

Demystifying amendment in Section 6 of Income Tax Act



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The amendment in section 6 brought by Finance Act, 2020 is the centre point of Conundrum for interpretation of Residential status of Individual under Income Tax Act, 1961. The object of making amendment in section 6 is to bring under the Income tax net in India, an Individual, who is stateless person, not paying taxes anywhere in the world on their income. The other object is to bring Indian Citizen or Person of Indian Origin from Non Resident status to Resident but not ordinary Resident (RNOR). The amended provisions of section 6 are reproduced under for better understanding and effective analysis.

6. For the purposes of this Act,—

(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) [***]
- (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.

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 the citizen or person of Indian origin 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.

(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.

.....

(6) 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.

(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)

1 Amendment in Explanation 1(b) of section 6(1)

1.1 Thus is clear from the above amended provisions that Explanation -1(b) to the section 6(1) is amended to replace 120 days or more number of days from 182 or more if Total Income other than foreign source Income is more than 15 lacs. This explanation is applicable to Citizen of India and Person of Indian Origin. There is few more terms required further deliberation to analyse the amendment.

Total Income: The word is defined under section 2(45) as

“total income” means the total amount of income referred to in section 5, computed in the manner laid down in this Act ; “

In other words total income is arrived at after making exclusion of exempted income. To work out threshold of Rs 15 lacs under this section concept of Total income need to be understood well. However in absence of any explanation on this item ultimately will lead to more litigation in many cases.

Income referred in section 5 :

5. (1) Subject to the provisions of this Act, the total income of any previous year of a **person who is a resident** includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(c) **accrues or arises to him outside India during such year :**

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

- (2) Subject to the provisions of this Act, the total income of any previous year of **a person who is a non-resident** includes all income from whatever source derived which—
- (a) is received or is deemed to be received in India in such year by or on behalf of such person ; or
- (b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

- 1.2 The greatest challenge here is circular reference of Residential status and Income while reading explanation and section 5. The taxability of total income is based on residential status of person and total income working is based on residential status. Therefore for the purpose of explanation 1(b) , total income needs to be redefined to arrive at proper interpretation of section to work out threshold of Rs 15 Lacs.

Otherwise there are two possible views are available :

- (1) The Individual may be considered as resident include all sources of Indian Income and ignored his NR status;
- (2) The Individual may be considered as NR and exclude all exempt income.
- 1.3 In my personal view interest Income from NRE fixed deposits ,ordinarily contributing large part of Income should be excluded while working out threshold of Rs 15 lacs in both possible views since interest income will remain exempted till it gets matured irrespective of residential status may be changed during intervening period.
- 1.4 The government is trying to achieve by this mischief may not be that significant to the coffer of exchequer but individually it will hit badly. The tax payer so far getting concessional tax treatment as NOR ,will be treated as RNOR and hence he has to pay more taxes. However in case of compliances of TDS provisions ,it is difficult to determine status of payee at early stage during the previous year and therefore payer need to get declaration from payee in the beginning of the about his probable residential status.
- 1.5 The benefit of Double Taxation Avoidance agreement can not be taken away by amending such type of provisions. The tax payer can avail tie breaker rules and certainly will get out of this provisions impact.
- 2 Insertion of subsection (1A) in section 6**
The newly inserted section starts with non obstante clause and therefore section 6(1) and 6(1A) are independent section. The intention behind introducing the section is tax the stateless Indian Citizen, who is not paying tax anywhere in the world. His stay in India may not be of single day nut he will be subject to tax India treating him as RNOR.

2.1 *The introduction of this section makes Indian Income tax as hybrid system. The tax is levied based on number of days stay in India as well as Citizenship based, irrespective of number of days stay or even stay in India. It is only applicable to Indian Citizen and not Person of India Origin.*

2.2 *It appears from the information available in public domain that Government has tried to tax income of the Indian Citizen working in UAE or some other jurisdiction, personal tax is not either leviable or income is not liable to tax. The sovereign state is always empowered to levy the tax on personal income. However there are certain states, territory or country they do not enforce such law to attract more economic activities. This results into double non taxation of Individual's personal income.*

2.3 *The all issues of determination of threshold income more than Rs 15 lacs needs to be addressed even in this case also.*

3 Addition of two clauses under section 6(6)

There are addition of clause (c) and clause (d) under section 6(6). The protections and relief granted to Indian Citizen and Person of Indian Origin by inserting above referred clause. The material effect on stateless person and Indian sources Income earned more than 15 lacs with of 120 days stays or more but less than 182 days, is diffused. Therefore based on deeming provisions such tax payer will never become resident and Ordinary Resident (ROR) getting relief under these clause.

Conclusion: The exercise of Government of India to plug the leakages may prove tough to the genuine tax payers. Finally Individual tax payer may be resident, Resident but not Ordinary Resident or Non Resident will depend on ascertaining no of days stay in India and citizenship criteria coupled with Income criteria. The summary table is as follow:

Sr. No.	No of days stay with total Income other than foreign sourced income	Incoming / Outgoing India	Citizenship	Residential status of Individual
1	182 days or more –no linking of Income	Stays	Irrespective of citizenship	Resident
2	60 days or more-no linking of Income but- other AND 365 days or more in 4 preceding years to p/y	Incoming	Other than Indian Citizen and Person of Indian Origin	Resident
3	120 days or more but less than 182 days and Income >Rs 15 lacs other than foreign source	Incoming -Visit	Indian Citizen or Person of Indian Origin	Resident
4	182 days or more – leaving India for employment -Crew	Outgoing	Indian Citizen	Resident
5	Even Nil Day-Stateless Individual for tax payment –Income >Rs 15 lacs other than foreign source	Incoming/ Outgoing	Indian Citizen	Resident
