Decoding CBDT's clarification on non-residents

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BEYOND THE TAX BOOK

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The CBDT has sought info so that it can check whether any relaxation is required

Many non-residents were forced to remain in India during covid and could not travel back to their home countries due to the absence of international flights or had to remain in India due to a complete lockdown in their home countries. In many such cases, the non-resident was in India for more than 182 days during the current financial year, and under tax laws would therefore be regarded as a person resident in India.

Given that the Central Board of Direct Taxes (CBDT) had issued a circular in May 2020 giving relief to such persons for FY20, there was hope that a similar relief would be granted for FY21. However, the budget contained no relief in such cases.

A taxpayer had filed a petition in the Supreme Court seeking directions to the CBDT to provide such relief for the current year, and the SC directed the CBDT to take action. Finally, the CBDT issued a circular on 3 March, clarifying the position.

The CBDT said that in most cases, a short stay would not result in residency in India. It has then reasoned that since most countries have the condition of stay for 182 days or more for determining residency, in most situations, a person will be resident in only one country. According to the CBDT, if a general relaxation of the 182 days' stay period is granted, it may amount to a case of double non-residency with no payment of tax in any country.

The logic given is that even in cases where a person is a dual resident, the provisions of the Double Taxation Avoidance Agreement (DTAA) with his home country provide for a tie-breaker test to determine the country of which he is resident. It has further been explained that even if a person is resident in India, he would normally be a resident but not ordinarily resident (RNOR), with

foreign income not taxable in India, except such income from a business controlled in, or a profession set up in, India.

In case of employment income, the CBDT has clarified that if an employee of a foreign company has got stranded in India, and works from India, under the DTAA, his salary will not be taxable in India unless he has been in India for 183 days or more. It has pointed out that the person treated as a resident in India will be entitled to tax credit for taxes paid in any other country. The CBDT has cited the observations of the OECD and the guidelines and clarifications issued by the US, UK, Australia and Germany in this regard, and come to the conclusion that the possibility of double taxation does not exist as per domestic tax law read with the DTAAs due to forced stay in India.

However, in order to understand possible situations in which a particular taxpayer is facing double taxation, the CBDT has sought relevant information from individuals in a specified form, so that it can examine whether any relaxation is required to be provided in a matter, and if required, whether general relaxation should be given or specific relaxation for that individual. This form is to be submitted online by 31 March.

It is important that persons impacted make their representation to the CBDT to demonstrate the significant impact that being resident in India could cause to them. The most common case is that of NRIs who come to India every year for three-four months to stay with their relatives, or persons who have become NRIs in recent years. Such persons may be regarded as resident and ordinarily resident in India as a consequence of having been in India for more than 729 days in the past seven years. Their worldwide income would be taxable in India, including income that is exempt in their home country such as income on their pension or retirement accounts, as well as investment income.

There would be no exemption for such income under DTAAs. There would be little or no tax credit available, since such income would either be exempt in the foreign country or may fall in a low tax bracket, resulting in low payment of tax in that jurisdiction. Even if tax credit is available, the tax rate in most foreign countries being lower than in India, most taxpayers may end up paying the higher Indian tax rates on their entire worldwide income, and not just their Indian incomes. Coupled with the tax paid in the home country, the effective overall tax rate would be the higher of the tax rate in both countries. The worst part is that even a low income in home countries, when translated into rupees, may appear quite substantial due to the rupee’s low value, and may result in a taxpayer falling in a high slab, with high rates of tax.

It is important that the CBDT recognize these practical problems, and grant relief to such persons, who may end up with higher tax liability for no fault of their own.

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