Residential Status –
Short Version of the Article

Finance Act 2020 – changes affecting NRIs.

Date: 17th April, 2020

This article is a short version meant for business men & others who have time constrains. A longer version of this article is also available on this website. It gives last thirty years history and explains reasons for different amendments.

Preface:

P.1 Genesis of Section 6 Amendments:

Government of India believed that (i) NRIs based in Tax Havens and (ii) "Stateless Persons" were abusing some reliefs given to them under S. 6. Hence on 1st February 2020 The Finance Bill proposed two amendments in S. 6. Proposals: (i) Reducing number of days' stay in India from 181 to 119 under Explanation 1(b); and (ii) Deeming a Stateless Person to be Indian Resident U/s. 6(1A). These amendments were strongly protested by NRI community – especially from UAE. In the Finance Act instead of dropping the amendment proposal, Government amended S. 6(6) and deemed the affected persons to be Not Ordinarily Resident (NOR). Hence most of the NRIs will not be affected adversely. Thus largely the purpose targeted under the Finance Bill will not be served. Ideally the Finance Bill Proposal to amend S.6 should have been completely dropped. Stability in law should have been maintained.

P.2 Short Forms used in this article: (In other laws the meaning can be different.)

DTA:	Double Tax Avoidance Agreement.
GOI:	Government of India.
IR:	Indian Resident.
IC:	Indian Citizen.
ICIR:	Indian Citizen as well as Indian Resident.
ICNR:	Indian citizen, Non-resident of India.
ITA:	Indian Income-tax Act.
NRI:	Foreign citizen, Non-resident of Indian Origin.
NR:	Non - Resident of India
NOR:	Not Ordinarily Resident of India.
ROR:	Resident & Ordinarily Resident.

P.3 **Three Changes:** The Finance Act 2020 has introduced three major changes regarding residential status. These will affect non-residents. The three changes are:

(i) **Anti- Avoidance: 119 days** (less than 120 days) for NRIs. S. 6(1) Explanation 1(b). See paragraph I below.

(ii) **Anti- Avoidance:** Stateless Citizens deemed to be Indian Residents. Section 6(1A). See paragraph II below.

(iii) **Anti- Anti- Avoidance:** NOR. Section 6(6). See Paragraph IV below. This amendment nullifies the two anti-avoidance provisions listed above.

Preface Completed.

I. Residential Status for NR visitors:

I.1 119 days: Section 6(1) (Explanation) (1) (b).

As per amended provision an NRI can now come to India for 119 days (instead of earlier 181 days) during a financial year to remain a Non-Resident of India. If his stay is 120 days or more, he will become an Indian resident. This provision is applicable only if the concerned person has "Indian income" (simplified phrase) of more than Rs. 15 lakhs. This is an anti-avoidance provision planned to curb a tax avoidance scheme.

I.2 Tax Planning:

Some people planned to become non-residents (NR) and 'continue remaining NR for long periods'. Getting Residence permit from USA, UK etc. is very difficult. And they levy substantial income-tax. Getting it in UAE was comparatively easier. And UAE does not impose income-tax. Hence people would obtain resident permit of UAE. SPVs incorporated in the UAE would earn substantial incomes. GOI felt that some of these SPVs were actually converting Indian black money into white. (Conversion Scheme) These NRIs could still manage their Indian and foreign business activities because of short air-distance between India & UAE. And Law permitted them to "Visit" India for 181 days every year. They can continue to be NR for many years. Earn incomes in & outside India. Pay Indian tax on Indian income. But get all foreign incomes tax free. If foreign incomes are tax free, Conversion Scheme goes on.

I.3 Anti-Avoidance provision:

Finance Bill proposed to amend the Explanation 1(b) and reduce the number of days from 181 days to 119 days. Hence, now if an NRI wants to remain NRI and yet look after the Indian business, he must ensure that his stay in India is for less than 120 days. This will affect all NRIs – whether they are coming from a normal taxed country like USA, UK; or from a tax

haven. NRIs were worried. They protested. See Paragraph IV below for the relief from this anti-avoidance provision.

II. Indian citizens, Stateless Persons deemed to be Indian Tax Residents. Section 6(1A). Stateless Person is a person who is not liable to pay income tax in any country because of his residential status.

II.1 Amendment in brief: S. 6(1A):

Under this sub-section a non-resident will be deemed to an Indian Resident if he is subject to the three conditions given below:

(i) He is an Indian citizen; and
(ii) His total income for the previous year, other than the income from foreign sources (Indian income) is more than Rs. 15 lakhs; and
(iii) He is not liable to Income-tax in any country other than India by the nexus of "Residential Status" (Stateless Person).

This provision is stricter compared to amendment in Explanation 1(b). Under this provision, a Stateless Indian citizen will be deemed to be an Indian resident even if he has not stayed in India for a single day in the relevant previous year.

II.2 Implications of the Proposal:

(i) The Stateless Person/ Tax Nomad will be considered Tax Resident of India.
(ii) His global income will be taxable in India. (After becoming ROR).
(iii) Hence, he will be liable to file his income-tax returns in India.
(iv) He will be liable to disclose his global income and wealth in his Indian Income-tax return.

There was a strong protest - especially by NRIs from UAE - against S. 6(1A). Finance Act has amended S. 6 (6), added two clause (d) and made provision deeming these persons as NOR. Hence the adverse consequences listed above will largely not apply to NRIs.

II.3 Two Way Relief:

Government has provided relief to genuine NRs in two ways.

3.1 Rs. 15 Lakhs threshold. It is said that there are a few lakh Indians working in UAE. A large number of them are poor labourers or middle class employees. They are not into any sophisticated tax planning. By providing a threshold of Indian income of Rs. 15 lakhs, GOI has exempted all these people. What is "Indian Income" is controversial. But that controversy is not discussed in this article.

3.2 NOR Status: Even HNIs are given a relief. They are deemed to be NORs under S. 6 (6). Hence their foreign incomes remain tax free irrespective of

the size of their Indian Incomes. This issue is elaborated in paragraph IV below.

II.4 Impact of the amendments for the first year.

We may note the structure of Section 6(1) providing for residential status in India. Under Section 6(1)(a), an individual becomes tax resident in India, if he stays in India for 182 days or more. There is a single condition. If this condition is fulfilled then the person becomes Indian resident.

Now consider Section 6(1)(c). This section provides for two cumulative conditions: (i) The individual should be in India for 365 days or more during the preceding four previous year; AND during the relevant previous year, he should be in India for 60 days or more. If any one of these two conditions is not applicable, then that individual is not subject to Section 6(1)(c). He will be subject to only Section 6(1)(a). Hence, he will become Indian resident only if he stays in India for more than 181 days.

Consider an **illustration**. Mr. John is a resident of UK. Since birth he has never entered India. Now in the year 2020, he is deputed to India. He will travel between India & UK for his job. In the preceding four previous years – 2016-17 to 2019-20, he was not in India for a single day. Hence, he did not complete the condition of 365 days under Section 6(1)(c). Hence, Section 6(1)(c) is not applicable to him. Under Section 6(1)(a), he will be Indian resident only if he physically stays in India for more than 181 days. If he plans his stay in such a way that in the first year – 2020-21, his stay in India is for 181 days or less; then he will not be considered to be an Indian tax resident. Thus, it is important to note that a person does not necessarily become Indian resident in the first year of his coming to India.

Even if he becomes an Indian resident in the first year itself, he will become Resident but Not Ordinarily Resident (NOR) - S. 6(6)(a). Hence, his global income will be not be taxable in India.

III. Technical Issues:

If a person is resident of UAE for many years; holds formal "Resident Permit"; can he claim that he is UAE resident & not Indian Resident? Holding "Residence Permit" in UAE does not mean that he is "**Liable to UAE Income-tax**". A resident permit is a permit to stay in a country. Normally Home Ministry handles such matters. It has nothing to do with Income-tax liability. The Dubai Income-tax Law (Decree) does not cover individuals as "Taxable Persons".

Similarly, if a person holds TRC – **Tax Residency Certificate** of Dubai, it does not mean that he is liable to tax in Dubai. It is widely known

that while Dubai does not levy any Income-tax on Dubai resident individuals; it does give TRC. TRC is issued in pursuance with Double Tax Avoidance Agreement between India & UAE. It enables the UAE person to claim benefit of DTA with India. But a TRC does not mean that the person is liable to Income-tax in UAE. Hence, a person cannot avoid S. 6(1A) just by holding UAE TRC.

IV. Not Ordinarily Resident (NOR) Section 6(6):

Now the focus shifts from S. 6(1) to S. 6(6). Amendments in this sub-section nullify the anti-avoidance provisions made in S. 6(1) & (1A).

IV.1 Two clauses added:

Section 6 (6). Two clauses have been added to NOR status - clauses (c) & (d) giving permanent reliefs. Interrelationship between S. 6(1) and S. 6(6) and their implications are discussed below:

1.1 A person who is subject to the conditions given under Section 6(1A) will be deemed to be an Indian Resident. **He will also be deemed to be Not Ordinarily Resident** (NOR) for the relevant year. **S. 6(6)(d).** Under S. 6 (6) (c) Indian non-resident citizens as well as PIO visitors are covered.

1.2 As an NOR, he will not be liable to Indian tax on his foreign income; and will not be liable to disclose his foreign assets & incomes in India. With this important change in S. 6(6), GOI has nullified the effect of amendments in S. 6(1). While the NR may be treated as IR under S. 6(1A), he will also be treated as NOR and hence he will not be liable to Indian tax on his foreign income. All non-residents were always liable to Indian tax on their Indian sourced incomes. So the Finance Act 2020 amendment achieves almost nothing.

IV.2 Permanent relief:

Clauses (c) & (d) provide a permanent relief. We consider following provisions to understand how these are permanent reliefs.

Section 6 sub section 6 starts with following sentence: *"A person is said to be "not ordinarily resident" in India in any previous year if such person is— ...."*

In simple terms - any assessee who can satisfy any one of the four conditions given below the sentence will be an NOR as long as he continues to satisfy those conditions. There are four separate and independent clauses given below this sentence: clauses (a), (b), (c) & (d). Please note the term "OR" at the end of each clause – (a), (b) & (c). This term signifies that each clause is independent of all the other clauses in S. 6(6). It is only in clauses (a) & (b) that the NOR status has been restricted to two or three years (depending upon the assessee's stay in India in earlier years. In clauses (c) & (d) such a condition is not made. Hence clauses (c) & (d) provide permanent relief.

However, a possible though **incorrect stand** may be taken as under. This ICNR will become IR in the very first year – say financial year 2020-21. He will be "Resident but Not Ordinarily Resident". (NOR) Hence when in FY 21-22 he comes to India, can he say that he "Was Outside India" and has "Come on Visit to India"? Can an Indian Resident claim that he is coming on visits to India? An IR is always considered to be staying in India. He "Goes Abroad on Visits". He cannot claim to be "Coming to India on Visits".

The fault in this argument is as under. S. 6(1) Explanation 1(b) condition is not that the ICNR should be a NR and should be on visit to India. Condition is that the ICNR should be Outside India and should be coming on Visit to India. This ICNR's centre of vital interests is situated outside India. Hence he is considered to be normally outside India. His primary home is not in India. His primary home is abroad. When he comes to India, he is purely a visitor. Visits may be long and frequent. But that was the specific reason why Parliament amended S. 6(6); introduced clauses (c) & (d) – to permit long stays within India to NR investors and still remain NORs. Hence he should get the relief under explanation 1(b). Hence he will continue to be an NOR as long as he does not come to India for more than 181 days.

IV.3 Implications of Combined operations of S. 6(1),(1A) & (6):

Let us examine section 6 as a whole for its implications. Consider the illustration of an **ICNR**. He is Indian citizen but non-resident of India. He has been settled in UAE for last several years. He has business in UAE as well as in India. UAE business is his main business. Indian business is either investment or subordinate. He has homes in UAE as well as in India. His income in India exceeds Rs. 15 lakhs. But his income outside India is far more. His family stays with him in UAE. Hence "**The Centre of His Vital Interests**" is situated in UAE. He comes to India for 180 days in every financial year. Hence U/s. 6(1) (a) he will be a NR for every year. But to be a NR, he should be NR under S. 6(1) clauses (a) & (c) both.

IV.4 **Under S. 6(1)(c)** the person will become IR if both of the following conditions are cumulatively applicable to him:

(i) He has been in India for **365 days** or more in preceding four previous years. The ICNR in illustration would satisfy this condition.

(ii) He has been in India in the relevant previous year for more than **59 days**. Even this condition will be satisfied by the ICNR. Hence prima facie he will be an IR.

However, **explanation 1(b)** grants a relief to him. Instead of 59 days as per S. 6(1)(c), he will get **181 days** if he fulfils **all** of the following conditions:

(i) He is an Indian **citizen** or a **PIO**; and
(ii) He has been "**Outside India**"; and
(iii) He comes **on a visit** to India.

Note that the condition in (ii) above is that he should be "outside India". Condition is not that he should be a "Non-resident". Since the ICNR's "Centre of Vital Interests" is situated outside India, he can easily claim that – every year he has been "Outside India"; and that he "Comes on Visits" to India. Hence he is entitled to the relief of 181 days U/S 6(1), Explanation 1(b) as it stood before amendment.

With the **amendment**, the number of days is reduced to **119 days.** Since he is coming to India for more than 119 days, he will become an IR U/S 6(1) (c). However, U/S **6(6) (c)** he will be an **NOR**. Hence **he will not be liable to Indian tax on his foreign income and will not be liable to disclose his foreign assets & incomes in his Indian return of income.** This is the final effect.

The **chain of provisions** considered in paragraph IV. is as under:

S. 6(1) (c) read with **Explanation 1(b):** ICNR becomes IR as per amended provision.
S. 6 (6) (c) he becomes NOR.
Hence he is not liable to tax in India on his foreign income. S. **5(1)(c).**

In the next paragraph we consider another Chain of provisions.

IV.5 State less Person: NOR status, Permanent Relief.

Here we consider **Chain of S. 6(1A), S. 6 (6) (d) and S. 5(1)(c).** We will consider both the provisions of this chain separately.

IV.5.1 Section 6(1A) Stateless Persons/ Tax Nomads.

The sub-section is reproduced below.

(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.

Now the same sub-section is broken up into its clauses:

(i) Notwithstanding anything contained in clause (1)
(ii) an individual, being a citizen of India,
(iii) having total income, other than the income from foreign sources, exceeding fifteen lakh rupees during the previous year

(iv) shall be deemed to be resident in India in that previous year,
(v) 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.

5.2 Discussion:

(i) Sub-section 1A starts with a non-obstante clause. Which means Sub-section 1 and sub-section 1A are independent. Under S.s 1A, number of days stay in or outside India is irrelevant. A person may be in India for all the 365 days in a year; or may be outside India for all the 365 days in the year. It does not matter.

(ii) The assessee in question should be an Individual and should be a citizen of India.
(iii) He should have Indian income of more than Rs. 15 lakhs per year.
(iv) In UAE, he is not liable to Income-tax based on his residential status.

All the above conditions are satisfied by the ICNR in our illustration. Hence he will be considered to be an IR. No need to go to S. 6(1) (c) and to explanation U/s. 6(1). We are not concerned with that chain of provisions.

The ICNR is now considered to be an IR. This is the effect that the Finance Bill targeted. But this was protested. To exempt such ICNRs from adverse consequences, clause (d) has been added to S. 6 (6). Under this clause the ICNR shall be an NOR. Hence he will not be liable to Indian tax on his foreign income and will not be liable to disclose his foreign assets & income in his Indian tax return. This is clearly the intention behind S. 6(6) clause (d) brought about by the Finance Act.

Conclusion:

GOI tried to plug a tax avoidance mechanism. However, the proposal would also hurt genuine non-residents. On realisation of this unintended consequence, GOI decided to provide relief to genuine NRIs by considering them as NORs. In the process, the law has become unnecessarily complicated. Ideally, the Finance Bill proposal to amend S. 6 should have been dropped. It would help stabilise the law.

Thanks.

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Foreign sources

Income to be considered is only the income earned by the individual assessee being considered.

Business controlled –

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