

# CNK & Associates LLP

News Flash-Residential Status for FY 2020-21

***No general relaxation in determining tax residency in India for FY 2020-21 due to COVID overstay; relief from actual double taxation under DTAA on case to case basis***

The Central Board of Direct Taxes (CBDT) vide Circular No. 11 of 2020, dated 8<sup>th</sup> May 2020 provided relief to non-residents in determination of residential status for Financial Year (FY) 2019-20 on account of COVID-19 pandemic and resultant overstay. The relief was by way of exclusion of certain number of days from the calculation of period of stay in India for determining residential status in India.

Various representations were received by the CBDT requesting for similar relaxation in determination of residential status for FY 2020-21 on account of the pandemic and consequential suspension of large number of international flights.

The CBDT vide Circular No. 2 of 2021 dated 3<sup>rd</sup> March 2021 has given several reasons to justify as to why a blanket / general relaxation on number of days stay in India cannot be given for FY 2020-21. One of the rationales given by CBDT is that most countries have a condition of stay of 182 days or more, out of 365 days of a year, for determining residency. Thus, a person in most cases would be a resident in only one country in a 365 days period and thereby instances of double taxation of income are unlikely. Based on this rationale the CBDT was of the view that if any relaxation beyond 182 days is given, the same could result in cases of double non-residency and thereby double non-taxation.

The reasons enumerated by CBDT in the circular for the non-granting of relief on lines similar to those granted for FY 2019-20 are summarized in the below table.

Sr. No.	Reason	Explanation				
I	Short stay in India due to COVID in FY 2020-21, of a person who is non-resident in India in FY 2019-20, would not result in tax residency in India for FY 2020-21	To qualify as a resident in India, the following conditions have to be satisfied: <table border="1"><tbody><tr><td>A) Citizen of India/person of Indian origin</td><td>1. If total income from Indian sources is <math>\leq</math>Rs. 15 lacs in FY 2020-21 and stay is <math>\geq</math> 182 days 2. If total income from Indian sources is <math>&gt;</math>Rs. 15 lacs in FY 2020-21 and: i. His stay is <math>\geq</math> 182 days in FY 2020-21 OR ii. His stay is <math>\geq</math> 120 days in FY 2020-21 and <math>\geq</math> 365 days in preceding 4 years</td></tr><tr><td>B) Individual who is not citizen of</td><td>i. His stay is <math>\geq</math> 182 days in FY 2020-21 OR ii. His stay is <math>\geq</math> 60 days in FY 2020-21 and</td></tr></tbody></table>	A) Citizen of India/person of Indian origin	1. If total income from Indian sources is $\leq$ Rs. 15 lacs in FY 2020-21 and stay is $\geq$ 182 days 2. If total income from Indian sources is $>$ Rs. 15 lacs in FY 2020-21 and: i. His stay is $\geq$ 182 days in FY 2020-21 OR ii. His stay is $\geq$ 120 days in FY 2020-21 and $\geq$ 365 days in preceding 4 years	B) Individual who is not citizen of	i. His stay is $\geq$ 182 days in FY 2020-21 OR ii. His stay is $\geq$ 60 days in FY 2020-21 and
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Sr. No.	Reason	Explanation		
		<table border="1" data-bbox="566 197 1487 331"> <tr> <td data-bbox="566 197 821 331">India/person of Indian origin</td> <td data-bbox="821 197 1487 331">&gt;= 365 days in preceding 4 years</td> </tr> </table> <p data-bbox="566 331 1487 555">Based on the above, short stay due to COVID will not change the residential status of such individuals. Thus, as per CBDT a person will become resident in India for the FY 2020-21 only if he stays in India for 182 days or more unless he is covered by the exceptions discussed above.</p>	India/person of Indian origin	>= 365 days in preceding 4 years
India/person of Indian origin	>= 365 days in preceding 4 years			
II	Possible situation of double non-residency arising in case a general relaxation is provided	<p data-bbox="566 555 1487 757">Generally, most of the countries have criteria of stay of 182 days or more out of 365 days for qualifying as a tax resident. If an individual becomes resident in one country due to 182 days criteria, it is unlikely, that he may qualify as a resident in another country.</p> <p data-bbox="566 757 1487 936">In case a relaxation for number of days is provided, there is a possibility that the individual may not qualify as a tax resident in any country if his stay in India is &gt;= 182 days, resulting in double non-taxation.</p>		
III	In case of dual residency, an individual can resort to Tie-breaker Rules prescribed under DTAA	<p data-bbox="566 936 1487 1137">A person may become resident in India, even if his stay is less than 182 days [(A.2.ii) and (B.ii) in above table] which may result in dual residency. In such a situation Tie-breaker Rule as per the relevant DTAA shall apply.</p> <p data-bbox="566 1137 1487 1406">Even in cases where an individual becomes resident in India due to exceptional circumstances, such person would most likely become not ordinarily resident in India. This would mean that foreign income of such individual would still not be taxable in India unless it is derived from a business controlled in or profession set up in India.</p>		
IV	Taxability of employment income as per DTAA	<p data-bbox="566 1406 1487 1585">Generally, under most Indian DTAAs, salary of an individual stranded in India who is a non-resident and an employee of a foreign employer who exercises the employment in India, will be taxable in India only if:</p> <ul data-bbox="566 1585 1487 1720" style="list-style-type: none"> <li>• the employee's stay in India is 183 days or more, or</li> <li>• the salary is borne by the permanent establishment of the foreign employer in India</li> </ul>		
V	Availability of credit of taxes paid outside India	<p data-bbox="566 1720 1487 1848">Any non-resident who becomes a resident in India for the FY 2020-21 and has paid taxes outside India, can claim the credit for the same in accordance with existing rules.</p>		

In light of the above, the CBDT is of the view that:

- in case any general relaxation is granted to non-residents for FY 2020-21, it might result into double non-taxation.
- the instances of double taxation, if any, shall be taken care of by the provisions of the Income-tax Act, 1961 and the DTAA (Tie-breaker Rule / taxation of employee as per DTAA).

- the view of non-grant of relief is in line with guidance note issued by Organization of Economic Co-operation and Development and the measures opted by other countries like Germany, USA, UK and Australia.
- it is unlikely that non-residents may face any disadvantage on account of non-grant of relief. In event of any possible situations leading to double taxation, the CBDT has made provision for such individuals or class of such individuals to submit required information by 31<sup>st</sup> March 2021, in form 'NR' electronically to Principal Chief Commissioner of Income-tax so that they can understand the possible situation of double taxation. On the basis of responses received in Form NR and after examining the facts of the case, CBDT may decide:
  - ✓ Whether any relaxation is required to be provided in this matter and
  - ✓ Whether any general relaxation can be provided to any class of individuals or specific relaxation is required to be provided in individual cases

**Comments:**

- *The circular does not provide any relief except what is provided under the Act or DTAA. A person who becomes resident in India due to forced stay will have to examine whether he qualifies as a not-ordinarily resident (for whom foreign source income is not taxable in India).*
- *The circular has tried to justify that there cannot be a blanket relaxation and in case an individual is facing double taxation, due to forced stay in India, the facts of the given case need to be examined by the Board.*
- *The CBDT while issuing the circular has given example of DTAA with USA. However, there are several countries like UAE and other Middle Eastern countries where there is no income tax and therefore the question of double taxation does not arise. The intent of the circular indicates that an individual may not be able to claim any relaxation from tax residency in India if they are otherwise resident of a country where there is no income tax and thereby not exposed to double taxation.*
- *The CBDT is silent on tax implications where an individual is resident of a country with which India does not have a tax treaty.*

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