Both the countries to determine the residential status if residential status cannot be determined by applying the tie breaker rule



- ❖ Tie breaker rule to be applied in the above order. Importance of tie breaker rule to increase as an individual is more likely to qualify as resident of both countries pursuant to the amendment.
- ❖ As per section 90(4) provides that the non-resident to whom the agreement referred to in sec. 90(1) applies shall be allowed to claim relief under such agreement if TAX RESIDENCE CERTIFICATE obtained by him from the government of that country or specified territory, is furnished declaring his residence of the country outside India or specified territory outside India, as the case may be.

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Effect on tax by shifting status from Non Resident to Not Ordinary Resident



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Position up to 31.03.2020 in case where Mr. A (citizen of India) visits to India for 150 days Scenerio -1				
Particulars	Singapore DTAA	UAE DTA A	Hong Kong DTAA	Status (Mr. A is non-resident in India but resident of other country.)
<b>Dividend paid by Indian Company ₹ 20Lakhs</b>	15%	10%	5%	Note 1:- The Individual shall be Non resident individual as his period of stay was less than 182 days. The tax rate as per 115 A(1)(a)(i) was 20%.The effective tax rate works out to lower of 20% or DTAA rate. Meaning thereby the dividend was taxable @ 15,10,5 in India and was not taxable in Singapore, UAE and Hong Kong.

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## Effect of amendment by Finance Act 2020 in case where Mr. A (citizen of India) visits to India for 150 days during F.Y. 2020-21 Scenerio-2

Particulars	Singapore DTAA	UAE DTAA	Hong Kong DTAA	Status (Mr. A is non-resident in India but resident of other country.)
<b>Dividend paid by Indian Company</b> ₹ 20Lakhs	15%	10%	5%	<p>Note 1:-The Individual shall be Not ordinary resident as per sec. 6(6)(c).</p> <p>Note 2:- Mr. A is Not ordinary resident for India and resident for other country. It is presumed that by applying tie breaker test Mr. A is resident for India and Non resident for other country as per DTAA.</p> <p>Note 3:- Such dividend income will be taxable in India at normal slab rate which may be as high as 35.88%. However the DTAA benefit will not be available.</p>

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## Impact of amended section 6(1), 6(1A) and 6(6)



- **1. Concessional tax rates lost** – On becoming RNOR, the following concessions are lost:
  - a. 115A(1)(a)(i) – **Dividend income** (subject to further reduced rates under DTA)
  - b. 115A(1)(a)(ii) – **Interest received** from Government or an Indian concern on moneys borrowed or debt incurred by Government or the Indian concern in foreign currency
  - c. 115A(1)(a)(iia) – **Interest received from an infrastructure debt fund** referred to in section 10(47)
  - d. 115A(1)(a)(iiaa) – **Interest received from an Indian company** on rupee denominated bonds (specified in section 194LC)
  - e. 115A(1)(a)(iiab)/(iiac) – **Interest on rupee denominated bond** referred to in section 194LD and income from units of business trust referred in section 194LBA
  - f. 115(1)(a)(iii) – **Income received in respect of mutual fund units specified under 10(23D)** or units of Unit Trust of India purchased in foreign currency (subject to further reduced rates under DTA) and [**Dividend income from mutual funds eligible for rate** prescribed under DTAA in respect of dividend income (DR. Rajnikant R. Bhatt versus CIT, [1996] 222 ITR 562, AAR)]
  - g. 115A(1)(b) – **Royalty or fees for technical services received** by a foreign company or non-resident non-corporate assessee (subject to certain conditions)
  - h. 115AC – **Interest or dividend income** arising in the hands of a non-resident from specified bonds or Global Depository Receipts or income in the nature of long-term capital gains arising from transfer of the bonds.



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Once an individual qualifies as not-ordinarily resident pursuant to the amendment, the following consequences will follow:



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- ❖ **Increase in scope of total income:** Income that accrues or arises outside India but is derived from business controlled in or profession set up in India will now become taxable in India in the hands of such individual.
- ❖ **Loss of exemptions:** Various exemptions that are available in the hands of non-residents will be lost once the status changes to RNOR. However, exemptions in respect of interest on NRE account balance and FCNR deposits will not be impacted by the amendment. Subject to FEMA rules allow such RNOR to maintain accounts in NRE .
- ❖ **Loss of concessional rate of tax/ presumptive scheme benefits:** Various nature of income that are taxable at concessional rates in the hands of non-residents (5% to 20%) will become taxable at normal slab rate applicable in the hands of such individuals.
- ❖ **Benefits provided under DTAA lost:** Once an individual becomes resident of India as well, the importance of tie breaker rule will increase to determine status of residence of the individual under the DTAA. If individual qualifies as resident of India after applying the tie breaker test, various concessions given under the DTAA with regard to capital gain, dividend, etc will be lost
- ❖ **Increased onus to substantiate non-taxability of income:** Indian Income Tax Officer will have greater jurisdiction on such individuals and such individuals will be required to justify as to why income from a particular source is not taxable in India by establishing that such income accrues or arises outside India

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## Issues due to COVID-19: :



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The persons who are forcefully locked down in India due to COVID-19, whether any benefit will be available to them? Answer:- As of now there is no notification from the government regarding this issue. Though there is no present relief sighted for the computation of period for determination of residency for FY 2020-21 (the present year), a relief circular has been issued by CBDT on 08th May 2020 (Circular No 11 of 2020), for granting a relief corresponding to FY 2019-20 (the previous financial year).

In this circular, it has been stated that for the computation of period of stay in India, period of stay in India shall be ignored, if such period pertains to

- ▶ Inability to leave India (Period between 22nd March to 31st March);
- ▶ Departure on evacuation flight on or before 31st March 2020 (Period between 22nd March to the date of departure);
- ▶ Departure before 31st March 2020 or has been stuck in India as on 31st March 2020 due to Quarantine in India post 01st March 2020 (Period from 01st March 2020 to the date of departure or 31st March 2020).

While no such measure has yet been introduced for FY 2020-21, one can expect such well sought relief measures to come up in future, especially due to the unfortunate effects of COVID 19.