

TAXATION OF OVERSEAS INCOME UPON RETURN TO INDIA



Income Tax Department

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Taxation of overseas income upon return to India

1. An individual under the Income Tax Act can either be
 - (i) Resident Ordinary,
 - (ii) Resident but Not Ordinarily Resident, or
 - (iii) Non-Resident.

The determination of exact status is important to know the tax incidence. We must remember that Residential status under the Income-Tax Act is different from residential status under the Citizenship Act, FEMA or any other act. A person may be Non-Resident under any other Act but he may be Resident under the Income-Tax Act. Residential status also changes every year and the rules for determination of residential status need to be applied every year to ascertain the correct status for that year. A person may be Resident in more than one country in the same year under the tax laws of these countries.

2. The Residential status of a person is important to understand scope of total income taxable in each case. Both Residents as well as Non-Residents are taxable for income accrued (or deemed to accrue) as well as income received (or deemed to be received) in India. However, if a person is Resident in India, he is also taxable for income accrued or arises to him outside India. If income is accrued or arises outside India and is not received in India, it is not taxable in the case of Non-Resident.
3. Income received outside and then remitted to India is considered as received outside India. If the income earned outside India is directly credited in the bank account of a Non-Resident in India, it is considered as received in India and hence is subjected to tax in India. However, as a special relaxation, the salary accrued to a Non-Resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) shall not be included in the total income merely because the said salary has been credited in NRE account maintained by such Non-Resident sea farer with an Indian Bank.
4. Once a Non-Resident returns to India, he is likely to become Resident in India. If so, he may be Resident or Resident but Not Ordinarily Resident. In the case of an Individual who is Resident but Not Ordinarily Resident, income accruing or arising outside India and not received in India, will get taxable in India only if it is derived from a business controlled in or a profession set up in India. For Resident Ordinary, income accrued or arising outside India is taxable in India in all situations. For this reason it is important to understand the difference between Resident Ordinary and Resident Not Ordinary.

5. The Residential status for individual depends on number of days that a person spends in India. For this there are Basic Conditions and then there are additional conditions.

5.1 Basic Conditions (Two):

- 1) He is in India in the previous year for a period or periods amounting in all to 182 days or more.
- 2) He is in India for a period or periods amounting in all to 365 days or more during the four years immediately preceding the previous year and is in India for a period or periods amounting in all to 60 days or more in the previous year.

Note1: In the Income Tax Act we have a concept of previous year and assessment year. Previous year is the financial year in which the income is earned by the person and which is to be charged to tax. Assessment year is the year immediately succeeding previous year.

Note2: In cases of (i) Indian citizen who leaves India during the previous year for the purpose of employment or (ii) Indian citizen who leaves India as a member of the crew of an Indian ship or (iii) an Indian citizen or a person of Indian Origin who comes to India on a visit during the previous year; the basic condition no 2 is non functional and their test of residency is restricted to first condition only.

Note 3: A person is said to be a person of Indian origin if either he or either of his parents or any of his grand parents was born in undivided India.

5.2 Additional conditions (two):

- 1) Resident in India in at least 2 out of 10 years preceding the previous year.
- 2) Presence in India for at least 730 days during 7 years immediately preceding the previous year.

5.3 Rule of Residency for Individuals:

- (i) Resident and Ordinary Resident: Must satisfy at least one (or both) of the basic conditions and both the additional conditions.
- (ii) Resident but Not Ordinary Resident: Must satisfy at least one (or both) of the basic conditions and one or none of the additional conditions.
- (iii) Non Resident: Should not satisfy any of the basic conditions.

5.4 To view it differently, if one of the two (or both) basic conditions is satisfied, the person is Resident and if none of the basic conditions are satisfied, the person is Non-Resident. At this stage it must be remembered that for person falling under Note 2 above there is only one basic condition (the first one - about the stay in India for 182 days) and if that is not satisfied the person is Non-Resident.

- 5.5 Additional conditions are only for the purpose of determining whether the person who is a Resident, is an ordinary Resident or not ordinary Resident. If both additional conditions are satisfied then he is Resident Ordinary, otherwise he is Resident Not Ordinary.
6. Thus, When an Indian citizen or person of Indian origin, after working overseas returns to India for good, depending on his stay period in India as discussed above, he could become Resident or Non-Resident in the year in which he returns.

Illustrations:

- a) If a person say "X" returns on 1 Feb (a non leap year) of Financial Year 2018-19, he stays for only 59 days during the Financial year in India (assuming he had not visited India earlier in this previous year). Thus he becomes a Non-Resident for the relevant financial year. The income that he earned in year 2018-19 outside India and also received outside India would not be taxable in India.
- b) However, if he returns in Financial Year 2018-19 and he stays for 60 days or more in India in this previous year, then we have to see his total stay period in India during Financial Years 2014-15, 2015-16, 2016-17 and 2017-18. If his total stay during these four years is 365 days or more then as per provisions mentioned above, he becomes Resident in India.
- c) Even if his total stay in India during Financial Years 2014-15, 2015-16, 2016-17 and 2017-18 was less than 365 days, there is a possibility that he can still become Resident in India in Previous Year 2018-19, if he was in India in this year for 182 days or more, in the aggregate.
- If he becomes Resident in Previous Year 2018-19, there is still a possibility that his overseas income will not get taxed in India. It depends on whether he is a Resident Ordinary and Resident Not Ordinary. So long he is Resident Not Ordinary, his overseas income received outside India is not taxable unless it is derived from a business controlled in or a profession set up in India.
7. If we look at additional conditions, it becomes clear that if a person returning to India was Non-Resident for at least 10 years preceding the previous year, then he would be Resident Not Ordinary in the first year of becoming Resident as well as in the next year of becoming Resident. Thus, this provision allows a Non-Resident exemption from taxation on overseas income (received outside India) even after becoming Resident for some period of time.

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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.