

Taxability of Sale of Immovable Property by Non-Residents



Income Tax Department

www.incometaxindia.gov.in

Non residents are liable to pay income tax on capital gains on sale of immovable property (land/ building / land or building both). If the period of holding of the capital asset is more than twenty four months, it will be taxed as long term capital gains and otherwise, it will be taxed as short term capital gains. Tax is also required to be deducted by the buyer from payment made to non-residents.

1. Who is non-resident under Income Tax Act?

The residential status is determined in every financial year i.e. the period from 1st April to 31st March of the relevant year. An individual is considered to be a resident if he satisfies either of the following two conditions:-

- He has been in India for a period of 182 days or more during the previous financial year. OR
- He has been in India for a period of 60 days or more during the previous financial year and has been in India for 365 days or more during the four years immediately preceding the financial year.

The second condition above is not applicable in the following cases:

- Citizen of India or PIOs who, being outside India comes on a visit to India during the previous year.
- Citizens of India who leaves India during a previous year for the purposes of employment outside India.
- Citizen of India being members of a crew of an Indian ship.

Thus, in these cases, an individual will become non-resident only if he has not been in India for a period of 182 days or more during the previous Financial Year.

2. Is capital gains from sale of immovable properties by non-residents taxable in India?

Yes, capital gains from sale of immovable property accrue and arise in India. It is taxable in India.

3. How Capital gains are computed in case of sale of immovable properties?

Capital Gains for immovable properties are calculated in accordance with the following formula:-

Short Term Capital Gains		Long Term Capital Gains	
Sales Proceeds *or Stamp Duty Value, whichever is higher	(X)	Sales Proceeds *or Stamp Duty Value, whichever is higher =	(A)
Less : Expenditure in connection with transfer =	(Y)	Less : Expenditure in connection with transfer =	(B)
		Less : Indexed Cost of Acquisition**	(C)
Less : Cost of Acquisition ** =	(Z)	Less : Deductions under sections 54/54EC/54F @	(D)
Taxable Capital Gain (Taxable as per normal rates) =	X-Y-Z	Taxable Capital Gain (Taxable as per special rate of 20%) =	A-B-C-D

* Sales proceeds is called Full Value of Consideration

** Cost of acquisition

- Cost of acquisition means the purchase price of the asset and cost of improvement or construction, if any.
- In case the taxpayer has obtained the asset through gift/will/inheritance/partition of HUF etc, cost to the previous owner at his date of acquisition or fair market value of the property as on 1.4.2001, whichever is later, is to be taken.

- Indexed cost is considered to give the taxpayer the benefit of inflation. The financial year 2001-2002 is now taken as the base year and the Government has come out with Cost Inflation Index with 2001-2002 as the base year with index of 100.
- Appendix: Cost Inflation Index [CII].

As per Notification no. So 1790(e)[no. 44/2017 (F. No. 370142/11/2017-tp1)] dated 5-6-2017, following table should be used for the Cost Inflation Index :-

Sl.	Financial Year	Cost Inflation Index
1	2001-02	100
2	2002-03	105
3	2003-04	109
4	2004-05	113
5	2005-06	117
6	2006-07	122
7	2007-08	129
8	2008-09	137
9	2009-10	148
10	2010-11	167
11	2011-12	184
12	2012-13	200
13	2013-14	220
14	2014-15	240
15	2015-16	254
16	2016-17	264
17	2017-18	272
18	2018-19	280

4. Is tax required to be deducted at source from the amount payable to the non-resident?

Yes, tax is required to be deducted from the amount payable to the non-resident. There is no threshold value.

[For more details please refer to Taxpayer Information Series Brochure on 'Sale of Immovable Properties by Non-Residents - TDS at a glance']

5. Can a Non-resident claim exemption from payment of capital gains tax?

Yes, the non-resident can claim exemption as given below:-

i) Exemption from capital gains tax on sale of residential house

- Capital gain will be partially or fully exempted if an individual/ HUF purchases or constructs a residential house (only one) property in India within a specific time frame.
- The new property must be either be purchased one year before or within two years from the date of sale of the property or constructed within three years from the date of sale of the original property.

- If the cost of the new property is more than the cost of the original property, the whole of the capital gain will be exempted.
- If the cost of the new property is less than the cost of the original property, the differential amount will be taxed as long term capital gain. **(Sec. 54 of I.T. Act, 1961)**

ii) Exemption from capital gain on sale of any asset including land:

- Capital gain will be partially or fully exempted if the an individual/ HUF purchases or constructs a residential house (only one) property in India within a specific time frame.
- The new property must be either be purchased one year before or within two years from the date of sale of the original property or constructed within three years from the date of sale of the original property
- In case of construction, the property must be constructed within three years from the date of sale of the original property.
- For availing the exemption, the taxpayer must not own more than one residential house on the date of transfer.
- The amount of exemption will be guided by the formula,

Amount of exemption =

$$\frac{\text{Capital Gain} \times \text{Amount Invested}}{\text{Sale value less expenditure on sales}^*}$$

[Section 54F of the I.T. Act, 1961]

* Technically called Net Consideration.

iii) Exemption for investment in specified bonds:

- Exemption upto Rs 50 lakhs in a financial year from the capital gain will be available to be invested in specified bonds within six months from the date of sale of immovable property; only if the long term capital asset is land and/or building. The building can be residential or commercial.
- The specified bonds are bonds issued by the National Highway Authority of India or Rural Electrification Bonds which must be held for five years. **[Sec. 54EC of I.T. Act, 1961]**

What happens if the owner transfers the 'new asset' within three years?

In case the taxpayer sells the newly acquired house on which capital gains tax was claimed exempted, the said exemption will be effectively withdrawn. In case of sale of residential property, if no capital gains was charged earlier, cost of the new property at the incidence of second sale, will be reduced by the amount of exemption. If the cost of the new asset was less than the capital gains, at the incidence of the second sale, its cost price is to be taken as nil.

- In case of sale of 'new asset' other than residential property, if no capital gains was charged earlier because the cost of the new asset was more, the gains exempted earlier will be treated as long term capital gain and the gains from the new asset will be dealt separately. If the cost of the new asset was less than the net consideration, the exemption availed earlier will be taxed and the second sale will be dealt separately.

(Section 54 and 54F)

Capital Gains Account Scheme, 1988

The taxpayers are given the option of purchasing or constructing new asset within two years/ three years from the date of transfer. However, where the taxpayer is not able to appropriate the capital gains/ Net consideration (as the case may be) before the filing of return of income, he is required to keep the unutilised portion of capital gains/sales proceeds in the Capital Gains Account Scheme maintained by

scheduled banks in India and may purchase/construct the property after making withdrawals from the said account.

The unutilised portion of capital gains will be charged to tax as the income of the year in which the three years from the date of transfer expires.

iv). Exemption from Capital Gain on compulsory acquisition of Land & Building or any right in Land & Building forming part of an Industrial undertaking:-

- Such Capital gain will be partially or fully exempted if the taxpayer purchases any other Land and Building or right in other Land & Building or constructs any other building (herein after referred as "new asset") for the purpose of establishing or re-establishing an Industrial undertaking within a period of 3 years after the date of transfer . In case the compensation is not received on the date of transfer then within 3 years after the date of receipt of compensation from the Government.
- The Land & Building, which have been compulsory acquired, must have been used by the taxpayer for the purpose of Industrial undertaking for a period of at least 2 years before the date of acquisition.
- The new asset so purchased/constructed should not be transferred for a period of at least 3 years of its purchase/construction.
- If the cost of new asset is more than the amount of Capital gain, then whole of the Capital gain is exempted.
- If the cost of new asset is less than the Capital gain then, the difference between the amount of capital gain and the cost of new asset shall be charged to tax as Capital Gain.
- In case the new asset is transferred within a period of 3 years of its purchase/construction, then the cost of the new asset for the purpose of computing Capital gain tax will be reduced by the amount of Capital Gain which had been claimed exempted as stated above. **(Sec 54D r.w.s. 54H).**

v). Exemption from Capital gains tax on sale of Residential property (a house or a plot of land)

- The Deduction is available to an individual or an HUF
- Eligible for sale made before 31.3.2019
- The Capital gains on such sale of Residential property will be partially or fully exempted if the Individual or HUF taxpayer utilises the net consideration* for the purpose of investment in equity shares of an "eligible start up"*** and such eligible start up utilises the amount for the purchase of a new asset*** within one year from the date of such investment by the tax payer.

* Net consideration means = Full value of consideration on transfer of the capital asset - any expenditure incurred wholly exclusively in connection to such transfer.

** Eligible start up means a company (or a limited liability partner-ship) engaged in eligible business which fulfils the following conditions, namely-

- (a) It is incorporated on or after the 1st day of April, 2016 but before the 1st day of April, 2021;
- (b) The total turnover of its business does not exceed Rs. 25 crores (in the previous year relevant to the assessment year for which deduction under sub-section (1) is claimed); and
- (c) It holds a certificate of eligible business from the Inter-Ministerial Board of Certification as notified in the Official Gazette by the Central Government;

*** New asset in which the investment by the startup has to be machinery and plant other than

- (i) any machinery or plant which, before its installation by the assessee, was used either within or outside India by any other person;

- (ii) any machinery or plant installed in any office premises or any residential accommodation, including accommodation in the nature of a guest-house;
 - (iii) any office appliances including computers or computer software; for a technology driven start up the new asset shall include computers or computer software
 - (iv) any vehicle; or
 - (v) any machinery or plant, the whole of the actual cost of which is allowed as a deduction (whether by way of depreciation or otherwise) in computing the income chargeable under the head "Profits and gains of business or profession" of any previous year:
- If the amount of the net consideration is greater than cost of new asset, then amount of exemption will be calculated as under:-

$$\frac{\text{Capital gain} \times \text{Cost of new asset}}{\text{Net consideration}}$$
 - If the amount of net consideration is equal to or less than the cost of new asset, then Capital gain will not be charged to tax.
 - The investment so made by the taxpayer and new asset so purchased by the eligible start up should not be transferred for a period of at least five years. In case it is violated, then exemption earlier allowed is deemed to be the Capital gain of the years in which such new asset is transferred.
 - In case the investment in new asset can't be made within one year then the amount needs to be deposited into specified bank a/c. **(Sec. 54GB)**

6. Are there any special Features of NRI Taxation on Sale of immovable Properties?

Yes, there are some special features as listed below:

- Even if the income of the non-resident is only long –term capital gains from sale of immovable properties, unlike in the case of resident individuals, no deduction on account of the tax slab is available. It is taxed @20%.
- Tax is deducted at source u/s 195 where the deductor is required to obtain TAN, unlike in the case of purchase from residents.
- Tax has to be deducted at source irrespective of the amount of sales consideration. In the case of purchase from residents, there is no need to deduct tax at source if the sale proceeds do not exceed Rs 50 lakhs.

DTAA Provisions

As per section 90 of the Income Tax Act'1961, the rates of taxation on taxable income of a non-resident will be as prescribed under the Income Tax Act'1961 or under the DTAA of India with the country of which the non-resident is a resident, whichever is more beneficial to the tax payer. Therefore, if the rates prescribed for taxation of capital gains in the DTAA are less than the 20% rate or the slab rate, then tax will be deducted at that rate.

However, for availing the benefit of lower rate of deduction of tax under the DTAA, the non-resident transferor will have to furnish a Tax Residency Certificate to the payer indicating the tax residency of which he is a resident. Under, the provisions of sub-sections (2) & (3) of section 195 the payer or transferor/payee may make an application to the jurisdictional Assessing officer to determine the sum of capital gains on which tax is to be deducted. The application to the AO will be made in the prescribed form.

The amount determined by the AO will be the amount on which tax is to be deducted. However, if no such application is made by the payer or the payee to determine the sum chargeable to tax, the tax will be deducted on the entire consideration for sale of immovable property.

Unutilised Tax Relief/Any other relief

Long term capital gain from the single property can be invested only in one property. A Non-Resident Individual or Non-Resident HUF cannot adjust LTCG against the basic exemption limit. Therefore, in the case of Non-Resident even if the taxable income is NIL and he has booked long term capital gain against the capital asset, a Non resident has to pay LTCG tax at the rate depending on the asset class.

7. Depositing of proceeds of sale of immovable property.

Irrespective of source of principal investment (i.e. whether investment was made using existing funds in NRO account (rupee funds) or through funds paid out of NRE/FCNR or external remittances, the entire capital gains / profit must be deposited in an NRO account.

NRIs are permitted to repatriate a total of only / upto USD 1 Million or approx Rs.7 crores per financial year per person (April to March) out of total balance held in their NRO account (which basically refers to income that is not freely repatriable i.e. income that is repatriable but is subject to certain restrictions).

This is the limit that includes all and any kind of repatriable income of the NRI such as :

- sale proceeds (principal + profits) of immovable property purchased through NRO/rupee funds or acquired through inheritance
- profits from sale of properties acquired through funds remitted into India or funds existing in NRE/FCNR accounts (i.e. foreign funds)
- rental income from residential or commercial property
- dividends from shares, pension, interest on loans, etc.

Hence, any income that is not freely repatriable (as explained in opening points) is subject to this limit.

8. Is the non-resident taxpayer required to file return of income?

If total income of the taxpayer including capital gains is taxable, the taxpayer is required to file his return of income. He may also file return of income if, after considering all his sources of income and investments, it is seen that tax has been deducted at higher rate and he is entitled to refund. If the result of the capital gains is a loss, he is required to file the return within due date in order to carry forward the loss.

9. How foreign remittances, inward and outward are regulated in India ?

The outward remittance by non-residents are guided by the provisions of the Foreign Exchange Management Act (FEMA), 1999. The procedures are laid down by the Reserve Bank of India through the Master Circulars issued from time to time. For outward remittance, there is compliance requirement by the Income Tax department also.

10. What are the procedures laid down in the Income Tax Act, 1961, for outward remittance to non-residents?

The Income Tax Act, 1961 stipulates that tax has to be deducted at source if the payment to the non-resident constitutes income in the hands of the non-resident. It also stipulates a reporting mechanism in respect of payment to non-residents, whether chargeable to tax or not. The Income Tax Rules, 1962 lays down the detailed procedure of the reporting mechanism.

11. What are the reporting requirements as per the Income Tax Rules, 1962 ?

- (I) Rule 37BB of the Income Tax Rules specifies that the remitter is required to furnish information to the authorised dealer in form no 15CA while sending remittance to a non -resident. ('Authorised dealer' means an entity licensed by the RBI to release foreign exchanges . Commercial

Banks, Co-operative Banks, Rural Banks, Full-Fledged Money Changers, Post Offices, all fall within the category of authorised dealers.)

- (ii) The information in Form No 15CA is required to be furnished electronically and thereafter, printout of the said form is to be submitted to the authorised dealer, prior to remitting the payment;
- (iii) The person responsible for payment to the non-resident, i.e, the remitter, is to furnish the following :
- the information in Part A of Form No. 15CA, if the amount of payment or the aggregate of such payments, as the case may be, made during the financial year does not exceed five lakh rupees;
 - for other payments -
 - the information in Part B of Form No. 15CA, after obtaining lower deduction certificate under section 197 from the Assessing Officer holding jurisdiction over the non-resident or Nil deduction certificate under section 195(3) of the Income Tax Act, 1961 obtained by the non-resident ;or deduction certificate under section 195(2) from the Assessing Officer holding jurisdiction over TDS matters of non-residents, obtained by the deductor/payer
 - the information in Part C of Form No. 15CA after obtaining a certificate from the Chartered Accountant in Form 15CB;
 - the information in Part D of Form No. 15CA, if the sum is not chargeable to tax,
 - No information is required to be submitted if the remittance is under the Liberalised Remittance Scheme (LRS) for which no RBI approval is necessary. Under the liberalised remittance scheme, remittance upto USD 2,50,000 may be made for several specified purposes .
 - There are some organisations and countries to whom money cannot be transferred into. These are typically either countries considered 'non-cooperative' by the Indian authorities, or organisations which may have links to terrorism.
 - Remittance under the LRS may be made for several purposes, such as, to cover the costs of overseas education and living expenses for students living abroad, travel / tourism /business travel costs/medical treatments/ family support/ gifts and donations etc., as well as business travel expenses.
 - No remittance of whatsoever amount can be made out of certain sources, such as lottery winnings, gambling etc.
 - The details may be obtained from the official website of the Reserve Bank of India.
 - No reporting requirement in Form 15CA is there for certain types of remittances as detailed in Rule 33BB, for thirty-three such items. (For details, reference may be to Rule 37BB of the Income Tax Rules, 1962 available in the website, [www. incometax.gov.in](http://www.incometax.gov.in)).
 - To remit over USD 250,000 in one year, one requires special permission from the RBI.

DIRECTORATE OF INCOME TAX
(Public Relations, Publications & Publicity)
6th Floor, Mayur Bhawan, New Delhi

Jan. 2019

This brochure should not be construed as an exhaustive statement of the law. For details - reference should always be made to the relevant provisions in the Act and the Rules.